Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/07971/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 February 2016	**On 30 March 2016**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SHUKRI FETA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. T. Bahja, public access counsel,
For the Respondent: Miss A Brocklesby-Weller, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant was born on 20 January 1982 in Kosovo. On 21 July 2011 he married his British wife in Kosovo. She was originally from Kosovo. He entered the United Kingdom a number of times to visit her after their marriage and she also visited him in Kosovo. Sometimes she took their son with her. The Appellant last entered the United Kingdom on 28 October 2014, as a visitor. On 22 December 2014 he applied for leave to remain here as his wife's spouse. This application was refused on 19 February 2015 and he appealed on 25 February 2015.
2. On 26 August 2015 First-tier Tribunal Judge Row dismissed the appeal. It was not argued at that appeal that the Appellant could succeed under the Immigration Rules. The Appellant did argue that he had a derivative right of residence but this ground of appeal is no longer relied upon.

3. The Appellant appealed on 4 September 2015 and First-tier Tribunal Judge Hollingworth granted him permission on 29 December 2015 on the basis that First-tier Tribunal Judge Row should have considered the Appellant's circumstances at the date of the appeal hearing when considering whether his Article 8 rights had been breached. The Respondent made a Rule 24 response on 18 January 2016.

ERROR OF LAW HEARING

4. Counsel for the Appellant submitted that First-tier Judge Row had erred in law when he found that the Appellant could not meet the financial requirements contained in the Immigration Rules at the time of his application when he was considering the Appellant's rights under Article 8 of the ECHR. He also referred to the table of the Appellant's wife's current earnings, which was at page 4 of his skeleton argument, and submitted that in the year up to 31 July 2015 she had earned a gross amount of £21,354.19. He also relied on the cases of *LS (post decision evidence; direction; appealability) Gambia* [2005] UKAIT 00085 and *SO (Nigera) v Secretary of State for the Home Department* [2007] EWCA Civ 76. In addition, he submitted that First-tier Judge Row's approach to the Appellant's English language skills was incorrect.
5. Counsel for the Appellant also submitted that First-tier Tribunal Judge Row did not apply the law relating to the Appellant's son's best interests correctly in paragraphs 22 to 25 of his decision. Counsel said that he failed to properly assess the impact on the child of separation from the Appellant when they currently lived together and the Appellant cared for him. He also relied on the case of *JO and Others (section 55 duty) Nigeria* [2014] UKUT 00517 (IAC).
6. The Home Office Presenting Officer then responded. She noted that the Appellant could not meet the requirements of the Immigration Rules as he was here as a visitor and that, therefore, he needed to show that there were compelling circumstances in his case which entitled him to leave to remain outside the Rules. She also submitted that there was no reason why the Appellant could not return to Kosovo and apply for entry clearance there and that he could not just refuse to return to do so. She also noted that the First-tier Judge had found in paragraph 25 of his decision that he did "not find that the welfare of the child would be adversely affected in any significant way by the return of the appellant to Kosovo".
7. First-tier Tribunal Judge Hollingworth had not given the Appellant permission to argue that First-tier Tribunal Judge Row had not taken into account the case of *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40. However, as the Home Office Presenting Officer had raised the issue of return in order to apply for entry clearance in her oral submissions, I permitted counsel for the Appellant to respond and rely on the section of his skeleton argument which related to *Chikwamba* and *Secretary of State for the Home Department v Hayat (Pakistan)* [2012] EWCA Civ 1054. He also submitted that, if the Appellant did return to Kosovo, he would succeed in any application for entry clearance as his wife's spouse.

ERROR OF LAW DECISION

8. When formulating his decision First-tier Tribunal Judge Row did not refer to the Immigration Rules or consider relevant case law such as *R (on the application of Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 and consider whether

there were any exceptional circumstances which entitled the Appellant to leave to remain outside the Immigration Rules. Instead, he started by considering whether Article 8 of the European Convention on Human Rights would be breached if the Appellant was removed from the United Kingdom.

9. When doing so he considered whether his removal would be a disproportionate breach of Article 8. As this was a human rights appeal, as opposed to an appeal under the Immigration Rules, First-tier Tribunal Judge Row was entitled to take into account any matter that was relevant to the substance of the decision at the date of the appeal hearing. This approach was confirmed in the cases of *LS* and *SO*. Therefore, in paragraph 29 of his decision First-tier Tribunal Judge Row erred in law when he failed to take into account that the Appellant's wife now earned more than £18,600 a year and looked back at the situation at the date of the decision under the Immigration Rules. He also erred when he failed to take into account the fact that the Appellant had obtained a certificate from the University of Cambridge which confirmed that he had passed a Key English Test at Council of Europe Level A2. Instead First-tier Tribunal Judge Row ignored this qualification and relied on the fact that the Appellant used an interpreter at the appeal hearing.
10. In paragraph 35 of his decision First-tier Tribunal Judge Row also found that in the context of section 117B of the Nationality, Immigration and Asylum Act 2002 "it is in the public interest that persons who seek to enter or remain in the United Kingdom are able to speak English [and] the appellant gave evidence today through an interpreter". However, First-tier Tribunal Judge Row failed to take into account the University of Cambridge certificate which indicated that the Appellant was able to speak English to some extent and this was a factor which should have been taken into account when applying section 117B.
11. When granting permission to appeal First-tier Tribunal Judge Holllingworth found that it was arguable that First-tier Tribunal Judge Row applied the wrong test in paragraph 25 of his decision when he found that "the welfare of the child would be adversely affected in any significant way by the return of the appellant to Kosovo". In paragraph 22 of his decision First-tier Tribunal Judge Row did remind himself the welfare of the Appellant's son should be a primary consideration and in paragraph 22 he noted that he was two years old, was in good health, was not at school and was primarily looked after by his mother.
12. He also took into account the fact that he was a British citizen but First-tier Tribunal Judge Row did not remind himself that in paragraph 30 of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 Lady Hale held that "although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a nationality and to preserve her identity, including her nationality".
13. In *JO and others* the Upper Tribunal found that "the duty imposed by section 55 of the Borders, Citizenship and Immigration Act 2009 requires the decision-maker to be properly informed of the position of a child affected by the discharge of an immigration function. Thus equipped, the decision maker must conduct a careful examination of all relevant information and factors". I find that the value which attaches to British nationality was one such factor which First-tier Tribunal Judge Row failed to take into account.
14. Counsel for the Appellant also relied on the case of *Chikwamba* and argued that this case confirmed that it was "only comparatively rarely, certainly in family cases

involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad. He also relied on *Hayat* where it was held that "where Article 8 is engaged and there is no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant has no lawful entry clearance".

15. However, in *R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality) (IJR)* [2015] UKUT 00189 (IAC) the Upper Tribunal found that "Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the UK. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case law concerning *Chikwamba*".
16. I find that *Chen* is particularly relevant in the Appellant's case because he had been coming in and out of the United Kingdom since the date of his marriage in 2011 and since the birth of his child in 2013 and there was nothing in the evidence to suggest that a further temporary separation would interfere disproportionately with protected rights and there was no evidence about how long it would take him to apply for entry clearance. Therefore, I find First-tier Tribunal Judge Row did not make any error of law when he found in paragraph 34 of his decision that "there is no reason why the Appellant could not go back to Kosovo and make his application for entry as the spouse of the sponsor".
17. However, I do find for the other reasons given above that First-tier Tribunal Judge Row did make material errors of law when dismissing the Appellant's appeal.

Notice of Decision

1. The Appellant's appeal to the Upper Tribunal is allowed on the basis that First-tier Tribunal Judge Row failed to take into account the Appellant's circumstances at the date of the appeal hearing and also failed to apply relevant law relating to the Appellant's son's best interests.
2. The Appellant's appeal against the Respondent's decision is remitted to the First-tier Tribunal to be heard *de novo* before a First-tier Tribunal Judge other than First-tier Tribunal Judge Row.

Signed

Nadine Finch Date: 11 March 2016

Upper Tribunal Judge Finch