



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001869
First-tier Tribunal No:
HU/52497/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE M SYMES

Between

ALKET PLAKU
(No anonymity order made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Gajjar
For the Respondent: Ms J Isherwood

Heard at Field House on 9 August 2023

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the First-tier Tribunal's decision of 3 May 2023 to allow the appeal of Alket Plaku, a citizen of Albania born 9 April 1995, itself brought against the refusal of his application for leave to remain as a partner (on 4 April 2022).
2. Mr Plaku's application was as the unmarried partner of Erica Boutsai, a Greek national born 23 May 2001, currently a university student in nursing having entered the UK in August 2016. Mr Plaku had entered the UK clandestinely on 17 January 2015. They had met in September 2016, began dating in July 2017 and cohabiting in May 2019; Ms Boutsai suffered from serious depression requiring counselling and had been compelled to take time out of university. The Respondent refused the application because, whilst the relationship was accepted as genuine and subsisting and the English language criteria was

satisfied, they did not meet the financial requirement as their annual income was £17,335, thus falling short of the target set by the Rules of £18,600. There were considered to be no insurmountable obstacles or unjustifiably harsh consequences to the refusal as they could live together in Albania.

3. The First-tier Tribunal noted the Appellant came to the UK when he was 19 years old and had lived in the UK for 8 years and 3 months at the hearing date; he had grown up in Albania where his parents and family members still lived, spent his formative years there, spoke Albanian and would still retain sufficient knowledge of the culture and way of life to enable his integration into society upon return. It accepted Dr Latifi's opinion that Ms Boutsai presented symptoms fulfilling the criteria of Major Depression, and that the worries created by the refusal including their inability to travel to see their families would have made things worse. However they were not the single major cause to her mental health issues given she had only mentioned her failed exam and her difficulties in focusing on her nursing studies to the GP when seeking help for her mental health issues in November 2021; her assertion she had been fearful of raising this issue with the GP was not credible given she could be presumed to understand doctor/patient confidentiality.
4. The Judge accepted that the ongoing stress and anxiety created by the Appellant's immigration status meant Ms Boutsai could not focus on her studies requiring her to repeat a year of her course, such that she would not complete the degree until summer 2024. She relied on him for emotional support and they spent every night together. Given her plausible evidence that she would feel compelled to relocate to Albania with him pending an entry clearance application (which could not be predicted as necessarily succeeding given the earnings shortfall), continuing family life outside the UK for her was possible but would entail very serious hardship.
5. The Secretary of State's grounds of appeal contended that the First-tier Tribunal materially erred in law in
 - (a) Failing to apply the stringent test for insurmountable obstacles which it had cited, given the available evidence that Ms Boutsai's depression arose from exam failures rather than stresses related to immigration status; her studies could reasonably be paused rather than abandoned, such that the couple could relocate abroad and benefit from the presence of the Respondent's family as a potential source of support in Albania, a country with a functioning healthcare system;
 - (b) Failing to appreciate that the Appendix FM financial criteria were not satisfied and thus that the doctrine in *TZ Pakistan* was not applicable, absent full satisfaction of the Immigration Rules.
6. Ms Isherwood submitted that the sole reason given for allowing the appeal did not withstand scrutiny. The First-tier Tribunal had effectively relied on the reasoning expressed in *Chikwamba* [2008] UKHL 40 (which was now shown to be of very limited application given the ruling in *Alam* [2023] EWCA Civ 30) and thus had wrongly considered the lack of likelihood of entry clearance as a factor relevant to the proportionality of the interference with family life. Besides, the medical evidence did not back up the proposition that consequences would be unjustifiably harsh given it did not clearly attribute Ms Boutsai's depression to her husband's immigration problems. Mr Gajjar argued

that the Secretary of State's appeal was essentially a disguised rationality challenge and did not meet the high test for success in such a venture given the Tribunal's findings were within the range of reasonable responses to the available evidence. He referred me to the medical evidence (as I set out below in my conclusions).

Decision and reasons

7. I note the First-tier Tribunal carefully addressed itself to the governing legal framework, noting the need for an assessment of the right to family life within the context of the Immigration Rules and that the first question to ask was whether the Appellant satisfied the Immigration Rules, specifically Appendix FM, including the question of "insurmountable obstacles" which entailed very serious hardship; if the Rules were not met, then it would be appropriate to weigh the pros and cons by reference to the rubric of the decision being "unjustifiably harsh". It then proceeded to make its core findings, in essence that the financial criteria under the Rules were not met, that Mr Plaka would face no very significant obstacles to integration to life in Albania, but that the evidence as to Ms Boutsai's mental health was of sufficient concern to reach the "insurmountable obstacles" threshold.
8. Following *Alam* the application of *Chikwamba* will be limited to cases where the Secretary of State has squarely based her refusal on the viability of an entry clearance application from abroad. Here the First-tier Tribunal's decision contains no express reference to *Chikwamba*. The nearest finding that veers into the territory that decision addressed is the Judge's statement that, given that the Appellant failed to meet the financial criteria under the Rules, "I cannot assume that he will be able to make a successful application for entry clearance and return to the UK within a short period of time."
9. I do not consider that this represents a fatal misdirection because it is not central to the Judge's reasoning founding her conclusions. She concluded that the Appellant's foreseeable mental health deterioration if she "be required to leave the UK and ... goes with him to Albania in order to carry on their relationship there" was such as to represent insurmountable obstacles to life abroad. The length of potential separation between the Appellant and Sponsor was not relevant to that question, and reading the decision as a whole appears to have been no more than a side consideration identified as potentially relevant, but not ultimately decisive, of the appeal as a whole. It was relevant to the possibility of Ms Boutsai losing Mr Plaka's support for a limited period if he went abroad; but that was simply not the basis upon which the appeal was ultimately determined. So the Secretary of State's ground of appeal based on *Chikwamba* discloses no material error of law.
10. As to whether or not the decision was a rational one, it is appropriate to review the underlying medical evidence supporting the conclusion that Ms Boutsai's mental health problems represented "insurmountable obstacles". The Appellant's GP records clearly referenced her suffering from maladies such as a "stress-related problem", abdominal pain and vomiting due to becoming "very stressed" each time she had a problem, and that she had been stressed and anxious before her exams; she had been referred for counselling around November 2021; and Dr Latifi's report of July 2022 stated that she had an "exceptionally close and loving relationship with her partner, one of the

triggers or precipitating factors for her current presentation is the refusal of her partner's immigration case and her potential separation from him".

11. It seems to me that this provided sufficient evidential foundation for the First-tier Tribunal's conclusion that the test posited in Appendix FM at Ex.1-2 was satisfied, ie that the case involved "very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner." One might think the Judge below took a generous approach, but it was not one that lay beyond the spectrum of possible responses to the evidence with which she was presented. The reference to *TZ Pakistan* of which the Secretary of State makes complaint was wholly anodyne: the Judge clearly understood the difference between the relevant approach in a human rights grounds appeal where the Rules are wholly satisfied and when the Exception under Appendix FM was appropriate; as already explained, satisfaction of the latter criteria was the lawful premise to her conclusions.

Decision:

The decision of the First-tier Tribunal contained no material error of law.
The appeal is dismissed.



Deputy Upper Tribunal Judge Symes
Immigration and Asylum Chamber

12 October 2023