**Upper Tribunal**
**(Immigration and Asylum Chamber)**

AK and IK (S.85 NIAA 2002 – new matters) Turkey [2019] UKUT 67 (IAC)

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision Promulgated** |
|---|---|
| **On 16 January 2019** | …… |

**Before:**

**UPPER TRIBUNAL JUDGE GILL**

**Between**

**MRS A K**
**MASTER I K**
(ANONYMITY ORDER MADE) Appellants

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Anonymity**

**I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellants. No report of these proceedings shall directly or indirectly identify them. This direction applies to both the appellants and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings.**
**I make this order because the second appellant is a minor.**
**The parties are at liberty to apply to discharge this order, with reasons.**

**Representation:**

For the Appellants: Mr S Canter, of Counsel, instructed by Simona Rodkin Solicitors LLP
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

*If an appellant relies upon criteria that relate to a different category of the Immigration Rules to make good his Article 8 claim from that relied upon in his application for LTR on human rights grounds or in his s.120 statement such that a new judgment falls to be made as to whether or not he satisfies the Immigration Rules, this constitutes a "new matter" within the meaning of s.85(6) of the Nationality, Immigration and Asylum Act 2002 which requires the Secretary of State's consent even if the facts specific to his own case (for example, as to accommodation, maintenance etc) remain the same.*

## DECISION AND REASONS

1. The appellants are nationals of Turkey, born (respectively) on 27 May 1975 and 29 August 2007. They appeal against a decision of Judge of the First-tier Tribunal Kelley who, in a determination promulgated 26 October 2018 following a hearing on 8 October 2018, dismissed their appeals against a decision of the respondent of 6 April 2016, to refuse their applications of 8 December 2015 for leave to remain ("LTR") in the United Kingdom as the spouse and child (respectively) of Mr A K (hereafter the "sponsor"). The sponsor is a Turkish national with indefinite leave to remain ("ILTR") granted under the Immigration Rules that were in force (the "standstill provisions") as at the date of the European Communities Turkish Association Agreement (the "Ankara Agreement"). He was granted ILTR as a sell-employed business person. The second appellant is the son of the first appellant and the sponsor.

2. The appellants appealed on the only statutory ground available to them, namely that the decision was unlawful under section 6 of the Human Rights Act 1998.

3. The judge found that the appellants enjoyed family life with the sponsor. He found that, as the first appellant was in the United Kingdom without LTR, she had to satisfy the requirements of EX.1(b) of Appendix FM, i.e. that there were insurmountable obstacles to family life continuing in Turkey. He was not satisfied that there were such insurmountable obstacles. He found that the second appellant was not a "*qualifying child*" for the purposes of EX.1 (a), having only lived in the United Kingdom for 4 years. The appellants have not challenged these findings.

4. The judge then considered the Article 8 claim outside the Immigration Rules. He was not satisfied that there were any compelling or exceptional circumstances that warranted a grant of discretionary LTR under Article 8 outside the Immigration Rules.

5. The grounds only challenge the judge's finding that the decision was not disproportionate in his assessment of Article 8 outside the Immigration Rules. They may be summarised as follows:

    (i) (Ground 1) The judge erred in law by failing to consider whether the appellants meet the requirements of Appendix ECAA of the Immigration Rules. It is contended that the appellants meet the requirements of Appendix ECAA and that this was therefore a relevant factor in the assessment of proportionality outside the Immigration Rules.

Ground 1 entails consideration of whether any reliance by the appellants on their satisfying the requirements of Part 7 of Appendix ECAA constituted a "*new matter*" within the meaning of S.85(6) of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"). If it does, then the judge was precluded from considering whether the appellants met the requirements of Appendix ECAA unless the respondent had consented, pursuant to s.85(5) of the 2002 Act. There was no Presenting Officer representing the respondent at the hearing before the judge.

(ii) (Ground 2) The judge erred in law by failing to consider the principle in Chikwamba v SSHD [2007] UKHL 40. It is contended, inter alia, that his explanation at para 22 of his decision for not doing so made no sense. In addition, he erred in taking into account the precarious immigration status of the appellants in assessing proportionality.

Background

6. The sponsor arrived in the United Kingdom on a visit visa in August 2010. He then applied for and was granted further LTR as a business person under the standstill provisions.

7. The appellants entered the United Kingdom on 12 August 2014 with entry clearance visas to join the sponsor as his dependent wife and son. All three then applied for ILTR. The sponsor's application was granted on 29 April 2015 but the appellants' applications were refused in a decision letter dated 29 April 2015 because they did not meet the 2-year residence requirement under Home Office guidance issued in 2011 for dependants of business persons granted leave under the standstill provisions. On 15 May 2015, the appellants again applied for LTR as the dependants of a Turkish national business person. This application was refused on 11 November 2015.

8. The appellants then made their applications of 8 December 2015 for LTR that were the subject of the appeal before the judge. It is plain that these applications were applications for LTR on the basis of their rights under Article 8 of the ECHR. The application form (hereafter the "Application"), signed and dated 8 December 2015, was accompanied by a letter dated 8 December 2015 from Stoke White (pages 55-60 of the appellant's bundle), who were then acting for the appellants (hereafter the "*Letter of application*"). The opening paragraph of this letter reads:

> "Our clients make this application for leave to remain in the UK on basis of the family and private life in the UK, namely on basis of their relationship and life in the UK with their husband, respectively, [Mr A K ] who has settled status."

9. The remainder of the Letter of Application explains why it was considered that the appellants' applications for LTR on their basis of their rights under Article 8 should be granted. There is no mention that they satisfy any of the requirements under the standstill provisions or the then applicable Home Office guidance relating to the requirements for LTR as dependants of Turkish nationals who have been granted leave as business persons under the standstill provisions.

10. On 6 July 2018, i.e. in the period between the date of the decision and the date of the hearing before the judge, Appendix ECAA of the Immigration Rules came into force. This sets out the requirements to be met for the grant of ILTR to Turkish nationals who have been granted LTR under the "ECAA worker" or the "ECCA business" category (as defined in Appendix ECAA) and their partners and children. Needless to say, as Appendix ECAA was not in force then, it was not mentioned in the Application or the Letter of Application nor was it considered by the respondent.

The judge's decision

11. It is not necessary to summarise the judge's reasons for concluding that the appellants did not satisfy the requirements for LTR under the Immigration Rules because his findings in this regard have not been challenged.

12. Nor is it necessary to summarise the judge's reasons for concluding, following his assessment of the Article 8 claims outside the Immigration Rules, that the decision was not disproportionate. If I decide that the judge did err in his assessment of proportionality as contended in ground 1 and/or ground 2, it would follow that his assessment of proportionality would be set aside. It would then be necessary to re-assess proportionality. Neither Mr Canter nor Mr Clarke sought to suggest otherwise.

13. Paras 22-24 of the judge's decision are relevant to the grounds of appeal. They read:

> "22. I do not consider that the principles in Chikwamba (FC) (Appellant) v Secretary of State for the Home Department [2008] UKHL 40 have any relevance to this appeal. This is because neither the Immigration Rules nor any other expression of the Secretary of State's policy require the appellants to seek entry clearance from abroad. On the contrary, the appellants were entitled to (and did) make their applications for further leave to remain whilst they were still in the United Kingdom. So far as I am aware, the Secretary of State has never suggested, otherwise.
>
> 23. Before embarking upon my Article 8 analysis of the facts, it is first necessary to deal with Ms Anzami's challenge to the legality of the respondent's reasons for refusing the appellant's [sic] applications under Appendix FM of the Immigration Rules. There are two linked aspects to this challenge. Firstly, it is said that the appellants ought not to have been treated as 'overstayers' given that they would not be treated as such in an application made under paragraph 7.1 of Appendix ECAA of the Immigration Rules. Secondly, it is said that given that the second appellant is the child of a person who was granted indefinite leave to remain under Appendix ECAA of the Rules, it was unlawful for the respondent to insist upon him meeting the requirement for that leave to be granted under Appendix FM.
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> 24. It is immediately apparent that both arguments depend upon a 'pick and mix' approach to what are in fact two discrete codes under the Rules. In my judgement, it is not appropriate to 'borrow' a requirement that an applicant is able to meet from one code simply because he is unable to meet a similar requirement under another. Each Appendix (ECAA and FM respectively) is intended to codify the United Kingdom's obligations under a particular and distinct international treaty. The fact that a person happens to qualify for consideration for leave to remain under both codes does not in my judgement alter the need for him to meet the requirements that are relevant to the basis

upon which he seeks it. Given their universal nature, this applies with especial force to provisions that are intended to codify rights guaranteed by the 1956 European Convention for the Protection of Human Rights and Fundamental Freedoms. Were it otherwise, the citizens of one country would be entitled to receive preferential treatment over the citizens of another under a Convention that expressly forbids the discriminatory application of its provisions on grounds of national origin (see Article 14). I therefore reject Ms Anzami's submission in this regard and now turn to consider the position under Appendix FM and Article 8. In doing so, I have adopted the step-by-step approach of Razgar v SSHD [2004] UKHL 27."

Section 85 of the 2002 Act

14. During the course of submissions, I was referred to ss.82, 85 and 120 of the 2002 Act. Section 84 is also relevant. These provide:

**82. Right of appeal to the Tribunal**

(1) A person "P" may appeal to the Tribunal where –
  (a) the Secretary of State has decided to refuse a protection claim made by P,
  (b) the Secretary of State has decided to refuse the human rights claim made by P, or
  (c) the Secretary of State has decided to revoke P's protection status.

**84. Grounds of appeal**

(1) An appeal under section 82(1)(a) (refusal of protection claim) must be bought on one or more of the following grounds –
  (a) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;
  (b) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
  (c) that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be bought on the grounds that the decision is unlawful under section 6 of the Human Rights Act 1998.

**85. Matters to be considered**

(1) An appeal under section 82(1) against the decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

(2) If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in a statement which constitutes a ground of appeal of a kind listed in section 84 the decision appealed against.

(3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.

(4) On an appeal under section 82(1) … against a decision the Tribunal may consider… any matter which it thinks relevant to the substance of the decision, including… a matter arising after the date of decision.

(5) But the Tribunal must not consider a new matter unless the Secretary of Status has given the Tribunal consent to do so.

(6) A matter is a "new matter" if –
  (a) it constitutes a ground of appeal of a kind listed in section 84, and

(b) the Secretary of State has not previously considered the matter in the context of –

(i) the decision mentioned in section 82(1), or

(ii) a statement made by the appellant under section 120.

**120 Requirement to state additional grounds for application etc**

(1) Subsection (2) applies to a person ("P") if—

(a) P has made a protection claim or a human rights claim,

(b) P has made an application to enter or remain in the United Kingdom, or

(c) a decision to deport or remove P has been or may be taken.

(2) The Secretary of State or an immigration officer may serve a notice on P requiring P to provide a statement setting out—

(a) P's reasons for wishing to enter or remain in the United Kingdom,

(b) any grounds on which P should be permitted to enter or remain in the United Kingdom, and

(c) any grounds on which P should not be removed from or required to leave the United Kingdom.

(3) A statement under subsection (2) need not repeat reasons or grounds set out in—

(a) P's protection or human rights claim,

(b) the application mentioned in subsection (1)(b), or

(c) an application to which the decision mentioned in subsection (1)(c) relates.

(4) Subsection (5) applies to a person ("P") if P has previously been served with a notice under subsection (2) and—

(a) P requires leave to enter or remain in the United Kingdom but does not have it, or

(b) P has leave to enter or remain in the United Kingdom only by virtue of [section 3C of the Immigration Act 1971] (continuation of leave pending decision or appeal).

(5) Where P's circumstances have changed since the Secretary of State or an immigration officer was last made aware of them (whether in the application or claim mentioned in subsection (1) or in a statement under subsection (2) or this subsection) so that P has—

(a) additional reasons for wishing to enter or remain in the United Kingdom,

(b) additional grounds on which P should be permitted to enter or remain in the United Kingdom, or

(c) additional grounds on which P should not be removed from or required to leave the United Kingdom,

P must, as soon as reasonably practicable, provide a supplementary statement to the Secretary of State or an immigration officer setting out the new circumstances and the additional reasons or grounds.

(6) In this section—

*"human rights claim"* and *"protection claim"* have the same meanings as in Part 5;

references to *"grounds"* are to grounds on which an appeal under Part 5 may be brought.

15. Section 82 and 85 were considered by the Vice President and Upper Tribunal Judge Jackson in Mahmud (S. 85 NIAA 2002 – 'new matters') [2017] UKUT 00488 (IAC). The judicial head-note reads:

> "1. Whether something is or is not a 'new matter' goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine for itself the issue.

2. A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal.

3. In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive."

16. Paras 29-31 of Mahmud are also helpful. They read:

"29. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal. For example, medical evidence of a serious health condition could be a matter which constitutes a ground of appeal on human rights grounds based on Article 3 of the European Convention on Human Rights which if breached, would mean that removal would be contrary to section 6 of the Human Rights Act, a ground of appeal in section 84(2) of the 2002 Act. Similarly, evidence of a relationship with a partner in the United Kingdom could be a matter which constitutes a ground of appeal based on Article 8 and for the same reasons could fall within section 84(2) of the 2002 Act as if made out, removal would be contrary to section 6 of the Human Rights Act.

30. A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. In the absence of this restriction, section 85(5) of the 2002 Act could potentially allow the Respondent to give the Tribunal jurisdiction to consider something which is not a ground of appeal by consent, thereby undermining sections 82 and 84 of the 2002 Act;

31. Practically, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive. By way of example, evidence that a couple had married since the decision is likely to be new evidence but not a new matter where the relationship had previously been relied upon and considered by the Secretary of State. Conversely, evidence that a couple had had a child since the decision is likely to be a new matter as it adds an additional distinct new family relationship (with consequential requirements to consider the best interests of the child under section 55 of the Borders, Citizenship and Immigration Act 2009) which itself could separately raise or establish a ground of appeal under Article 8 that removal would be contrary to section 6 of the Human Rights Act."

Submissions

17. Mr Canter submitted that, applying Mahmud, the appellants' reliance on Appendix ECAA did not constitute a "*new matter*" within the meaning of s.85(6). The factual matrix upon which the appellants relied in connection with the requirements of Appendix ECAA was drawn to the respondent's attention in the Letter of Application and was considered by the respondent in the decision letter challenged in the instant appeals. Given that Appendix ECAA was not in existence at the relevant time, there was no specific reference to it in the Letter of Application and the decision letter.

18. Mr Canter submitted that the judge should have considered whether the appellants met the requirements of Appendix ECAA in order to assess the proportionality of the decision outside the Immigration Rules. If they satisfied these requirements, this was a weighty consideration when assessing proportionality. It is clear from para 23 of the judge's decision that he refused to consider whether the appellants satisfied the requirements of Appendix ECAA. In doing so, he materially erred in law.

19. In response, Mr Clarke referred me to para 23 of the judge's decision which, he submitted, sets out what was argued before him in relation to Appendix ECAA. Para 23 shows that there were two limited aspects of the appellants' case on Appendix ECAA. He submitted that the case advanced to the judge in relation to Appendix ECAA did not concern proportionality but the lawfulness of the respondent's decision. However, the judge did not have jurisdiction to consider whether the respondent's decision was lawful. In any event, the respondent's decision could not be unlawful for failure to consider Appendix ECAA given that Appendix ECAA was not in existence then. It was not suggested to the judge on the appellants' behalf that part 7.1 of Appendix ECAA was relevant to proportionality under Article 8.

20. Mr Clarke submitted that an application for LTR under Appendix ECAA or the standstill provisions was not a human rights application. He submitted that this followed from the judgment of the Court of Appeal in SSHD v CA (Turkey) [2018] EWCA Civ 2875. The appellants had not submitted statements under s.120 of the 2002 Act raising Appendix ECAA after it came into force on 6 July 2018. Accordingly, any reliance upon Appendix ECAA before the judge would constitute a new matter. As the respondent was not represented before the judge, consent was not given. He therefore submitted that the judge had no jurisdiction to consider Appendix ECAA. Accordingly, any failure by the judge to consider it was immaterial.

21. Upon my pressing him to give me a clear answer, Mr Clarke eventually accepted that para 9 of grounds correctly distils from Appendix ECAA the requirements that the appellants had to satisfy under Appendix ECAA. Para 9 of the grounds reads:

> "Part 7 of Appendix ECAA to the Immigration Rules states that partners of Turkish Workers or Business Persons with. ILE, can be granted leave to remain where:
>
> a. They are the spouse or civil partner;
> b. The Sponsor was granted ILR. in Line with the ECAA guidance in force prior to 16 March 2018;
> c. They have last been granted leave to remain as the dependant of an ECAA worker or business person;

d. They are without leave to remain because they did not meet the two year residence requirement (under the previous guidance) and did not qualify for further leave because the ECAA business person had acquired ILR;
d. They are together in a subsisting relationship with the ECAA worker or business person, they don't fall for refusal under the general grounds and that maintenance and accommodation requirements are met."

22. On being pressed, Mr Clarke also accepted that the appellants appear to meet Part 7.1 although he stressed that this could not bind any decision-maker in any subsequent application by the appellants under Appendix ECAA. He reminded me that they had not made any application for LTR under Appendix ECAA. Furthermore, he submitted that the respondent's decision could not be regarded as disproportionate on this basis because they have the option of making an in-country application for LTR under Appendix ECAA. The possibility of making an in-country application means that the decision would not interfere with any family life or private life, in his submission.

23. In relation to ground 2, Mr Clarke accepted that the judge's reasoning at para 22 for not considering the principle in Chikwamba was in error. However, he submitted that this was not material because: (i) the appellants had not argued before the judge that they meet the criteria for the grant of entry clearance under Appendix ECAA; (ii) in any event, Appendix ECAA is not applicable to entry clearance applications because it only applies to in-country applications for LTR; and (iii) as the appellants had not submitted English language test certificates, they could not satisfy the requirements for entry clearance under Appendix FM on the evidence before the judge.

24. In response, Mr Canter submitted that it was not necessary for the appellants to serve a s.120 statement following the introduction of Appendix ECAA. Section 120 requires applicants to notify the respondent if there had been a change in their circumstances. There had been no change in their circumstances. What had changed was the introduction of Appendix ECAA. The Secretary of State must have been aware that his own Immigration Rules had changed with the introduction of Appendix ECAA. The appellants' factual matrix remained the same. The factual matrix upon which they relied was always based on their relationship with the sponsor who had obtained ILTR as a Turkish business person. The reason why they made their applications for LTR on human rights grounds was that an earlier application for LTR as dependants of a Turkish business person was refused because they had then only lived in the United Kingdom for 4 months and therefore did not meet the 2-year residence requirement.

25. With regard to the judge's summary of the submissions advanced on the appellants' behalf in relation to Appendix ECAA, Mr Canter said that he had to accept that para 23 of the judge's decision shows that the argument advanced by the appellants' Counsel before the judge related to the legality of the respondent's decision. However, he submitted that this did not affect the appellants' case that, where a judge considers a human rights appeal, the judge is obliged to look at the Immigration Rules and consider whether the appellant satisfies the requirements of the Immigration Rules because it is a weighty factor in the appellant's favour in the

assessment of proportionality outside the Immigration Rules if the requirements are satisfied.

26. In relation to ground 2, Mr Canter said that it appears that there were no English language test certificates before the judge. However, in his submission, the judge should nevertheless have considered the fact that the remaining criteria for the grant of entry clearance were satisfied. He submitted that, to all intents and purposes, the appellants satisfied the requirements for the grant of entry clearance.

27. Mr Canter submitted that Mr Clarke's submission that the decision does not interfere with the appellants' rights under Article 8 because they are able to submit in-country applications for LTR under Appendix ECAA means that the appellants would be left to suffer the inconvenience and expense of making another application during which time they would be left without LTR.

28. I reserved my decision.

Assessment

29. In relation to Mr Clarke's reliance upon the fact that the appellants had failed to submit statements under s.120 of the 2002 Act in which they relied upon Appendix ECAA after it came into force on 6 July 2018, Mr Canter submitted that they were not under a duty to do so because their circumstances had not changed and that what had changed was that the Immigration Rules had been amended with the introduction of Appendix ECAA.

30. I agree with Mr Canter that the appellants were not under a duty to submit statements under s.120 but for a different reason. The duty under s.120(5) to inform the Secretary of State if an individual has additional reasons for wishing to remain in the United Kingdom only arises if the Secretary of State has decided to exercise his discretion under s.120(2) and issue a notice. In Lamichhane v SSHD [2012] EWCA Civ 260, the Court of Appeal held that the service of a section 120 notice is at the discretion of the Secretary of State. This was followed in TY (Sri Lanka) v SSHD [2015] EWCA Civ 1233 (para 28). It follows that it would not have been open to the appellants to submit s.120 statements of their own volition. There is nothing to suggest that the respondent served any s.120 statements on the appellants.

31. Before turning to the "new matter" issue, it is worth pointing out that the appellants' case is that, if they were to make an application for LTR under Appendix ECAA, their applications would succeed. It is very difficult to see how the respondent's decision of 6 April 2016 can be said to be disproportionate if all the appellants have to do is to make valid applications for LTR under Appendix ECAA.

32. I turn to the "new matter" issue, i.e. whether the appellants' reliance upon Appendix ECAA before the judge constituted a "new matter" within the meaning of s.85(6).

33. Mr Canter submitted, in reliance upon para 31 of Mahmud to the effect that "*… a new matter is a factual matrix which has not previously been considered by the Secretary of State…*", that the factual matrix upon which the appellants relied in relation to Appendix ECAA (for example as to accommodation, maintenance and their

relationship with Mr A K) remained the same as the factual matrix upon which they relied in the Letter of Application.

34. In Mahmud, the evidence in question concerning which the "*new matter*" issue arose was evidence of the appellant's relationship with a new partner, Ms P, and her sponsor which he first raised in his Notice of appeal. It is therefore not surprising that the Tribunal did not comment upon whether reliance upon a different category of the Immigration Rules in support of a human rights claim amounted to a "*new matter*". I entirely agree with the reasoning of the Tribunal concerning the issue that was before it in Mahmud. The Tribunal did not need to consider whether an appellant's reliance upon a certain factual matrix *and* a different category of the Immigration Rules to make good his Article 8 claim constituted a "*new matter*" which is precisely the issue in the instant case. There is nothing in Mahmud which relates to the issue I have to decide.

35. In the instant case, although the application before the respondent was plainly an application for leave to remain on the basis of the appellant's rights under Article 8, the Letter of Application stated that the first appellant could not submit an application under the 5-year partner route because she had not passed her English language test. The letter then proceeded to make submissions as to the reasons why this family unit should not be expected to relocate to Turkey and why it would be in the best interests of the second appellant for him to be permitted to remain in the United Kingdom with his parents. In other words, the Letter of Application relied upon the general considerations that are normally fall for assessment in Article 8 case.

36. Mr Canter asked me to take into account the fact that the reason why the Letter of Application made no mention of Appendix ECAA was that it was not in existence at that time. Be that as it may, the fact is that the appellants now seek to rely upon what I accept is the same factual matrix as to accommodation, maintenance, their relationship with Mr A K and that he has ILTR *as well as* the criteria in part 7.1 of Appendix ECAA to establish their Article 8 claim. They now contend, in reliance upon the same factual matrix, that: "*My removal is disproportionate and therefore in breach of Article 8 because I meet the requirements of part 7.1 of Appendix ECAA. I could not say this before because Appendix ECAA did not exist when I made my application but the Immigration Rules have since been amended*" whereas their Article 8 claim, as set out in the Letter of Application, was essentially that: "*My removal is disproportionate and therefore in breach of Article 8 because it would be unreasonable (and in the case of the second appellant, not in my best interests) to expect me and the remaining members of my family unit to relocate to Turkey to enjoy family life*".

37. The case the appellants now put on the issue of proportionality in relation to their Article 8 claims requires a new legal judgment to be made as to whether or not they comply with the Immigration Rules. Given the importance of the proposition that compliance with the Immigration Rules is relevant in deciding proportionality, a legal judgment as to whether or not the appellants comply with the Immigration Rules must be recognised as a new factual matter when a new judgment falls to be made based on the same facts.

38. Such an interpretation is consistent with s.86(6) of the 2002 Act because the appellants' reliance upon their satisfaction of the criteria in part 7.1 of Appendix ECAA:

    (a) constitutes a ground of appeal of a kind listed in s.84; and

    (b) the Secretary of State has not previously considered whether the appellants meet the requirements of part 7.1 of Appendix ECAA in the context of the decision of 6 April 2016 (as stated above, there is no evidence that any s.120 statement was served on the appellants).

39. It is also consistent with the policy purpose of s.85(5) which must be to enable the Secretary of State to be the first person to make a judgment as to whether or not an individual satisfies the requirements of the Immigration Rules unless he consents to the Tribunal doing so. To conclude otherwise would run counter to that policy purpose and it would make judges of the First-tier Tribunal first instance decision-makers.

40. For the reasons given above, and to summarise, I have concluded that, if an appellant relies upon criteria that relate to a different category of the Immigration Rules to make good his Article 8 claim than that relied upon in his application for LTR on human rights grounds or in his s.120 statement such that a new judgment falls to be made as to whether or not he satisfies the Immigration Rules, this constitutes a "*new matter*" within the meaning of s.85(6) which requires the Secretary of State's consent even if the facts specific to his own case (for example, as to accommodation, maintenance etc) remain the same.

41. I therefore agree with Mr Clarke that the judge had no jurisdiction to consider whether the appellants satisfy Appendix ECAA. Accordingly, the judge did not err in law in failing to consider whether the appellants satisfied the requirements of Appendix ECAA.

42. I therefore reject ground 1 on the basis that the judge did not have jurisdiction to consider whether the appellants satisfy the requirements of Appendix ECAA.

43. If I am wrong and if the judge *did* have jurisdiction to consider whether the appellants satisfied the requirements of Appendix ECAA, I have concluded that he did not err in law in failing to do so. It is plain from para 23 of his decision that Appendix ECAA was relied upon in order to argue that the respondent's decision was unlawful. It was not argued that they satisfy the requirements of part 7.1 of the Appendix ECAA. He was under no obligation to embark, of his own volition, upon the exercise of considering whether the appellants satisfied the requirements of part 7.1 of the Appendix ECAA.

44. I therefore reject ground 1 on this alternative basis.

45. In relation to ground 2, the judge's reasoning at para 22 simply does not make sense as it runs counter to the logic of the Chikwamba principle. It is clear from R (Agyarko) and others v SSHD [2017] UKSC 11 that an individual's ability to meet the requirements for a hypothetical entry clearance application remains a relevant consideration when considering proportionality. At para 51 of Agyarko, Lord Reed

said *"If … an applicant - even if residing in the UK unlawfully - was otherwise **certain** to be granted leave to enter, at least if an application were made from outside the UK, then **there might be** no public interest in his or her removal"* (my emphasis). The judgment of the Court of Appeal in Tikka v SSHD [2018] EWCA Civ 642 is more recent confirmation of the Chikwamba principle.

46. However, the judge's failure to consider the Chikwamba principle is simply immaterial on the facts of the instant case. Even if the judge had had jurisdiction to consider whether the appellants satisfy Appendix ECAA, contrary to my conclusion above, Appendix ECAA does not apply to entry clearance applications. It is evident from a perusal of Appendix ECAA that it only applies to in-country applications for LTR. Any hypothetical application for entry clearance under Appendix FM was bound to fail on the evidence before the judge because the appellants had not submitted any English language test certificates. Mr Canter's submissions, summarised at my para 26 above, simply ignore the fact that entry clearance must be certain to be granted for the Chikwamba to be applied, as is clear from para 51 of Agyarko. Even where entry clearance is certain to be granted, proportionality still has to be considered.

47. I therefore reject ground 2.

48. In summary, therefore:

    (i) I reject ground 1 because the judge did not have jurisdiction to consider whether the appellants satisfy the requirements of Appendix ECAA.

    (ii) Even if the judge did have jurisdiction to consider whether the appellants satisfied the requirements of Appendix ECAA, I reject ground 1 on the alternative basis that it was not argued before him that the appellants satisfied the requirements of Appendix ECAA.

    (ii) In relation to ground 2, I accept that the judge erred in law in failing to consider whether the Chikwamba principle applied but the error was not material because the evidence submitted to the judge did not establish that entry clearance was certain to be granted to the appellants.

**Decision**

The decision of Judge of the First-tier Tribunal Kelly did not involve the making of any error of law sufficient to require it to be set aside.

Upper Tribunal Judge Gill Date: 31 January 2019