Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06698/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th October 2018	**On 6th November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ED (ALBANIA)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Jafar, Counsel instructed on a Direct Access basis
For the Respondent: Mr Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who remained in the UK without leave from 8 August 2016 (having had only temporary admission as an air passenger who was supposedly in transit to the USA) and who subsequently claimed asylum on 13 January 2017 – a claim which she subsequently abandoned - appeals from the decision of the First-tier Tribunal dismissing her appeal against the decision of the respondent to refuse to grant her leave to remain on the basis of family life established in the UK with the partner whom she came to join and their two children. The Judge found that there were not insurmountable obstacles to family life between the appellant, her partner and the

children being carried on in Albania. Alternatively, he found that the appellant had the reasonable option of returning with the children to Albania for a relatively short period of time in order to make an application for entry clearance under the Rules.

The Reasons for the Initial Refusal of Permission

2. Permission to appeal was refused by First-tier Tribunal Judge Pickup on 7 December 2017 for the following reasons:

> "The grounds assert the Judge erred in failing to accept that the appellant's case engaged the **Chikwamba** principle and failed to give due weight to the best interests of the children.
>
> However, it is clear from the reading of the decision that the Judge addressed the relevant considerations. Neither of the children is a qualifying child for the purpose of Appendix FM, paragraph 276ADE, or s117B(6). The Judge addressed the best interests of the children, finding that these were to live with their mother, but noted that the appellant's representative did not argue that there were insurmountable obstacles to continuing family life in Albania. The Judge gave anxious consideration as to the private life claims of each child. This is not a **Chikwamba** situation, as it is far from clear whether she would meet the requirements for entry clearance, as she requires an English language qualification and in which application her immigration history may be relevant."

The Reasons for the Eventual Grant of Permission to Appeal

3. On 15 May 2018 Upper Tribunal Judge Plimmer granted permission to appeal because arguably, "*the First-tier Tribunal's reasons for finding at [58] that the case has not engaged the* ***Chikwamba -v- SSHD*** *[2008] UKHL 40 principle, given the findings at [53-55], are inadequate.*"

Relevant Background Facts

4. The appellant is a national of Albania, whose date of birth is 13 February 1980. She has two children, "A" born on 24 September 2008, and "B" born on 14 July 2011. Both her children were born in Albania and they are Albanian nationals. Her partner, and the father of the two children, is "HL", a Serbian national who has indefinite leave to remain.

5. The appellant served in the Albanian army from 2004 until 16 August 2016. On 29 June 2006 the appellant entered into an arranged marriage with Arjan. In her asylum claim, she said that on the first night of their marriage he raped her, and thereafter she suffered financial, physical and emotional abuse from him on almost a daily basis throughout the duration of their marriage.

6. She first met HL on a visit to the UK in August 2006. Their relationship began at that point. She returned to the UK in October 2007 to stay with him for 10 days while she was stationed in Germany. She subsequently came to the UK again from Germany in October 2010, and stayed with HL for 2 weeks.

7. Arjan suspected that he was not the father of the children to whom the appellant had given birth, but he did not take a paternity test to verify his suspicions.

8. The appellant separated from Arjan in August 2011, and their divorce was finalised on 31 January 2012. The appellant's parents were aware that HL was the biological father of the children, but HL was not mentioned in the divorce proceedings. Nor was he listed as the children's father on their birth certificates.

9. After the divorce, the appellant said she received threats by phone from her ex-husband and that he also came round to their house and visited the children's nurseries. HL would also visit her in Albania from time to time, and on 14 July 2016 he proposed marriage to her.

10. She said that she had decided to leave Albania for good in February 2016. She obtained a visit visa for the USA for herself and her two children, which was valid from June 2016. She left her employment with the Army at the beginning of August 2016, and on 6 August 2016 she and her children purportedly embarked on a journey to the USA, which was going to involve transiting at Gatwick Airport for 24 hours. Upon their arrival in the UK, she left the airport with her children to join HL.

11. On 4 July 2017 the respondent gave her reasons for refusing the appellant's protection and human rights claims. It was not accepted that she had suffered ill-treatment from her ex-husband. The reasoning of the respondent included the fact that she had been able to reside and work in Albania until her departure in August 2016; she had been able to live on her own for the last six years and had travelled to Germany and to the UK on several occasions since 2006; and until August 2016 she had remained in the same locality where her ex-husband knew her location and also knew that she was in a relationship with HL.

12. On the issue of future risk, she had been educated up to university level; she had a good relationship with her parents; she could speak Albanian, English and German; and she had relevant transferable skills to support herself on return to Albania. It was not considered unduly harsh to expect her to relocate within Albania away from her local area. She failed to demonstrate that the authorities in Albania would have been unable or unwilling to offer her protection if she had sought it. She said that her ex-husband had connections with the police in Albania, but she had not provided any details or evidence of this.

The Hearing Before, and the Decision of, the First-tier Tribunal

13. The appellant's appeal came before Judge Harris, sitting in the First-tier Tribunal at Hatton Cross on 11 August 2017. Both parties were legally represented. At the outset of the hearing, Mr Alim of Counsel clarified that the appellant was only pursuing an appeal on human rights grounds under Article 8 ECHR.

14. The Judge received oral evidence from the appellant and HL. In her evidence, the appellant said that Arjan was always suspicious that the children were not his. After leaving him in 2011, she and the children lived in Tirana in a flat owned by her

parents. Arjan, who was renting accommodation in Tirana at the same time, used to make threatening phone calls to her and also come to her home and intimidate her and the children. He would also appear outside the children's schools.

15. The children had, in consequence, had difficult childhoods. A had witnessed Arjan abusing the appellant, and Arjan had also been physically and emotionally abusive towards A. The appellant described A as being traumatised and extremely afraid of Arjan. For many years he would always sleep in the same bed as her, and he had had behavioural problems at school in Albania.

16. The fact that HL had fathered the two children was confirmed by DNA test evidence. HL had obtained indefinite leave to remain in the UK in 2014 under the Legacy Scheme. He had visited the appellant in Albania in September 2015; December 2015; and July 2016. Their relationship between 2006 and 2014 had been on and off, but it had grown stronger from 2015 onwards. They had become engaged on 14 July 2016. At present, no date had been set for the marriage.

17. The children had begun to settle well into the country, learning English, attending school and making friends. The children became anxious when the appellant and HL talked about Albania. She believed that removing her two sons to Albania would affect them emotionally, socially and behaviourally.

18. In his subsequent decision, Judge Harris noted that Mr Alim had made it clear in his submissions that he was not arguing that the circumstances of either of the children or HL engaged paragraph EX.1 of Appendix FM. Neither child was a qualifying child, and there were not insurmountable obstacles to either the appellant or HL integrating into Albania.

19. On the issue of proportionality, he acknowledged at paragraph [41] that he had to treat as a primary consideration what was in the best interests of each of the appellant's sons. At paragraph [52], he referred to the guidance given by Clarke LJ at paragraph [35] of **EV (Philippines) [2014] EWCA Civ 874**.

20. At paragraph [43], he held that it was clearly in the best interests of both children to reside with their mother and father. However, the appellant had not argued that there were insurmountable obstacles for either herself or HL in relocating to Albania. This allowed the children to have family life with their parents in Albania. It was not the case that family life could only be pursued in the UK.

21. At paragraph [44], the Judge observed that the appellant relied more on the effect in private life terms that leaving the UK for Albania would have on the children. A was now 9 years old, and E was now 6 years old. It was accepted that each of them had begun to develop private lives separately from the family life they had with their parents. It was also accepted that neither child should be blamed for a decision of their parents which resulted in them being overstayers. However, each child had only been in the country since August 2016. The family would not face destitution in Albania. The children were of primary school age, and already had experience of the Albanian education system. It was not asserted that the children would be at real

risk of serious harm in Albania from Arjan or anyone else. It was accepted that the level of past harassment and threatening behaviour from Arjan, described by the appellant, would be distressing for the children. But, even taking her account at its highest, neither she nor the children had suffered actual physical harm at his hands since the appellant had left him in 2011.

22. The appellant claimed that there would be a psychological effect for each child in returning to Albania. But she was not a medical expert. There was no medical evidence before him in respect of either child being diagnosed with suffering any mental health or behavioural problems, and there was no prognosis of mental health or behavioural problems arising on relocation to Albania.

23. Accordingly, he concluded at paragraph [51] that the ex-husband was not such a threat to the wellbeing of the children to make it against their best interests to relocate to Albania with their parents.

24. He could accept that there would be some disruption, socially and emotionally, for each child leaving the UK for Albania, but it was not established that the consequence of relocation would be so severe for either child that return to Albania would be against their best interests.

25. In any event, the respondent submitted - correctly in his view - that there was an alternative to permanent relocation to Albania which was open to the appellant and the children. This was to return to Albania for a relatively short period of time in order to make an entry clearance application under the Rules to join HL in this country.

26. Mr Alim's objection that the applications might be refused on account of the appellant having a poor immigration history was not a basis for finding compelling circumstances in the current appeal. It was well established that there was a significant public interest in encouraging people who are illegally present in the UK to return to their home countries in order to make appropriate applications under the Rules.

27. HL was employed in the building industry and his oral evidence was that he earned around £669 net per week. This was indicative that he would be able to sponsor his family's applications at the required level of income under the Rules with the required specified evidence. The appellant was a trained linguist who would be asked to provide a relatively basic qualification in English to satisfy the language requirements of the Rules. It would be open to HL to accompany the family to Albania for the period it took to make the applications.

The Hearing in the Upper Tribunal

28. At the hearing before me to determine whether an error of law was made out, Mr Jafar developed the appellant's case on similar lines to that sketched out by Upper Tribunal Judge Plimmer when granting permission. Mr Jafar submitted that the analysis of best interests had not been properly conducted. The Judge had not

considered best interests first. Instead, he had determined that it was in the best interest for the children to be removed because there were no insurmountable obstacles, and then he had gone on to consider whether their best interests were affected by matters that should have informed him where the children's best interests lay in the first place. The Judge had put the cart before the horse.

29. The Judge's approach to the **Chikwamba** line of authority was also flawed. In **Chikwamba -v- SSHD [2008] UKHL 40**, Baroness Hale had held that, even if it would not be disproportionate to require the husband to endure some months of separation, it was unreasonable to expect the child to do so. The jurisprudence of the European Court of Human Rights made it clear that the separation of young children from their parents caused serious and irreversible harm.

30. In reply, Mr Tarlow adhered to the Rule 24 response settled by a colleague. There was no error of law in the Judge's line of reasoning in paragraph [53]-[58] of his decision. In **Chen -v- SSHD IJR [2015] UKUT 189**, the Upper Tribunal held as follows: "*There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where a 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 -v- SSHD [2008] UKHL 40.*"

31. The Upper Tribunal also held in the same case that Lord Brown was not laying down a legal test in **Chikwamba** when he opined that requiring a claimant to make an application for entry clearance from abroad would only "*comparatively rarely*" be proportionate in a case involving children.

Discussion

32. I will address the two grounds of appeal in the order in which they appear in the application for permission to the Upper Tribunal.

33. Ground 1 is that the Judge erred in law in not accepting that the appellant's case engaged "*the principle*" of **Chikwamba**. What is meant by this is apparent from the passage in **Hayat v SSHD [2011] UKUT 00444** which is then cited, and which was also cited by the Judge at paragraph [57]:

> "The significance of **Chikwamba** is to make it plain that, in an appeal where the only matter weighing on the respondent's side of an Article 8 proportionality balance is the public policy of requiring an application to be made under the immigration rules from abroad, that legitimate objective will usually be outweighed by factors resting on the appellant's side of the balance."

34. I consider that it was open to the Judge to find that the **Chikwamba** principle was not engaged as defined in Ground 1. This is not a case where the only matter weighing on the respondent's side of an Article 8 proportionality balance was the public policy of requiring an application to be made under the Immigration Rules from abroad. On the contrary, there were clearly other factors in play which rested

on the respondent's side of the proportionality balance. Firstly, the appellant had not shown that there were insurmountable obstacles to family life being carried on in Albania, or even that it was unreasonable to expect family life to be carried on in Albania. Secondly, the appellant had not shown that she qualified for leave to remain on the alternative basis of the minimum income requirement being satisfied. Thirdly, the appellant had used deception to gain entry to the UK.

35. As Mr Jafar tacitly recognises by dealing with Ground 2 first in his skeleton argument, in order to establish an error of law in the application of **Chikwamba**, it is first necessary for the appellant to establish that the Judge erred in law in finding that it was reasonable and proportionate for the entire family to relocate to Albania.

36. This is illuminated by a passage from the judgment of Elias LJ in **Hayat [2012] EWCA Civ 1054** at paragraph [18], cited by Mr Jafar at paragraph 7 of his skeleton argument:

> "It may at first blush seem odd that Article 8 rights may be infringed by an unjustified insistence that the applicant should return home to make the application, even though its subsequent decision to refuse the application on the merits will not. The reason is that once there is interference with family or private life, the decision maker must justify that interference. Where what is relied upon is an insistence on complying with formal procedures that may be insufficient to justify even a temporary disruption to family life. *By contrast, a full consideration of the merits may readily identify features which justify a refusal to grant leave to remain.*" (my emphasis)

37. The Judge undertook a full consideration of the merits, and, subject to Ground 2 (see below), he adequately identified the features which justified the refusal to grant leave to remain.

38. Neither the Judge nor the respondent was insisting that the appellant should go back to Albania to apply for entry clearance. The Judge merely found that, aside from the reasonable option of the entire family relocating to Albania, there was also the reasonable option of the appellant going back with the children and applying for entry clearance.

39. Moreover, this was not a case where the only public interest that was engaged was the narrow one of compliance with formal procedures.

40. Although the Judge characterised the appellant as an overstayer, he recorded at paragraph [19] an admission that the appellant had obtained USA visit visas and had bought flights to the USA to use them "*as cover*" for entering this country. It was not part of the appellant's case that she genuinely intended to visit the USA with her children, but changed her mind while being in transit at Gatwick airport. Her leaving the airport to join her partner was part of a pre-planned stratagem to circumvent the rules. It was precisely because the appellant was not a mere overstayer but potentially came into the category of an applicant who *"has previously contrived in a significant way to frustrate the intentions of the Rules"* – see Rule 320(11) - that Mr Alim expressed concern that an Entry Clearance Officer might refuse an application for entry clearance from abroad on account of her poor immigration history.

41. In addition, although there was a reasonable prospect of HL being able to produce the specified evidence to show that the minimum income requirement was met through his self-employment in the building industry, there was no evidence that he would be able to demonstrate compliance with the financial requirements in the near future, as opposed to six or twelve months down the line.

42. For the above reasons, it was clearly open to the Judge to find that the appellant's case did not engage the principle of **Chikwamba** as defined in the passage from **Hayat** cited in the permission application. As the Judge said at paragraph [58], it was not just public policy requiring an application to be made under the rules from abroad that was an obstacle to the decision of the respondent being found to be disproportionate: "*As I have indicated above, there are other factors that do not weigh in the appellant's favour.*"

43. Turning to Ground 2, I do not consider that there was an error of law in the Judge's approach. As I explored with Mr Jafar in oral argument, I consider that his approach was entirely consonant with the guidance given by the Upper Tribunal in **Azimi–Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)**: as well as with the guidance given by the Court of Appeal in **EV (Philippines)**. In the former, the UT said:

> 30. It is not the case that the best interests principle means it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:
>
> (i) As a starting point in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
>
> (ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
>
> (iii) Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
>
> (iv) Apart from the terms of published policies and Rules, the Tribunal notes that seven years from age 4 is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than peers and are adaptable.
>
> (v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life

> deserving of respect in the absence of exceptional factors. In any event, protection of the economic wellbeing of society amply justifies removal in such cases.

44. It is apparent from the above guidance that the Judge did not impermissibly put the cart before the horse, as Mr Jafar puts it. Consistent with the first principle in **Azimi-Moayed**, the Judge directed himself that it was clearly in the best interests of both dependent children to reside with their parents. Although only one parent was facing removal, a crucial consideration was whether there were insurmountable obstacles, as defined in EX.2, to the family unit being reconstituted in Albania, to which the answer was no.

45. The Judge went on to consider all the remaining relevant best interest considerations before arriving at the sustainable conclusion that returning to Albania would not be against the children's best interests.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Direction Regarding Anonymity – rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 18 October 2018

Judge Monson
Deputy Upper Tribunal Judge