Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20215/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 March 2022	**On 11 May 2022**

Before

UPPER TRIBUNAL JUDGE ALLEN
DEPUTY UPPER TRIBUNAL JUDGE MALIK QC

Between

ALFONC BEQIRI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms Sonia Ferguson, Counsel, instructed by Freemans Solicitors
For the Respondent: Ms Susana Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is remaking of the decision in the Appellant's appeal against the Secretary of State's decision of 25 November 2019 to refuse his human rights claim based on Article 8 of the European Convention on Human Rights.

Factual background

2. The Appellant is a citizen of Albania and was born on 23 May 1988. He arrived in the United Kingdom illegally on 29 February 2016.

3. The Appellant made an application for leave to remain in the United Kingdom on the basis of his marriage with Mrs Ledi Lulaj on 31 July 2019. Mrs Lulaj is a British citizen born on 1 November 1995. The Appellant and Mrs Lulaj married on 12 July 2019.

4. The Secretary of State refused the Appellant's application on 25 November 2019. The Secretary of State stated that the Appellant does not meet the immigration status requirement as he had entered the United Kingdom illegally. The Secretary of State also stated that there were no insurmountable obstacles to the Appellant's family life with Mrs Lulaj continuing outside the United Kingdom. The Secretary of State accordingly held that the Appellant was not entitled to leave to remain on the grounds of his family life under Appendix FM to the Immigration Rules. The Secretary of State also held that the Appellant was not entitled to leave to remain on the grounds of his private life under Paragraph 276ADE(1) of the Immigration Rules. The Secretary of State concluded that there were no exceptional circumstances and the Appellant's removal from the United Kingdom would be compatible with Article 8.

5. First Tier Tribunal Judge Swinnerton heard the Appellant's appeal from the Secretary of State's decision on 2 March 2020 and allowed it in a decision promulgated on 9 March 2020. Judge Swinnerton, at [23], held that "it would be disproportionate to require the Appellant to return to Albania to apply for entry clearance as a partner particularly as there appears to be every indication that such application would be successful". On that basis, Judge Swinnerton concluded that the Appellant's removal from the United Kingdom would be incompatible with Article 8.

6. Upper Tribunal Judge Allen heard the Secretary of State's appeal from Judge Swinnerton's decision on 17 March 2021 and set aside it in a decision promulgated on 12 May 2021. Judge Allen held that the judgment in *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40 [2009] 1 All ER 363, which was relied upon by the Appellant, was distinguishable. Judge Allen concluded that Judge Swinnerton's decision was wrong in law. Judge Allen preserved the unchallenged findings made by Judge Swinnerton at [20]-[22] and retained the appeal for the purpose of remaking of the decision.

Resumed hearing

7. We are grateful to Ms Ferguson who appeared for the Appellant, and Ms Cunha, who appeared for the Secretary of State, for their assistance and able submissions.

8. The documents before us included the Appellant's bundle, the Appellant's supplementary bundle, the Secretary of State's bundle and Ms Ferguson's skeleton argument.

9. The Appellant and Mrs Lulaj gave oral evidence by adopting their witness statements. They were cross-examined by Ms Cunha. We then heard closing submissions from Ms Ferguson and Ms Cunha respectively. We shall refer to the evidence and submissions as appropriate in our findings.

10. We reserved our decision at the conclusion of the resumed hearing.

Grounds of appeal

11. The sole ground of appeal is that the Secretary of State's decision is unlawful as being incompatible with Article 8.

Findings

Entitlement under the Immigration Rules

12. Section E-LTRP of Appendix FM to the Immigration Rules sets out the eligibility requirements for leave to remain as a partner. These requirements are in four parts, namely, the relationship requirements, the immigration status requirements, the financial requirements and the English language requirements. Ms Cunha accepted that the Appellant meets the relationship requirements and the financial requirements. Ms Ferguson, on the other hand, accepted that the Appellant does not meet the immigration status requirements and the English language requirements. It is therefore common ground that the Appellant does not meet the eligibility requirements for leave to remain as a partner.

13. Section EX of Appendix FM to the Immigration Rules sets out certain exceptions to the eligibility requirements for leave to remain as a partner. Paragraph E.X.1(b) applies if:

> "the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen … and there are insurmountable obstacles to family life with that partner continuing outside the UK".

14. Paragraph E.X.2 adds that:

> "… insurmountable obstacles means the 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."

15. Ms Ferguson's skeleton argument does not suggest that the Appellant was able to meet this requirement. In her oral submissions, she accepted that there were no insurmountable obstacles to the Appellant's family life with Mrs Lulaj continuing outside the United Kingdom. Accordingly, no exception from the eligibility requirements for leave to remain as a partner applies in this appeal.

16. In the circumstances, the Appellant is not entitled for leave to remain under the Immigration Rules on the grounds of his family life with Mrs Lulaj.

17. Paragraph 276ADE(1) of the Immigration Rules set outs the requirements for leave to remain on the grounds of private life. Sub-paragraph (vi) provides:

> "… [the applicant] is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

18. Ms Ferguson's skeleton argument does not suggest that the Appellant was able to meet this requirement. In her oral submissions, she accepted that there were no very significant obstacles to the Appellant's integration in Albania on return.

19. In the circumstances, the Appellant is not entitled to leave to remain under the Immigration Rules on the grounds of his private life.

Article 8

20. We consider the Appellant's claim by reference to five questions identified in *Razgar v Secretary of State for the Home Department* [2004] UKHL 27 [2004] 3 All ER 821, at [17]. First, will the proposed removal be an interference by the Secretary of State with the exercise of the Appellant's right to respect for his private or family life. Second, if so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8. Third, if so, is such interference in accordance with the law. Fourth, if so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others. Fifth, if so, is such interference proportionate to the legitimate public end sought to be achieved.

21. We answer the first four questions in the affirmative. There is no dispute that the Appellant's marriage with Mrs Lulaj is genuine and subsisting. The Appellant has a private and family life in the United Kingdom. The Secretary of State's decision amounts to an inference with that life and is of such gravity so to engage the operation of Article 8. We bear in mind, as emphasised in *AG (Eritrea) v Secretary of State for the Home Department* [2007] EWCA Civ 801 [2008] 2 All ER 28, at [28], and *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5 [2009] Imm AR 436, at [22], that the threshold for engagement of Article 8 is low. It merely requires more than a technical or inconsequential interference with one of the protected rights. This threshold, in our judgment, is met in this case. The interference caused by the Secretary of State's decision is in

accordance with the law and is necessary in a democratic society in the interests of the economic well-being of the United Kingdom. The real issue in this appeal, as posed by the fifth question, is whether that interference is proportionate.

22. Section 117A(2)(a) of the Nationality, Immigration and Asylum Act 2002 requires us to have regard to the considerations listed in section 117B in considering the public interest question. The public interest question is, in turn, defined in section 117A(3) as being the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2). There is, however, an element of flexibility within this provision. In *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58 [2019] 1 All ER 1007, at [49], Lord Wilson observed that the provisions of section 117B cannot put decision-makers in a strait-jacket which constrains them to determine claims under article 8 inconsistently with the article itself.

23. We take careful account of the considerations in section 117B of the Nationality, Immigration and Asylum Act 2002. As sub-section (1) provides, the maintenance of effective immigration control is in the public interest. The Appellant gave evidence in English. He is able to speak English for the purpose of sub-section (2). For the purpose of sub-section (3), as construed in *Rhuppiah*, at [55], there is no evidence of financial dependence upon the state so he is financially independent. These, however, are not matters which can positively weigh in favour of the Appellant in our assessment. We note that sub-section (4) provides that little weight should be given to a private life or a relationship with a qualifying partner that is established by a person at a time when they are in the United Kingdom unlawfully. The Appellant, as we note above, arrived in the United Kingdom illegally on 29 February 2016. He formed the relationship with Mrs Lulaj and established his private and family life at a time when he was in the United Kingdom unlawfully.

24. The Appellant, as we find above, does not qualify under the Immigration Rules. In *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60 [2017] 3 All ER 20, at [53], Lord Reed emphasised that the failure to meet the requirements of the Immigration Rules is a relevant and important consideration in an Article 8 assessment because the Immigration Rules reflect the assessment of the general public interest made by the responsible minister and endorsed by Parliament. In making our assessment, we attach particular weight to this important consideration.

25. Ms Ferguson relied heavily on *Chikwamba* and its consideration in subsequent authorities. The key submission made by her is that it would be disproportionate and inconsistent with *Chikwamba* to require the Appellant to return to Albania to make an application for entry clearance in the circumstances where he would satisfy all the requirements if he applied from abroad. In our judgment, this submission is misconceived.

26. In *Chikwamba*, the applicant was a Zimbabwean national. Her claim for asylum and leave to enter were refused in June 2002. Her removal was however suspended because of deteriorating conditions in Zimbabwe. She then married a Zimbabwean man who had earlier been granted asylum in this country, and in April 2004 a daughter was born to them. In November 2004, the bar on forced removals to Zimbabwe was lifted. The applicant appealed against the Secretary of State's refusal of her claim that removal to Zimbabwe would breach her Article 8 right to respect for her family life. The issue was whether she should be required to return to Zimbabwe in order to apply from there for permission to re-join her husband. It was accepted that he could not return to Zimbabwe. It was found by the adjudicator that conditions in Zimbabwe would be "harsh and unpalatable". In that context, Lord Scott, at [6], said (emphasis added):

> "It is, or ought to be, accepted that the appellant's husband cannot be expected to return to Zimbabwe, that the appellant cannot be expected to leave her child behind if she is returned to Zimbabwe and that if the appellant were to be returned to Zimbabwe she would have every prospect of succeeding in an application made there for permission to re-enter and remain in this country with her husband. So what on earth is the point of sending her back? Why cannot her application simply be made here? The only answer given on behalf of the Secretary of State is that government policy requires that she return and make her application from Zimbabwe. This is elevating policy to dogma. Kafka would have enjoyed it. I would allow this appeal."

27. Lord Brown, at [46], said (emphasis added):

> "is it really to be said that effective immigration control requires that the claimant and her child must first travel back (perhaps at the taxpayers' expense) to Zimbabwe, a country to which the enforced return of failed asylum seekers remained suspended for more than two years after the claimant's marriage and where conditions are 'harsh and unpalatable', and remain there for some months obtaining entry clearance, before finally she can return (at her own expense) to the United Kingdom to resume her family life which meantime will have been gravely disrupted? Surely one has only to ask the question to recognise the right answer."

28. The principle was then considered in a number of judgments and, ultimately, Lord Reed said this about it in *Hesham Ali*, at [34] (emphasis added):

> "It is, however, necessary to bear in mind that whether the continuation of family life in the UK is uncertain may be a more complex question than it might appear at first sight. For example, where a person was residing in the UK unlawfully at the time when the relationship was formed, but would have been permitted to reside here lawfully if an application were made from outside the UK, the

> latter point should be taken into account. That example illustrates how the distinction between settled migrants and aliens residing in the host country unlawfully may be, in some situations, of limited practical importance when translated into the context of UK immigration law (see, for example, Chikwamba v Secretary of State for the Home Department [2008] UKHL 40; [2008] 1 WLR 1420).

29. Lord Reed provided further clarification in *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11 [2017] 1 WLR 823, at [51] in this way (emphasis added):

> "Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was <u>otherwise certain to be granted leave to enter</u>, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*."

30. The Court of Appeal revisited the issue in *Kaur v Secretary of State for the Home Department* [2018] EWCA Civ 1423. Holroyde LJ, at [45], observed (emphasis added):

> "I have quoted in paragraph 26 above the passage in which Lord Reed (at paragraph 51 of his judgment in *Agyarko*) referred to *Chikwamba*. It is relevant to note that he there spoke of an applicant who was <u>certain to be granted leave to enter if an application were made from outside the UK</u>, and said that in such a case there might be no public interest in removing the applicant. That, in my view, is a clear indication that the *Chikwamba* principle will require a fact-specific assessment in each case, <u>will only apply in a very clear case</u>, and even then will not necessarily result in a grant of leave to remain."

31. The immediate difficulty for the Appellant is that he, on the evidence that is presently available, does not meet the requirements for entry clearance from abroad. The Appellant does not meet the English language requirement in the Immigration Rules. In order to qualify for leave to remain from within the United Kingdom or for entry clearance from abroad, under Paragraphs E-ECP.4.1 and E-LTRP.4.1 of Appendix FM to the Immigration Rules, he is required to show, among other things, that he has:

> "… passed an English language test in speaking and listening at a minimum of level A1 of the Common European Framework of

> Reference for Languages with a provider approved by the Secretary of State"

32. The Appellant has not passed such an English language test. The fact that he gave evidence in English and is able to speak the language does not answer the specific requirements in the Immigration Rules. In his oral evidence, the Appellant sought to explain that he was unable to sit for the English test in absence of his passport. It was not suggested, either by the Appellant in his evidence or by Ms Ferguson in her submissions, that it was practically impossible for the Appellant to sit for the required English language test in the United Kingdom. In any event, for the purpose of our analysis, the fact is that the Appellant does not have an English language test certificate and therefore does not qualify for entry clearance from abroad at this stage.

33. In the circumstances, unlike *Chikwamba*, the Appellant does not have "every prospect of succeeding" in an application for entry clearance from abroad. In the words used in *Agyarko* and *Kaur*, he is not "certain to be granted leave to enter" if the application were made from outside the United Kingdom. The principle does not apply in this case.

34. There are a number of additional difficulties for the Appellant. There is no suggestion that the conditions in Albania are "harsh and unpalatable". In fact, as we note above, Ms Ferguson accepted that there were no insurmountable obstacles to the Appellant's family life with Mrs Lulaj continuing outside the United Kingdom and there were no very significant obstacles to the Appellant's integration in Albania. There is no child in the family. This is factually a very different case.

35. Ms Ferguson's skeleton argument quoted extensively from the Upper Tribunal's decision in *Hayat (nature of Chikwamba principle) Pakistan* [2011] UKUT 00444 (IAC). However, as we pointed out at the hearing, the Upper Tribunal's decision made in that case was set aside by the Court of Appeal as being wrong in law in *Secretary of State for the Home Department v Hayat* [2012] EWCA Civ 1054. In arriving at its conclusion, the Court of Appeal considered the effect of its earlier judgment in *MA (Pakistan) v Secretary of State for the Home Department* [2009] EWCA Civ 953, which was also relied upon by Ms Ferguson.

36. We also brought to Ms Ferguson's attention the Upper Tribunal's decision in *Younas (section 117B(6)(b); Chikwamba; Zambrano)* [2020] UKUT 129 (IAC) and invited submissions. Ms Ferguson submitted that the approach adopted in *Younas* is correct, which is summarised in the judicial head note in these terms:

> "An appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') including section 117B(1), which

stipulates that 'the maintenance of effective immigration controls is in the public interest'. Reliance on *Chikwamba v SSHD* [2008] UKHL 40 does not obviate the need to do this."

37. As we note above, we recognise the element of flexibility within sections 117A-B of the Nationality, Immigration and Asylum Act 2002. The Appellant entered the United Kingdom illegally and formed a relationship with Mrs Lulaj with full knowledge that he had no basis to stay in the United Kingdom. We acknowledge the possibility that the Appellant may well be able to pass the required English language test in order to comply with the Immigration Rules in future and then make an application for entry clearance from abroad. However, on the facts of this particular case, this consideration does not outweigh the public interest in the Appellant's removal from the United Kingdom.

38. In her evidence, Mrs Lulaj referred to the health issues concerning her parents. As we note above, Judge Allen preserved the unchallenged findings of fact made by Judge Swinnerton at [20]-[22]. Judge Swinnerton found that Mrs Lulaj's father does not suffer from any significant mental health issues but her mother has ongoing mental health issues. Judge Swinnerton did not accept that Mrs Lulaj has been taking care of her parents as claimed. Judge Swinnerton also rejected the suggestion that Mrs Lulaj's father cannot provide help and support to his wife or that their son, who lives with them, cannot continue to help them if the Appellant was required to return to Albania. Judge Swinnerton further found that Mrs Lulaj's parents would receive the required help and support even if the Appellant returns to Albania. Ms Ferguson did not invite us to depart from these findings.

39. In his evidence, the Appellant stated that his removal from the United Kingdom would be "quite stressful" for Mrs Lulaj. Mrs Lulaj also stated in her oral evidence that it would be "very hard" for her to either live apart from the Appellant or to accompany him to Albania. The Appellant, however, has lived in Albania for 27 years, speaks the native language, has family in that country and is familiar with the local way of life. The Appellant and Mrs Lulaj are both healthy and resourceful individuals. They are capable of overcoming any difficulties that arise from relocation, or indeed separation.

40. Taking into account all these considerations, in our judgment, the interference caused by the Secretary of State's decision as to the Appellant's private and family life is justified and proportionate. The Secretary of State's decision is not incompatible with Article 8 or result in unjustifiably harsh consequences for the Appellant or Mrs Lulaj.

Conclusion

41. For all these reasons, we remake the decision in the Appellant's appeal by dismissing it.

Notice of decision

42. The Appellant's appeal is dismissed.

Anonymity order

43. Having regard to the Presidential Guidance Note No 2 of 2022, *Anonymity Orders and Hearing in Private*, and the Overriding Objective, we do not consider that an anonymity order is justified in all circumstances. We therefore make no order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Fee award

44. We make no fee award in the light of our decision to dismiss the appeal.

Zane Malik QC
Deputy Judge of Upper Tribunal
Immigration and Asylum Chamber
Date: 22 April 2022