Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: HU/15955/2019

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 18th November 2020	**On 23rd November 2020**

Before

Upper Tribunal Judge Bruce

Between

Klodian Vani

(no anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: **Mr Collins, of Counsel, instructed by Mayfairs Law Limited**

For the Respondent: **Mr McVeety, Senior Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Albania born in 1988. He appeals with permission against the decision of the First-tier Tribunal (Judge J. Watson) to dismiss his human rights appeal.

2. The basis of the Appellant's claim before the First-tier Tribunal was that he is in a genuine and subsisting relationship with his partner in the United Kingdom, and further that he has a genuine and subsisting parental relationship with her children. The Appellant's partner was at the date of the appeal hearing, pregnant. One of her existing children suffers from a disability, and she needs the Appellant's assistance in caring for them. The Appellant submitted that it would in all the circumstances be a disproportionate interference with his family life, as protected by Article 8 ECHR, to refuse him leave to remain in the United Kingdom.

3. The Respondent refused to grant leave. Although it was accepted that the Appellant is in a relationship with his partner there was insufficient evidence to demonstrate that he had lived with her for two years of more (a necessary pre-requisite for qualification under the rules), that he had a parental relationship with the children or that there was any exceptional circumstances such that leave should be granted 'outside of the rules'. The First-tier Tribunal agreed and the appeal was dismissed.

4. The Appellant now appeals on one ground only: that the First-tier Tribunal materially erred in law in its assessment of proportionality because it failed to weigh in the balance its own recognition that "any future entry clearance application should be successful in terms of satisfying Appendix FM" [at paragraph 8 of the grounds]. The point made in both Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 and Secretary of State for the Home Department v Hayat [2012] EWCA Civ 1054 - that it may be pointless and therefore disproportionate to expect people to travel back to their countries of origin simply to be let in again – is endorsed in the context of the 'new rules' in R (on the application of Agyarko and Ikuga) v Secretary of State for the Home Department [2017] UKSC 11. Post the grant of permission Mr Collins submitted further submissions in which he placed reliance, for the same point, on the Presidential decision in Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC).

5. Whilst I am grateful for Mr Collins' submissions, I am not satisfied that this ground is made out.

6. First, the grounds rely on an unduly optimistic reading of First-tier Tribunal decision. The Tribunal nowhere says that a future application for entry clearance "should" be successful. What paragraph 36 actually says is this: "she may sponsor him as a fiancée in the future if she wishes". No positive finding is made in respect of the Appellant's English language ability, a matter specifically raised in the refusal letter, nor is any commentary offered on whether the Appellant may fall foul of one of the 'general' grounds for refusal in part 9 of the Rules. In fact the Tribunal gives no indication at all

that it considered this to be a case where the Appellant would be granted entry clearance if he so applied. It is therefore not the case that this was an appeal which could have benefitted from any application of the *Chikwamba* principle.

7. Second, even if positive findings had been made about the Appellant's ability to meet the requirements of an application for entry clearance, that was not the end of the matter. Under the new rules the relevance of the *Chikwamba* principles are primarily whether it is proportionate to expect a claimant to return home to make an application for entry clearance: Younas (*supra*), R (on the application of Chen) v Secretary of State for the Home Department) (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC). The difficulties that might be faced by a family because of such temporary separation are matters that should be taken into account in the overall balancing exercise: Agyarko (*supra*). In this case the Tribunal expressly found that there was no difficulty at all in the Appellant returning for a period to Albania, where he has family. It further found no evidence to show that his sponsor's children would be unduly affected by his short absence. Neither of those findings of fact have been challenged in the grounds. *Had* this been a *Chikwamba* assessment Mr Collins makes the good point that the sponsor's pregnancy would have been a relevant consideration, but I am far from satisfied that it would have been a determinative one.

8. In these circumstances the grounds have failed to identify any error of law in the decision of the First-tier Tribunal. It follows that the appeal must be dismissed.

9. I understand that this does not matter much to the Appellant, whose partner has now given birth to his British child, enabling him to make a new application for leave to remain on the basis that it would not be reasonable to expect that child to leave this country, and so be separated from its half-siblings and mother: section 117B(6) Nationality, Immigration and Asylum Act 2002 refers.

Decisions

10. The determination of the First-tier Tribunal contains no error of law and it is upheld.

11. I was not asked to make an order for anonymity and on the facts I see no reason to do so.

Upper Tribunal Judge Bruce 18th November 2020