IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003545
First-tier Tribunal No:
HU/54322/2021
IA/10989/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 06 April 2023

Before

UPPER TRIBUNAL JUDGE SMITH

Between

HIGERT KOLDASH
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Anzani, Counsel instructed by Waterstone Legal
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 31 January 2023

DECISION AND REASONS

1. By a decision promulgated on 13 October 2022, I found an error of law in the decision of First-tier Tribunal Judge G D Davison, allowing the Appellant's appeal. I set aside Judge Davison's decision in consequence and gave directions for a hearing to re-make the decision in this Tribunal. My error of law decision is appended hereto for ease of reference. The re-making hearing was initially listed on 9 November 2022 but had to be adjourned as an Albanian interpreter was required for the witness evidence of the Appellant and his mother-in-law and the Appellant's solicitor had not requested that one be booked.

2. The appeal came back before me on 31 January 2023. Having heard witness evidence from the Appellant, his wife, Matilda Shkupi, his sister-in-

law, Mirela Shkupi, and his mother-in-law, Fatmira Shkupi, and having heard submissions from Ms Anzani and Mr Melvin, I indicated that I intended to reserve my decision and provide that in writing which I now turn to do.

FACTUAL BACKGROUND AND LEGAL FRAMEWORK

3. The factual background to this case is set out in summary at [2] of my error of law decision and I do not repeat it. The Appellant relies on his family life with Matilda and to a more limited extent his private life formed since he arrived in the UK in 2016.

4. The Appellant has never had lawful status in the UK. He entered the UK illegally. Accordingly, he can only succeed within the Immigration Rules ("the Rules") if he can meet paragraph EX.1 of Appendix FM to the Rules ("Paragraph EX.1."). Paragraph EX.1.1 reads as follows so far as relevant:

> "EX.1. This paragraph applies if
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> (a) …
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> or
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> (b) 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.
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> EX.2. For the purposes of paragraph EX.1.(b) '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."

5. At [21] of my error of law decision, I set out an extract from the Supreme Court's judgment in R (on the application of Agyarko and another) v Secretary of State for the Home Department [2017] UKSC 11 ("Agyarko"). That judgment concerns the legal position for those such as the Appellant and his wife who are in a genuine relationship but where the foreign national spouse has no lawful right to reside in the UK. What is there said confirms the test which is now applied by paragraph EX.1. Judge Davison had found that Paragraph EX.1 was not met (see [4] of my error of law decision).

6. Judge Davison allowed the Appellant's appeal outside the Rules on the basis that, in spite of the Appellant's unlawful residence, he should not be required to return even temporarily to Albania in order properly to regularise his stay, as he might well succeed in an application for entry clearance and therefore little point would be served by that requirement. His reasoning depended for its success on the case of Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 ("Chikwamba"). I explained at [15] to [30] of my error of law decision why the Judge's reasoning on that issue was flawed.

7. The case-law regarding Chikwamba has recently been clarified by the Court of Appeal in Alam and Rahman v Secretary of State for the Home Department [2023] EWCA Civ 30 ("Alam"). Having reviewed the line of authorities following Chikwamba, the Court said this about the principle said to arise from that case:

> "107. Those three points mean that *Chikwamba* does not state any general rule of law which would bind a court or tribunal now in its approach to all cases in which an applicant who has no right to be in the United Kingdom applies to stay here on the basis of his article 8 rights. In my judgment, *Chikwamba* decides that, on the facts of that appellant's case, it was disproportionate for the Secretary of State to insist on her policy that an applicant should leave the United Kingdom and apply for entry clearance from Zimbabwe.
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> ...
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> 112. The two present appeals, subject to A1's ground 2, are both cases in which neither appellant's application could succeed under the Rules, to which courts must give great weight. The finding that there are no insurmountable obstacles to family life abroad is a further powerful factor militating against the article 8 claims, as is the finding that the relationships were formed when each appellant was in the United Kingdom unlawfully. The relevant tribunal in each case was obliged to take both those factors into account, entitled to decide that the public interest in immigration removal outweighed the appellants' weak article 8 claims, and to hold that removal would therefore be proportionate. Neither the F-tT in A1's case nor the UT in A2's case erred in law in its approach to *Chikwamba*.
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> 113. Moreover, the Secretary of State did not refuse leave in either case on the ground that the appellant should leave the United Kingdom and apply for entry clearance. I accept Mr Hansen's submission, based on *Hayat*, that *Chikwamba* is only relevant if the Secretary of State refuses an application on the narrow procedural ground that the appellant should be required to apply for entry clearance from abroad. It does not apply here, because the Secretary of State did not so decide. *Chikwamba* is irrelevant to these appeals. I also reject the appellants' submission that the UT determination in *Younas* was wrong; in *Younas* and in *Thakral*, the UT's approach was correct.
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> 114. *Rhuppiah* does not help the appellants. Even if there is some flexibility in section 117B and section 117B(4)(b), there is, on the findings which the tribunals were entitled to make, no exceptional positive feature of the claim of either appellant which could enable it to succeed. There is, moreover, in each case (and subject to ground 2 in A1's case), a further negative factor, that is, that family life could continue abroad."

8. In light of Alam, and as Ms Anzani accepted, the issues for me now are simply whether the Appellant succeeds within the Rules based on his family life (which depends on whether Paragraph EX.1. is met) and, if not, whether removal would be a disproportionate interference with his family life and private life outside the Rules. When considering the Appellant's family life, I also have to consider the interference with the family and

private lives of others affected by the Appellant's removal, particularly of course his wife.

9. When considering the Appellant's case outside the Rules, I have to balance the interference with the right to respect for the family life and private life of the Appellant and those others affected, against the public interest. When doing so, I also have to take into account the factors set out in section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B") so far as relevant.

10. The date for consideration whether there is a breach of Article 8 ECHR is the date of the hearing before me. It is for the Appellant to establish the level and extent of interference on which he relies. Once that is established, it is for the Respondent to justify the interference in the public interest.

THE EVIDENCE AND FINDINGS

11. I had before me the Appellant's bundle as before the First-tier Tribunal ([AB/xx]), a supplementary bundle lodged by the Appellant ([ABS/xx]) and some additional documents filed by the Appellant on 16 December 2022 (unpaginated). I also had the Respondent's bundle as before the First-tier Tribunal. I have read all the documents but refer only to those which are relevant to the issues I have to consider. Mr Melvin filed a skeleton argument for the hearing before me and I also had the Appellant's skeleton argument as before the First-tier Tribunal.

12. The Appellant gave evidence via an Albanian interpreter. There were no difficulties with interpretation. He has provided witness statements dated 23 December 2021 ([AB/3-6]) and 8 November 2022 [ABS/1-4]. The latter statement replicates the earlier statement and updates it.

13. The Appellant confirmed that his parents and two brothers still live in Albania. He has weekly contact with them. He confirmed that there are no obstacles to him returning to live in Albania. The difficulties are for his wife due to her mother's illness, her own medical problems, that his wife is British and is in full-time employment in the UK and that she is now pregnant. The Appellant admitted that there was no reason that he had not returned to Albania to regularise his stay. He said only that he had met Matilda after one year. Although he said that it was hard to live in the UK illegally, he did not disagree with Mr Melvin that he would have continued to live here illegally if he had not met his wife.

14. The Appellant confirmed that Matilda is of Albanian descent. Although she is "not 100% fluent" in Albanian they are able to converse in that language. He said though that she would not be able to continue her employment as a radiographer in Albania although he admitted that he and his wife had not made any investigation whether that would be possible because his wife had a contract in the UK and they did not consider it necessary therefore to do so.

15. In terms of his wife's family in Albania, the Appellant's evidence was somewhat confused. He consistently said that all her close family are in the UK. He began by saying that on her father's side, he did not know. Then he said that she had a grandfather in Albania and some distant family members in Albania.

16. The Appellant's wife, Matilda, has provided two witness statements dated 23 December 2021 ([AB/8-10]) and 8 November 2022 ([ABS/5-9]). Again, the latter statement replicates and updates the former.

17. Matilda is employed full-time as a radiographer. She qualified in July 2022. Her contract with the Royal Free London NHS Foundation Trust began on 14 November 2022. Although she is now pregnant and due to give birth on 15 July 2023, she confirmed that she intends to return to work after her maternity leave.

18. When asked about why she could not return to Albania with the Appellant, Matilda said that she did "not trust" the Albanian healthcare system. She said that she would not cope with the culture change with a young baby. She also said that she suffers from anxiety. Matilda said that she does not get on with the Appellant's parents who were "not welcoming". When asked about what a temporary separation from the Appellant would mean, she said that "mentally [she] would not cope without [the Appellant] during her pregnancy and the birth". She said that she was worried about how her anxiety would be impacted by the birth. She was also worried about how her mother would cope without her. Her sister could not help as she has just had her first child.

19. I found the Appellant's wife to be an evasive witness who was all too willing to exaggerate the problems she said she would face if the Appellant were removed to Albania in order to bolster the Appellant's case.

20. Dealing first with her own medical problems, Matilda said that she had suffered with anxiety for some time. However, she admitted that she was not taking any medication for her anxiety. Although at first she said that she did not take medication because she was pregnant she then admitted that she had not taken it prior to conception either. Instead she had sought help from a psychologist. It was pointed out to her that on her own admission she had not seen the psychologist because she had not attended appointments. Matilda sought to suggest that this was because the psychologist had called her whilst she was driving and she could not take the call. She then accepted that the psychologist had tried to call a couple of times but insisted that she was driving on both occasions. I did not believe this evidence. Even if she was driving whenever the psychologist called (which appears rather a coincidence), that does not explain why she did not phone back once she arrived at her destination.

21. There is evidence at [AB/19] that Matilda was diagnosed by a GP in December 2021 with anxiety which was "likely exacerbated by several stressors such as full time employment whilst being a carer for her mother as well as her university studies". The letter appears to have been written with a view to her university providing her with support with her studies.

Although the GP provided Matilda with links to counselling and prescribed some medication, on her own admission, she did not take the medication and did not engage with counselling. The documentary evidence in the main consists of Matilda herself complaining that she is anxious (mainly it appears about her studies) but then doing little about it. I am unable to accept that Matilda suffers from anxiety to the extent that she claims.

22. Turning then to the extent to which Matilda cares for her mother, again, neither the documentary evidence nor the oral evidence supports the Appellant's case that Matilda's mother would not be able to manage without her. Matilda's mother, Fatmira Shkupi, has provided a statement dated 23 December 2021 ([AB12-14]) and gave oral evidence via an interpreter. There were no problems with interpretation.

23. A document at [AB/27] dated 16 August (no year given) from the GP indicates that Matilda was added to her mother's notes as a carer but that provides no detail of the care which is needed or given. The medical notes relating to Fatmira ([AB/28-49]) indicate that she is on some medication to treat a combination of what appears to be general pain, vitamin deficiency, general infection and depression. In her witness statement, Fatmira describes her problems as a "history of depression ranging from physical pain to severe episodes" but there is no medical evidence supporting the extent of her problems. Matilda said that her mother takes anti-depressants, but the medical notes suggest that the last time she was prescribed anti-depressants was in April 2018 when she was prescribed Paroxetine 20mg (60 tablets). Even then, the prescription is for one tablet to be taken it is said only once every month. Even if a prescription of 60 tablets would on that basis last for five years, the dosage does not suggest a serious problem with depression. There is no evidence from a GP or other qualified medical professional supporting the Appellant's case that his mother-in-law could not cope without her daughter's help.

24. Matilda said that she has to go with her mother to the GP to translate for her. Whilst I accept that Fatmira does not speak much English (she gave evidence via the interpreter), the evidence about the extent to which Fatmira has to go to the GP was lacking. I do not have full medical notes so I cannot tell from the documentary evidence how often she has to visit the GP. However, Fatmira's evidence was that she had not taken any medication for the past twelve months apart from painkillers obtained over the counter and that although she had previously had counselling, she had now stopped. She said that the GP had told her to stop taking medication and she had done so "maybe three to four years ago". Fatmira herself admitted that she had only been to see a GP two or three times in the past year. Mirela admitted in her oral evidence that Fatmira's husband (Matilda and Mirela's father) also goes to GP appointments with her when he can although he does work long hours. There is insufficient evidence that Fatmira would not have other options for assistance if Matilda were not in the UK to help her.

25. By a combination of the evidence of Matilda, her sister and mother, I was also told that Fatmira works as a self-employed cleaner. Although all three

witnesses sought to downplay the level of work which Fatmira could do due to her illnesses, I do not accept that, if she were as ill as suggested and could not do without Matilda's care as is said, she would be able to work as she apparently does. All three witnesses insisted that Fatmira works for herself and not via an Agency. If that is the case, it is difficult to see how she would maintain a customer base if she were only able to work intermittently. It is more likely that, as the witnesses said when pressed, Fatmira is in fact able to work a lot of the time and for "5-6 hours per day" (as Mirela said was the case) or "10,15,20 hours" per week (as Fatmira said was the case). Either way, it is clear from the evidence that Fatmira can and does work at the very least part-time. That undermines the Appellant's case about the level of care which Fatmira requires.

26. Fatmira also says in her statement that "when Matilda is working or studying" the Appellant looks after her and "takes [her] out when [she is] feeling unwell or down". Fatmira said in her oral evidence that since Matilda works full-time, the Appellant now looks after her and helps her with shopping and cooking when she is not well. Although she said that this happened last in the week prior to the hearing, I do not accept that evidence. The Appellant has provided an updated statement dated only a few months ago as has Matilda. Neither of them mentions the Appellant providing care to his mother-in-law. At its highest, the Appellant says only that he helps Fatmira by "taking her out and so on". As with much of the evidence about Fatmira's illnesses and need for care, I find the evidence to be exaggerated. I do not accept that she could not manage without her younger daughter. If needs be, her husband and elder daughter could help out on the isolated occasion when such help might be needed.

27. I turn then to the evidence about the problems which Matilda and the Appellant might face on return to Albania. When considering this, I take into account also the evidence of Matilda's sister, Mirela, who has provided a statement dated 23 December 2021 ([AB/16-17]) and who gave oral evidence.

28. I begin with the evidence about family members living in Albania. The evidence in this regard was absent from any of the witness statements and emerged therefore only in oral evidence. Evan then, the evidence was largely inconsistent. I have mentioned already the Appellant's evidence about this. I deal now with the evidence given by Matilda, Mirela and Fatmira.

29. Matilda admitted in oral evidence that she has "some family" in Albania. She said that the "door would not be open to [her]" as they have their own economic problems. She later said that her "whole family" was in the UK. When asked about visits she had made to Albania (mainly in the context of the contact she has had with the Appellant's parents), she at first said that these visits were for "holiday purposes" before admitting that her grandparents live in Albania and that she had visited them. She said that these were her grandparents on her father's side.

30. Mirela at first denied that Matilda had grandparents in Albania but accepted this was the case when confronted with Matilda's evidence. Similarly, Fatmira at first suggested that the family's annual visits to Albania were simply for holiday purposes and that they had no family members in Albania. When that evidence was challenged, she at first said that she had "cousins, friends" before being forced to accept that Matilda's grandparents were living in Albania. Whilst it was not clear whether she was talking about her own parents or her husband's parents, it is clear from the evidence that was finally obtained from the witnesses that Matilda has family members in Albania including at least one set of grandparents and some other extended family.

31. Matilda has clearly forged some links with Albania via her family. Her mother said that they took holidays in Albania once per year and visited family there when they had the chance. Mirela said that the family went to Albania last year and that she and her sister had visited "multiple times".

32. Moving on to Matilda's contact with the Appellant's parents who remain living in Albania, I have already referred to her evidence that his parents are not welcoming to her. It emerged however from her answers to later questions that she had met the Appellant's parents "multiple times" and had visited them in Albania.

33. Mirela also confirmed in her evidence that she had met the Appellant's parents although she said that she had not been "this time". She agreed that she had met them "a few times". Although she sought to suggest that the situation was "a bit complicated" and that the Appellant's parents were "not very happy about how they got together", she agreed that the relationship between Matilda and her parents-in-law did not prevent visits. I did not understand why the Appellant's parents would be unhappy about his relationship with Matilda, particularly since he relies on that relationship in order to remain in the UK. It may be as Mirela explained, that there are cultural differences between the two families but, in any event, as Mirela pointed out, the Appellant's parents will be grandparents to the Appellant's child and would not therefore cut ties.

34. Fatmira denied that she had met the Appellant's parents whilst in Albania. However, she also said that "so far as she was aware" her daughters had not done so either. Although it was not entirely clear whether the question in that regard related only to the family's last holiday rather than more generally, I found Fatmira's evidence on this topic to be evasive. It was in any event inconsistent with the evidence given by Matilda and Mirela that they have visited the Appellant's parents. After some pressing, Fatmira finally admitted that she had met the Appellant's parents once when she had coffee with them.

35. The evidence overall is that Matilda has chosen to visit the Appellant's parents during visits to Albania and when doing so without the Appellant (as he is unable to travel due to his status). She provided no evidence about why she would have chosen to visit them if, as she says, they do not have a good relationship. In any event, particularly now that Matilda is

expecting the Appellant's child, I find that they would be willing to support the couple if they were to return to Albania.

36. I turn then to employment prospects in Albania. Matilda said that she would be unable to work there as a radiographer. However, as I have already mentioned, the Appellant accepted that they had not made any enquiries about job prospects in that field because Matilda already has a job in the UK. I have no evidence that Matilda's qualifications would not be accepted nor that there are not job vacancies in Albania in that field of work.

37. In evidence, Matilda insisted that she would be unable to work as a radiographer in Albania as she would not understand the language for technical terms such as body parts. I do not place a great deal of weight on Mirela's evidence that her sister has a sufficient grasp of Albanian to be able to understand words relating to body parts. I accept that technical terms would in any event go beyond merely the words relating to various body parts.

38. However, the evidence overall is that Matilda is quite fluent in Albanian. That is unsurprising given that her mother speaks little English and her evidence was that her father is not fluent in English either. Whilst I accept that the Albanian spoken at home is unlikely to relate to terms which would commonly be used in the radiography field, I do not accept that Matilda could not learn the necessary technical terms quite easily. After all, she was born in the UK and therefore grew up speaking both English and Albanian. She has not apparently encountered any problems learning and communicating in two languages.

39. Furthermore, I have no evidence that the Appellant would be unable to find work in Albania. He is not able to work in the UK due to his status. It may well be that Matilda's earnings would be higher as she is a qualified professional. I do not know since the evidence does not say whether the Appellant has any qualifications. His evidence is silent about job prospects in Albania. The evidence such as it is does not suggest that he would be unable to work in Albania.

40. When Matilda was asked whether she would go with the Appellant to Albania if he lost his appeal at least whilst he applied for entry clearance, she insisted that she could not, asking who would pay the rent. She said that she needed to work to pay the rent. However, she later admitted that she has around £18,000 in savings. She will of course be on maternity leave from later in the year. She earns just under £2,000 per month after tax.

41. The main factor relied upon now as an obstacle to the Appellant and Matilda returning together to Albania is her pregnancy. As I have already noted, Matilda said that she did not trust healthcare in Albania although I am not clear whether that was in the context of her employment or her pregnancy. There is however no supporting evidence suggesting problems in the healthcare system for pregnant women in Albania. I have no evidence that there are any complications with Matilda's pregnancy which

would require any specialist care. Although Matilda herself said that she was worried about what would happen after the birth due to her anxiety, I have no evidence that the Albanian healthcare system would not be able to assist her. Whilst I accept that her parents and sister are in the UK, the Appellant's parents live in Albania and would be able to help with the baby if necessary. I have already rejected the evidence about difficulties between Matilda and her parents-in-law. Matilda also has her own family members in Albania.

42. Mr Melvin indicated in his skeleton argument that the processing times for visas is about 24 weeks following application. As I understand it, that is a general UK government target for spouse visas rather than relating to Albania specifically. I do not have evidence about the position in Albania in particular nor whether it would be possible to make a priority application. Whatever the position, however, the Appellant could ensure before leaving the UK that all the paperwork is in order so that an application could be made promptly after return.

DISCUSSION

43. I begin with the position within the Rules. As I have already set out, the obstacles prayed in aid relate in the main to the Appellant's wife and not the Appellant himself.

44. I accept that Matilda was born in the UK and is British. As is made plain in Agyarko, however, the fact that she is British and even if she had no ties with Albania would not mean that there would be insurmountable obstacles to her going to live there. As it is, she has ties to that country. Whilst the witnesses sought to downplay her connections, I do not accept that she would find it difficult to live in Albania just because she is British. She has family members living there. She visits the country quite regularly. She speaks the language quite fluently.

45. I have already explained why I have rejected the evidence about the difficulties which Matilda might face in obtaining employment as a radiographer. I have no evidence that her qualifications would not be accepted. I have found that she could learn relatively quickly the Albanian translation for the terms needed to work in that field. Moreover, the Appellant could also work in Albania. He cannot do so currently in the UK. Matilda has a relatively large sum in savings which could assist the couple to find accommodation in the short-term whilst seeking employment. The Appellant's parents continue to live in Albania as do some of his wife's family members. They could also assist with support. The Appellant has provided no evidence that they could not do so.

46. I have rejected in large part the evidence about the caring responsibilities which Matilda has for her mother. I do not accept that Fatmira is incapacitated to the extent that the Appellant contends. At most, Fatmira has had to visit the GP a few times in the past year. There is no reason why either her husband or her elder daughter could not assist her by attending those appointments with her so far as necessary. Although I have not needed to mention it because it is not relevant to the Appellant's

case, Mirela's partner is also Albanian and does not currently work. Although he also looks after their child, if and insofar as any assistance has been provided by the Appellant to his mother-in-law (which I have rejected due to lack of evidence), there is no reason why Mirela's partner could not assist her in addition to his caring responsibilities for their young child.

47. I have also found that Matilda is not suffering from any serious medical conditions herself. I accept that she may have suffered from mild anxiety at times, predominantly when studying for her exams. However, there is no evidence that she could not seek assistance for her condition in Albania if she requires it. As I have already found, she has not been taking medication or receiving professional help in the UK.

48. The main factor relied upon now is Matilda's pregnancy. I accept that she does not wish to give birth to her child in Albania. There is however no evidence before me to suggest that the Albanian healthcare system is unable to provide adequate maternity services. I accept that Matilda would much rather give birth to her child in the UK with both her family and the Appellant there. However, this factor, even taken in conjunction with the other factors relied upon, does not reach the high threshold of showing that there are insurmountable obstacles to the Appellant and his wife going to live in Albania. I cannot of course speculate about the position after Matilda has given birth. I have to consider the position as at the date of hearing.

49. For the foregoing reasons, and taking all the foregoing factors together and cumulatively, I conclude that there are no insurmountable obstacles to the Appellant and his wife continuing their family life in Albania. Paragraph EX.1. is not met. The Appellant therefore fails within the Rules. It is not suggested that he could meet the Rules based on his private life.

50. I turn then to the position outside the Rules. The same factors are at play. However, Ms Anzani understandably placed greater emphasis in this regard on Matilda's pregnancy. She pointed out that 24 weeks would take the period for a decision on an entry clearance application beyond the due date for the birth of the baby. I accept that is the case. She said it was unrealistic to expect the Appellant to be able to leave the UK, apply and get a decision on that application prior to mid-July. I accept that submission.

51. I accept that there might be some rare cases where a temporary interference would be disproportionate even if in the longer term family life could be continued outside the UK. I have carefully considered whether that could be said to be the position here.

52. I accept that Matilda will be faced with a difficult choice between going with the Appellant whilst he seeks entry clearance and giving birth in Albania or remaining in the UK to give birth with the potential that the Appellant will not be present at the birth. However, I do not find that either option would render removal disproportionate. I have already pointed out that there is no evidence about the Albanian healthcare system for maternity services (or otherwise) which suggests that Matilda

could not give birth there even if she would prefer not to do so. She would have the support of the Appellant and his parents as well as from her own family members in Albania. If she decides to remain in the UK to support an application for entry clearance, she would have her parents and sister here to support her. I accept that either option is far from ideal for Matilda or the Appellant but I do not find it to be a decisive factor in and of itself.

53. I do not repeat my previous conclusions about the other factors which weigh in the Appellant's favour in terms of interference. I have already found that those taken together with Matilda's pregnancy do not amount to insurmountable obstacles with family life continuing in Albania. The level of interference does not meet the threshold in the Rules.

54. I accept that if Matilda decided to relocate to Albania with the Appellant this would represent an upheaval for her and for her family. I have already set out what that would involve and why I do not accept that the evidence shows that these difficulties would reach the threshold to give rise to insurmountable obstacles. I take all those factors into account when conducting the balancing exercise.

55. I give some weight to the Appellant's private life. I have little evidence about that beyond what is said about his family life. Nevertheless, I accept that he has been in the UK now for over six years and will have developed some private life of his own.

56. Having regard to Section 117B however, I can give little weight to either the Appellant's private life or his family life with Matilda. The Appellant has lived in the UK unlawfully. His relationship with Matilda was formed at a time when he was here unlawfully (and she was fully aware that this was the position). I accept that this does not mean that no weight should be given but the level of weight depends on the evidence about the strength of the private and family life and interference with it. I do not repeat what I have already said. Although I accept that the Appellant has a strong family life with Matilda, I have already concluded that this can be continued in Albania.

57. I accept that the Appellant is financially independent. He does not work as he is not entitled to do so. Matilda has been supporting them both. They do not however rely on State support. That is however a neutral factor as is his ability to speak English.

58. Against, the interference I have to balance the public interest. That is the interest in maintaining effective immigration control. The Appellant has circumvented the lawful operation of the immigration system by coming here illegally. Even though he said that it was hard to remain in the UK illegally, he did not disagree with Mr Melvin's suggestion that, had he not met Matilda, he would have continued to live her illegally. Even if ultimately the Appellant may be granted entry clearance as Matilda's spouse (as to which I do not speculate given my earlier findings), the need for foreign nationals to follow the Rules is not a minor public interest consideration. The system of immigration control is undermined by a failure to follow the Rules. It is also unfair on those who enter in

accordance with the Rules to allow persons in the Appellant's situation to remain when they initially entered illegally and without requiring such persons to regularise their stay in accordance with the Rules. Finally, I have also concluded that the Appellant cannot meet the Rules in any event as he does not meet Paragraph EX.1.

59. The public interest in this case is a strong factor. Balancing the interference with the private life of the Appellant and his family life and the rights of those affected by his removal against that strong public interest, I conclude that the public interest outweighs the interference. Removal would not lead to unjustifiably harsh consequences for the Appellant or those (in particular his wife) who are affected by the decision. Removal of the Appellant does not breach section 6 Human Rights Act 1998 (Article 8 ECHR).

60. For those reasons, I dismiss the Appellant's appeal.

Notice of Decision

The Appellant's appeal is dismissed on human rights grounds. His removal does not breach section 6 Human Rights Act 1998 (Article 8 ECHR).

L K Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
17 February 2023

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003545
[HU/54322/2021]

THE IMMIGRATION ACTS

Heard at Field House, London
On Wednesday 21 September 2022

Decision & Reasons Promulgated
13 October 2022

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Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

HIGERT KOLDASHI

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Ms S Anzani, Counsel instructed by Waterstone Legal

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge G D Davison dated 23 June 2022 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 30 July 2021, refusing the Appellant's human rights claim (Article 8 ECHR). The claim was made in the context of an application to remain in the UK as the spouse of a British citizen, Matilda Shkupi ("the Sponsor"). Although the Sponsor is a British citizen, she, as the Appellant, is of Albanian descent.

2. The Appellant came to the UK from Albania in September 2016, illegally. On 17 December 2017, he was served with notice of his illegal entry. On 26 October 2020, having married the Sponsor, he applied to remain as her spouse. Due to his illegal immigration status, the Appellant cannot meet the Immigration Rules ("the Rules") to remain as a spouse unless paragraph EX.1 of Appendix FM to the Rules ("Paragraph EX.1") is met. The Respondent did not however take issue with any other aspect of the Rules. The Respondent has not disputed that the English language requirement and financial requirements of the Rules are met.

3. As the Judge noted at [7] of the Decision, the issues raised in this appeal were first whether Paragraph EX.1 is met (in other words whether there are insurmountable obstacles to the Appellant and Sponsor continuing their family life in Albania). The second issue raised by the Appellant was "whether the Chikwamba argument could apply i.e. whether it was proportionate/reasonable in all the circumstances to expect the Appellant to return to Albania and apply for entry clearance" (based on the principle set out in Chikwamba v Secretary of State for the Home Department [2008] UKHL 40).

4. The Judge found that Paragraph EX.1 was not met ([25] of the Decision). However, he went on to find that removal would be disproportionate outside the Rules, based on "the Chikwamba argument". He therefore allowed the appeal on the basis of Article 8 outside the Rules.

5. The Respondent appeals on the basis that the Judge's reasoning is inadequate. Further, the Respondent draws attention to what she says is an inconsistent finding in relation to the prospects of an application for entry clearance succeeding. The finding in that regard is relevant to the basis on which the Judge allowed the appeal.

6. Permission to appeal was granted by First-tier Tribunal Judge Landes on 19 July 2022 in the following terms so far as relevant:

> "…2. I consider it arguable that the judge failed to give adequate reasons for his conclusions. At [28] the judge finds both that there would be no reason that any application for entry clearance would fail, then that waiting times are presently 24 weeks, and then notes that as the appellant's counsel says, the refusal of such a claim and onward appeal would extend the time to 18 months. The respondent assumes at [8] grounds that the proportionality assessment is based on a separation time of 18 months or at least a possible separation time of 18 months. I agree with the respondent that if that is the case, the decision is arguably inadequately reasoned as the Chen case is predicated on entry clearance being granted, and if so then there is no need to factor in the time for appeal. It might be said that the judge was simply noting the submission of the appellant's counsel, but if so, the judge did not make clear what length of time he was taking into account in the proportionality balance and there would be no need to mention the period of 18 months unless he found it relevant for his conclusions. It is arguable that if the period of separation factored into the proportionality balance by the judge is no more than 24 weeks then the judge has not adequately explained why that length of separation would be disproportionate for the reasons set out at paragraph 4 grounds; no real detail is given or findings made by the judge about the severity of the appellant's wife's mental health condition save to say that she takes medication on occasion."

7. The matter came before me to determine whether the Decision contains an error of law. If I were to conclude that it does, I must then decide whether the error should lead to a setting aside of the Decision and, if I set it aside, I must either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

8. I had before me a core bundle of documents relevant to this appeal, the Respondent's bundle before the First-tier Tribunal and the Appellant's bundle before the First-tier Tribunal. I do not need to refer to the documents before the First-tier Tribunal as the issue is one of law.

9. After hearing oral submissions from Mr Whitwell and Ms Anzani, I indicated that I would reserve my decision and provide that in writing which I now turn to do.

DISCUSSION

10. I begin by dealing with a submission made by Mr Whitwell that it was not open to the Judge to consider the "Chikwamba argument" at all. He referred me to the decision of this Tribunal (Nicol J) in R (on the application of Thakral) v Secretary of State for the Home Department IJR [2015] UKUT 96 ("Thakral").

11. The guidance in Thakral reads as follows:

> "The Chikwamba v SSHD [2008] UKHL 40 [2008] 1 WLR 1420 principle is only engaged if, in the terms of [30] (a) of SSHD v Hayat (Pakistan) [2012] EWCA Civ 1054, the SSHD has refused the application in question 'on the procedural ground that the policy requires that the applicant should have made the application from his home state'".

12. In this case, the Respondent had not refused on the basis that any policy required that an application should have been made from outside the UK. She did so on the basis that the Appellant's immigration status precluded him from succeeding under the Rules (unless Paragraph EX.1 were met) and that it was not therefore disproportionate for him to be removed.

13. This is not a point which appears in the Respondent's pleaded grounds, but Ms Anzani did not object to it being raised. As she pointed out, Thakral was a judicial review case. As such, the issue being considered was whether the Respondent had erred by failing to consider the "Chikwamba argument". That has no bearing on whether a Tribunal Judge is able to consider the argument.

14. I agree with Ms Anzani that Thakral is not authority for the proposition that a Tribunal Judge cannot consider the "Chikwamba argument" even if it would not be engaged on the Respondent's reasoning.

15. The central issue in this case is whether the Judge was entitled to allow the appeal outside the Rules based on "the Chikwamba argument", having rejected the claim within the Rules, whether his findings are consistent with an appeal being allowed on that basis and whether his reasoning is adequate.

16. It is first necessary to look at the Judge's reasoning in this regard which appears at [26] to [31] of the Decision. Having reminded himself of some of the case-law relating to the "Chikwamba argument" at [26], he continued as follows:

> "27. Unlike Chen above I have been provided with evidence concerning the disruption in family life and the time-frames involved. Although I have not accepted the insurmountable obstacles threshold would be met it

cannot be stated that the couple would not experience many difficulties if they chose to live in Albania.

28. I find the likely scenario would be that the Sponsor would remain in the UK and the Appellant would apply for entry clearance. Given the parts of the Rules that have been met, although I am not pre-judging any future application, there would appear to be no reason why any application would fail. Those without status are encouraged to return to regularise their position. The situation in Ukraine has led to the closure of visa routes that led to expedition of an application. Waiting times are presently 24 weeks. As noted by Counsel, a refusal of such a claim and onward appeal is likely to extend this time to, at least, 18 months.

29. The Sponsor does suffer from anxiety and stress. She has a lot to contend with in finalising her education to be a radiographer, trying to secure employment and assisting with the care of her Mother. I find the separation from her Husband and the uncertainty about when they would be reunited is likely to exacerbate those conditions.

30. Younas requires an assessment of 117B. The Appellant was here unlawfully, his private and family life was formed when he had no status and his wife was aware of his lack of status when they agreed to, and got, married. The Appellant is financially independent as he is supported by his wife and has the necessary English qualifications for compliance with the Rules, these are neutral points. The maintenance of an effective immigration control is in the public interest and significant weight attaches to this. I remind myself of the adverse weight that attaches to the manner of the Appellant's arrival in the UK and failure to promptly regularise his status. These adverse factors have to be balanced against the relationship he has, the situation of his spouse and the likely time of separation. In balancing these competing interests I conclude, on balance, that removal to make an entry clearance application would be a disproportionate interference in the Appellant's accepted family life. I do not find it to be in the public interest to remove him so that he may apply for entry clearance.

31. In making the above decision I remind myself that Article 8 is not a general dispensing power, nor should an appeal be allowed just because a future entry clearance application may be successful. I have balanced the individual factors of the present appeal and conclude that this is one of the, possibly rare cases, where to expect the Appellant to leave to seek entry clearance is not proportionate/reasonable in all the circumstances."

17. Mr Whitwell submitted that the Judge's findings in this regard are inconsistent. He pointed not only to the findings in relation to the prospects of success of an entry clearance application (in other words the point made in the pleaded case) but also the inconsistency of finding that a permanent interference with family life in the UK would be proportionate (because Paragraph EX.1 is not met) but a temporary interference is not. As I indicated, that was a point which also troubled me about the Decision.

18. Judge Davison considered the decision of this Tribunal in 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) ("Chen"). The headnote in Chen includes the following guidance relevant to this case:

> "Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where 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."

19. I accept that Chen lends some support to the Appellant's argument that a temporary interference can be disproportionate even if permanent interference is not. It is though important to consider that guidance in context.

20. The Tribunal considered the argument in this regard in more detail at [39] to [42] as follows:

> "39. In my judgement, **if it is shown by an individual (the burden being upon him or her) that an application for entry clearance from abroad would be granted *and* that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced.** In cases involving children, where removal would interfere with the child's enjoyment of family life with one or other of his or her parents whilst entry clearance is obtained, it will be easier to show that the balance on proportionality falls in favour of the claimant than in cases which do not involve children but where removal interferes with family life between parties who knowingly entered into the relationship in the knowledge that family life was being established whilst the immigration status of one party was 'precarious'. In other words, in the former case, it would be easier to show that the individual's circumstances fall within the minority envisaged by the House of Lords in Huang or the exceptions referred to in judgments of the ECtHR than in the latter case. However, it all depends on the facts.
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> 40. In Chikwamba, it was accepted that an application for entry clearance would succeed and that went in the claimant's favour. It is unresolved whether, conversely, the Secretary of State's view that an application for entry clearance would be unlikely to succeed (if she took that view in any individual case) means that the Chikwamba principle cannot apply. I did not hear argument on this point. I therefore reach no concluded view on it. However, in my experience, applicants frequently rely upon the Secretary of State's silence on this point as synonymous with an acceptance by her that an application for entry clearance would succeed, in that, it is said that the Secretary of State has not said that an application would not succeed. To state the obvious, if an individual makes an application for leave to remain on the basis of Article 8, the Secretary of State is only obliged to reach a decision on that application. She is not obliged to consider further (although she is not prevented from doing so if she wishes to) whether an application for entry clearance would succeed.
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> 41. In the instant claim, the applicant has relied upon the Chikwamba to make good her Article 8 claim. She has not placed before the respondent any evidence to show that her removal (if removal notionally took place

consequent upon the refusal of leave to remain on the basis of Article 8) would interfere with any family life being enjoyed. It has been accepted on her behalf that there are no insurmountable obstacles to family life being enjoyed between her and Mr Cheung in China. Mr Palmer appeared to retract from para 7 of his skeleton argument, which specifically states that it has to be accepted that the applicant is unable to argue that there are no insurmountable obstacles to her returning to China to apply for entry clearance. Even if it is the case that this was not a concession as to the facts, the reality is that the applicant has not placed any evidence of her circumstances and/or those of Mr Cheung. The couple do not have children. There was quite simply no evidence before the respondent to show that the decision would result in any interference with family life.

42. The applicant has relied solely upon the case-law concerning the Chikwamba principle in an attempt to make good her Article 8 claim outside the IRs. Unfortunately, this misguided approach is not uncommon. Indeed, in the instant claim, it would be correct to say that such evidence as there was before the respondent undoubtedly shows that the respondent was fully entitled to take the view that it would be proportionate to require the applicant to make an application for entry clearance from China, pursuant to the guidance in Chikwamba. Her parents and siblings live in China. There was no evidence or explanation why, even if there were no insurmountable obstacles to family life being enjoyed on a permanent basis in China, temporary separation for the purpose of making an application for entry clearance would interfere with family life. The applicant simply has not descended into any detail about her Article 8 claim, choosing instead to rely upon legal principles. She made no case as to any form of hardship that she and/or her husband would suffer if she were to be required to make an application for entry clearance."

[my emphasis]

21. I have also considered the Supreme Court's judgment in R (on the application of Agyarko and another) v Secretary of State for the Home Department [2017] UKSC 11 ("Agyarko"). As a judgment of the Supreme Court, this is of course binding on me. Moreover, it is a decision which directly concerns the interplay between Paragraph EX.1 and the "Chikwamba argument". That is dealt with at [48] to [51] as follows:

"**48. The Secretary of State's view that the public interest in the removal of persons who are in the UK in breach of immigration laws is, in all but exceptional circumstances, sufficiently compelling to outweigh the individual's interest in family life with a partner in the UK, unless there are insurmountable obstacles to family life with that partner continuing outside the UK, is challenged in these proceedings as being too stringent to be compatible with article 8. It is argued that the Secretary of State has treated 'insurmountable obstacles' as a test applicable to persons in the UK in breach of immigration laws, whereas the European court treats it as a relevant factor in relation to non-settled migrants. That is true, but it does not mean that the Secretary of State's test is incompatible with article 8. As has been explained, the Rules are not a summary of the European court's case law, but a statement of the Secretary of State's policy. That policy is qualified by the scope allowed for leave to remain to be granted outside the Rules. If the applicant or his or**

her partner would face very significant difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship, then the 'insurmountable obstacles' test will be met, and leave will be granted under the Rules. If that test is not met, but the refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are 'exceptional circumstances'. In the absence of either 'insurmountable obstacles' or 'exceptional circumstances' as defined, however, it is not apparent why it should be incompatible with article 8 for leave to be refused. The Rules and Instructions are therefore compatible with article 8. That is not, of course, to say that decisions applying the Rules and Instructions in individual cases will necessarily be compatible with article 8: that is a question which, if a decision is challenged, must be determined independently by the court or tribunal in the light of the particular circumstances of each case.

Precariousness

49. In *Jeunesse*, the Grand Chamber said, consistently with earlier judgments of the court, that an important consideration when assessing the proportionality under article 8 of the removal of non-settled migrants from a contracting state in which they have family members, is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be 'precarious. Where this is the case, the court said, 'it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8' (para 108).

50. Domestically, officials who are determining whether there are exceptional circumstances as defined in the Instructions, and whether leave to remain should therefore be granted outside the Rules, are directed by the Instructions to consider all relevant factors, including whether the applicant '[formed] their relationship with their partner at a time when they had no immigration status or this was precarious'. They are instructed:

> 'Family life which involves the applicant putting down roots in the UK in the full knowledge that their stay here is unlawful or precarious, should be given less weight, when balanced against the factors weighing in favour of removal, than family life formed by a person lawfully present in the UK.'

That instruction is consistent with the case law of the European court, such as its judgment in *Jeunesse.* As the instruction makes clear, 'precariousness' is not a preliminary hurdle to be overcome. Rather, the fact that family life has been established by an applicant in the full knowledge that his stay in the UK was unlawful or precarious affects the weight to be attached to it in the balancing exercise.

51. **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 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. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department.*"**
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> [my emphasis]

22. I asked Ms Anzani to point me to the factors which had led the Judge to find that temporary interference would be disproportionate in circumstances where the Judge had already found that the Appellant and Sponsor could go to Albania together to live together permanently without encountering very significant hardship. She directed me to [28] and [29] of the Decision as set out above. However, the fact that the Sponsor might choose to remain in the UK whilst the Appellant returns does not mean that she could not be expected to go to Albania with him. It is worth remembering that, in Chikwamba, there was no question of the sponsor leaving the UK as she was a recognised refugee. It is difficult to see why the Judge had to consider separation even on a temporary basis in this case. Even if he was entitled to do so, unless the public interest were diminished, it is difficult to see why the same factors, balanced against the same public interest factors, which led to a conclusion that permanent interference would not be disproportionate could lead the Judge to the opposite conclusion that separation for a period would be "unjustifiably harsh". Ms Anzani did not suggest that the public interest in removal was diminished, and it is evident from [30] of the Decision that the Judge did not consider this to be the position. As such, that opposite conclusion required to be explained.

23. Ms Anzani made the point that the Decision has to be read as a whole. I entirely accept that submission. However, having considered the findings made in relation to whether there are insurmountable obstacles to family life continuing in Albania and particularly those concerning the difficulties which the Sponsor would face (as set out at [22] to [24] of the Decision) those do not go beyond the matters raised in summary at [29] of the Decision.

24. Even accepting (as I do) that the Judge was entitled to allow the appeal outside the Rules without any inconsistency arising with his conclusion within the Rules, there is a difficulty with the Judge's approach to the "Chikwamba argument". This concerns his reasoning in relation to the prospects of success of an entry clearance application and the timescale involved in temporary separation. This is the point which found favour with Judge Landes when granting permission.

25. The first difficulty is that Judge Davison did not recognise that he needed to consider the prospects of success of the entry clearance application. The "Chikwamba argument" at least as it applies in a case like this is predicated on there being no (or a reduced) public interest in requiring an individual to return to his or her home country simply to seek entry clearance because such an application would be highly likely to succeed. In Chen, the Tribunal set out the Chikwamba principle at [39] (cited in full above) as follows:

> "…if it is shown by an individual (the burden being upon him or her) that an application for entry clearance from abroad **would be granted** *and* that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced."

[my emphasis]

26. Similarly, in Agyarko, at [51] of its judgment (cited above), the Supreme Court referred to the principle as being engaged where an individual in the UK unlawfully would be "otherwise certain" to succeed if he/she made the application from abroad. At [36] of the judgment, the Supreme Court referred to the Court of Appeal's judgment in Agyarko setting out the Chikwamba principle as being that, where an application for entry clearance "which would clearly be successful" was made in circumstances where interference with family life "could not be said to serve any good purpose", removal would be disproportionate.

27. I have set out the Judge's reasoning in relation to the "Chikwamba argument" at [16] above. The Judge did not appear to recognise that the prospects of success of a future entry clearance application were an important part of the consideration. He expressly said that he was "not pre-judging" that outcome. Although he said that he could see "no reason why any application would fail", he made no finding that an application "would succeed" or that the Appellant "was otherwise certain to be granted leave to enter" when a further application was made from outside the UK.

28. Although the Judge recognised that an appeal could not be allowed "simply" (my emphasis) on the basis that an entry clearance application "may" succeed, that is not a recognition that he understood the basis of the Chikwamba principle. It arises only in cases where the public interest in the maintenance of effective immigration control is reduced because there would be no real point in requiring the foreign national to return to his home country simply in order to be allowed to re-enter. In most cases, that principle would not apply because, in most cases, there is a public interest in allowing an entry clearance officer to take the decision as to leave in order to maintain effective immigration control. The fact that an entry clearance application might well succeed in the future is not sufficient.

29. Moreover, as the Respondent points out, the Judge has taken into account the time period of separation based on an appeal. No appeal would be necessary if an application for entry clearance would be "otherwise certain" to succeed or "would clearly be successful". I reject Ms Anzani's suggestion that the Judge was there merely recording the submission of Appellant's Counsel. If the Appellant's case was that an application for entry clearance was clearly going to succeed there would be no need for that submission to be made. More importantly, there was no need for the Judge to take it into account when considering the time period of separation. That reference is clearly part of the Judge's finding as to the period of separation which is then directly relevant to the level of interference and therefore feeds into the assessment of proportionality. It therefore infects that assessment.

30. For the foregoing reasons, I conclude that there is an error of law identified by the Respondent's grounds. The Judge has failed properly to apply the Chikwamba principle and to take into account relevant case law. He has misdirected himself in law. Further, if and insofar as he purported to find that an application for entry clearance would succeed, he has made findings which are inconsistent as to the period for which the Appellant and Sponsor might be separated which inconsistency is relevant to and infects the proportionality assessment. The Judge has also failed adequately to explain what it is about this case which renders removal for a temporary period disproportionate, having found that the Appellant and Sponsor could continue their family life in Albania on a permanent basis without very significant difficulties.

CONCLUSION AND NEXT STEPS

31. For the above reasons, the Respondent's grounds identify an error of law in the Decision. Accordingly, I set aside the Decision.

32. The parties were agreed that the decision could be re-made in this Tribunal. Mr Whitwell submitted that I could re-make without a further hearing on the evidence before me. The appeal was heard only in May 2022 and nothing was likely to have changed. Ms Anzani reminded me that, as a reasons challenge, I could not preserve findings. Moreover, I am required to consider the position as at the date of hearing. She therefore submitted that there should be a further hearing. I have therefore directed that below.

DECISION

The Decision of First-tier Tribunal Judge G D Davison dated 23 June 2022 involves the making of an error on a point of law. I therefore set aside the Decision.

DIRECTIONS

The appeal is to be listed for a re-making hearing before me (on a face-to-face basis) after 14 days from the date when this decision is sent with a time estimate of ½ day. If an interpreter is required, the Appellant shall notify the Tribunal forthwith.

Signed: L K Smith

Upper Tribunal Judge Smith Dated: 28 September 2022