



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

Appeal Number: HU/05669/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 30 May 2017**

**Decision & Reasons Promulgated  
On 2 June 2017**

**Before**

**DR H H STOREY  
JUDGE OF THE UPPER TRIBUNAL**

**Between**

**ERKAN ATALAY  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr M Murphy, Counsel, instructed by Ashton Ross Law  
For the Respondent: Mr P Singh, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant, a citizen of Turkey, brings a challenge to the decision of First-tier Tribunal (FtT) Judge Walters sent on 24 October 2016 dismissing his appeal against a decision made by the respondent on 8 September 2015 refusing to grant him leave to remain.

2. I am grateful to both parties for their submissions. I can be brief since this is a case where the FtT Judge has clearly erred in law in a number of respects.
3. First of all the judge wrongly concluded that the appellant's family and private life were not engaged because there was no removal decision. Given that (i) the respondent's decision letter included a decision that the appellant met neither the Immigration Rules on private and family life nor the requirement to show exceptional or compassionate circumstances pertaining to Article 8 outside the Rules; and (ii) the appellant's grounds of appeal raised Article 8 grounds, this was a plain error.
4. Second, insofar as the judge purported to conduct a proportionality assessment within the parameters of the Rules, his assessment failed to take into account all material factors, in particular there was no assessment of the weight to be attached to the evidence that the appellant's wife had close family ties with her mother who depended on her to a significant extent. Another factor not given any consideration was the fact that the appellant's wife had been granted refugee status.
5. Third, the judge appears not to have properly applied **Chikwamba** principles to the appellant's case. On the judge's findings the appellant met almost all of the requirements of the Immigration Rules on spouses, although he felt unable to reach any definitive view as regards the financial requirements. The appellant's wife was also expecting a child. Whilst ordinarily a court or Tribunal will not consider a family to include a child until there is an actual birth, in this case the guidance given by the House of Lords in **Chikwamba [2008] UKHL 40** is clearly forward-looking, having regard to the reasonableness of expecting an appellant to apply subsequently for leave to remain from abroad. At the very least the judge should have assessed this issue on the basis that the case had a maternity dimension. Further, in rejecting the reliance the appellant's representative sought to place on **Chikwamba**, the judge wrongly considered he could not weigh in the balance such factors as whether the appellant would be able to meet the financial requirements, because assessment of such requirements was too uncertain and was "impossible to predict". The judge had considerable evidence before him as to the appellant's ability to meet the financial requirements as at the date of hearing and should have considered whether it was reasonably likely that in a relatively short time after, the appellant would still be able to meet them.
6. I am satisfied that the aforementioned errors were material and accordingly I set aside the decision of the FtT judge.
7. I sought submissions from the parties as to how I should proceed if I found a material error of law. Mr Murphy urged that I remit it to the FtT; Mr Singh said he would not object to that course, although equally he would not object if it were reheard in the Upper Tribunal.

8. Having considered the matter I conclude that it would be appropriate to remit the case to the First-tier Tribunal as there was not in fact any effective proportionality assessment. It will be open to the appellant in compliance with Tribunal directions to rely on the further evidence as regards the birth of the child in January 2017 and the conferment on the child of British citizenship shortly after, and as to the appellant's and his wife's financial circumstances.
9. I would add the observation that in light of the reported decision of the Upper Tribunal in **SF and others (Guidance-post-2014 Act)** [2017] UKUT 120 (IAC), the respondent may wish, before the case is heard before the First tier Tribunal - to reconsider her decision in line with her own policy that it is not reasonable to expect a British citizen child to leave the territory of the UK or the European Union and that as a consequence the appellant meets the requirements of Section 117B(6), unless there are any significant criminal or other public policy considerations.

**Notice of Decision**

10. For the above reasons:

The decision of the FtT judge has already been set aside for material error of law.

The case is remitted to be heard in the First-tier Tribunal not before Judge Walters.

No anonymity direction is made.

Signed

Date: 31 May 2017



Dr H H Storey  
Judge of the Upper Tribunal