IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003127

First-tier Tribunal Nos: HU/63086/2023
LH/02535/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 8th of October 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NDRICIM KOCI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: No appearance by either the Appellant or the Representative

Heard at Field House on 25th September 2024

DECISION AND REASONS

1. Mr Koci is a citizen of Albania whose date of birth is recorded as 13th October 1983. On 4th September 2023 he made application for leave to remain in the United Kingdom as a spouse. On 31st October 2023 a decision was made by the Secretary of State to refuse the application. Mr Koci appealed, and on 4th June 2024 his appeal was heard by First-tier Tribunal Judge Sweet who in a decision dated 7th June 2024 allowed the appeal on human rights grounds outside the Rules.

2. Not content with that decision by application dated 14th June 2024 the Secretary of State sought permission to appeal to this Tribunal. The application was made on three grounds which in essence were that Judge Sweet:

(a) in stating at paragraph 17 of the decision,

> *"However, I take into account that the appellant would have succeeded under the EUSS scheme, but for the subsequent case of **Celik**, and it accepted that he is in a genuine and subsisting relationship with his spouse, who has had EUSS status in the UK since 26 March 2021."*

Judge Sweet attached weight to an immaterial matter;

(b) failed to perform an adequate balancing exercise when determining the issue of proportionality and in particular failed to have regard to Sections 117A to D of the Immigration, Asylum and Nationality Act 2002;

(c) failed to provide adequate reasons for the decision made.

3. On 4th July 2024 First-tier Tribunal Judge Dainty granted permission, thus the matter came before me.

4. A preliminary matter arose in this case. Neither Mr Koci nor his representative attended. It was necessary in those circumstances to have regard to Rule 38 of the Upper Tribunal Procedure Rules 2008 in determining whether it was proper to proceed with this hearing in their absence. I am satisfied that Mr Koci had been notified of the hearing and that reasonable steps had been taken to notify him of the hearing because before proceeding I caused my clerk to make contact with the solicitors who are on record who said that in fact they were no longer acting for Mr Koci and that Mr Koci had left the country, which they subsequently confirmed in writing. In those circumstances given the nature of the appeal and the fact that Mr Koci has left the country, I found it to be in the interests of justice to proceed with the hearing absent Mr Koci or any representative for him.

5. Whilst shorter decisions are to be encouraged, an almost complete absence of reasoning is not acceptable. The losing party is entitled to know why they failed in either bringing, or in this case, resisting an appeal. On very limited findings, i.e. that the Appellant and his spouse were in a subsisting relationship, the judge appears to have thought it proper to circumvent the reasoning in the case of **Celik** and then apply the reasoning in **Chikwamba [2008] UKHL 40** without appreciating its lack of application to the facts of this case, if ever the judge was even aware of its existence. If **Chikwamba** were to apply the judge would have to say why an application was bound to succeed. He does not do so. Further, it is not even clear whether it remains good law though it would appear that it does not.

6. In the case of **Alam & Anor -v- Secretary of State for the Home Department [2023] EWCA Civ 30**, the Court of Appeal considered the relevance in the decision of the House of Lords in **Chikwamba** and the Court of Appeal took the view that the case law in Article 8 in immigration cases had developed significantly since **Chikwamba** was decided and that **Chikwamba** was decided before the enactment of Part 5A of the 2002 Act. The Court of Appeal went on to note that when **Chikwamba** was decided there was no provision in the Rules which dealt with Article 8 claims within, or outside the Rules. By contrast by the time of the decisions which were subject to the cases in **Alam** Appendix FM dealt with such claims. There was also paragraph EX.1. of Appendix FM which provide exceptions to the requirements of the Rules if the

applicant had a relationship with a qualifying partner and there were insurmountable obstacles to family life abroad, and so in the case of **Alam** it was held that **Chikwamba** did not state a general rule of law but simply decided that in the Appellant's particular circumstances it was disproportionate for the Secretary of State to insist on her policy that an Appellant should leave the United Kingdom and apply for entry clearance from in that case Zimbabwe. It is of note that in this case in Mr Koci's own statement he recognises that he might not succeed in his application from abroad were he to make it. In those circumstances it is difficult to see why Mr Koci succeeded.

7. Still further, consideration of those matters set out in Section 117B of the 2002 Act are mandatory, the judge has failed to deal with that which of itself amounts to an error of law. There is an almost complete absence of any attempt to balance those factors weighing in favour of the public interest and those in Mr Koci's interest. One is left with a decision which in short, finds that Mr Koci was not entitled to succeed under the Rules but the appeal would be allowed anyway because inevitably were he to apply from his home country he would succeed. What is missing from the decision is why the judge was of the opinion that that was so. I set the decision of the First tier Tribunal aside.

8. Having set the decision aside, it falls to be remade or remitted. The available evidence is that Mr Koci has left the jurisdiction. By section 98(2) of the Nationality, Asylum and Immigration Act 2002*, "Where an appellant brings an appeal from within the United Kingdom but leaves the United Kingdom before the appeal is finally determined, the appeal is to be treated as abandoned unless the claim to which the appeal relates has been certified under section [F894(7)] or section 94B.]"*

9. As the appeal to the First tier Tribunal was not certified I am left with no alternative but to now treat the appeal to the First-tier Tribunal as abandoned, which I do.

DECISION

The appeal of the Secretary of State is allowed. The decision of the First-tier Tribunal contained a material error of law and is set aside. In the remaking the decision, I find that there is no appeal before me as the appeal is abandoned.

D G Zucker

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 October 2024