Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26606/2013

THE IMMIGRATION ACTS

Heard at Stoke	**Decision and Reasons Promulgated**
On 20th July 2015	**On 31st July 2015**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

NM
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs Sood, instructed by Trent Centre for Human Rights
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. On 28th July 2014 the President of the Upper Tribunal allowed the Appellant's appeal against the determination of a judge of the First-tier Tribunal who dismissed the appeal for the reasons set out in the error of law finding.

2. The matter comes before me to day for the purposes of the Resumed hearing after which a decision shall be made to either allow or dismiss the appeal.

3. The Appellant asserts a right to remain in the UK by virtue of Articles 8, 9 and 12 ECHR.

4. Evidence was received from the Appellant, his wife and two family members in addition to the written material, all of which has been considered with the required degree of anxious scrutiny.

Background

5. The Appellant is a citizen of Pakistan born on the 12th November 1983. An application for leave to remain in the United Kingdom under Appendix FM and paragraph 276ADE of the Immigration Rules on the basis of a partnership with NK was refused on 12th June 2013 and a direction for the Appellant's removal to Pakistan issued.

6. NK was born in Pakistan but is now a British citizen. The couple married in a civil ceremony on 10th December 2013 in the United Kingdom having entered into an Islamic marriage (Nikkah) on 19th May 2012, with parental agreement. Following the Islamic marriage the couple attempted to start a family but have experienced difficulties by way of a miscarriage and a still born child on 15th May 2013. Their son is buried at a cemetery in Nottingham which they visit weekly.

7. The Appellant entered the UK as a student in 2005. He is said to have 'dropped out' of Nottingham Trent University in 2011 although claims to have studied there again in 2012 for a period of two weeks.

8. Members of the Appellants extended family live in and around Nottingham and Middlesbrough. For approximately eight years the Appellant lived with his brother, B, and his brother's family in Nottingham during which time it is said he developed a strong attachment to his brother's children (born 2001, 2003, 2011 and 2013) to whom he is the testamentary guardian. An older sister also lives in the UK.

9. It was said earlier in the proceedings that the Appellants wife is a carer for her own parents as her mother has a heart condition and her father has other health issues, including Type 1 Diabetes.

10. The Appellant has also provided support to his sister who was diagnosed with breast cancer in 2012, as detailed in her witness statement of 20th July 2015 and oral evidence.

11. The Appellants brother sponsored him to come to the UK as a student and provided accommodation until May 2013 when the Appellant and his wife moved to their current address. Financial support was provided for college fees, living accommodation and two years university fees. The brother refers in his statement and oral evidence to the nature of the relationship within the family and the issues relating to the child buried at Bulwell Cemetery.

12. The skeleton argument of Mrs Sood prepared for the purposes of an earlier hearing, dated 21st February 2014, contains the following statement:

> "The Appellant and his British wife are at a pivotal stage in their family planning. They had hoped to have children of their own but have been advised to wait for the time being. They are very much integrated into the lives of their extended family and the Appellant enjoys a special relationship and a strong bond with his nieces and nephews, especially as he has been part of their household for 8 years which is for all or the majority of their young lives….. "

Expert and documentary evidence

13. At pages 16 -26 of the Appellants bundle is a report commissioned from Dr Zena Schofield who conducted a Perinatal Psychiatric Assessment of NK. The report is dated 8th September 2014 (signed 24th September 2014). Dr Schofield notes Mrs K was born and raised in a village in Pakistan and is the youngest of four siblings, having two older sisters and an older brother. She had a happy childhood in Pakistan being raised by her mother as her father was working in the UK. Mrs K studied Art in Pakistan up until the age of 20 when she entered an arranged marriage to a British Muslim man and moved to the UK. The marriage failed and at the age of 23 Mrs K was separated and later divorced. Both Mr and Mrs K expressed to Dr Schofield the importance to them of being able to visit the grave of their son who they lost in 2013 and who is buried in Nottingham. Dr Schofield set out her opinion in section 5 of the report in the following terms:

> "5.1 During my assessment Mrs K was upset and distressed at talking about her miscarriages, the immigration status of her husband, and her perceptions of how life would be for her if she returned to Pakistan. However, she was, with the assistance of an interpreter, able to articulate herself well. In my opinion Mrs K is fit emotionally to give evidence in Court, however this will be a distressing process for her, and she will require the Court to be understanding and supportive of this. She is likely to be better able to give evidence once her current depressive episode has resolved.
>
> 5.2 In my opinion the triggers for Mrs K's moderate depressive episodes are the miscarriage in May 2013 at 21 weeks gestation and the ongoing uncertainty of her husband's immigration status.
>
> 5.3 Regarding prognosis, the evidence base is that for a moderate depressive episode the best course of treatment is combination for antidepressant medication and psychological treatment. To date Mrs K has only received six-sessions of counselling using a CBT style framework. The screening tools from the Let's Talk-Wellbeing Practitioner indicate that there has been some improvement in her mental health, however she continues to be symptomatic. In my opinion she requires treatment with an antidepressant medication that would be suitable for use during pregnancy as she will continue to require this medication for six-months once her symptoms have fully resolved. She may also require further psychological sessions particularly as her symptoms are continuing. The most appropriate

source of psychological sessions would be through the Let's Talk-Wellbeing Service at present. However, given that the two clear triggers for this depressive episodes are Mrs K's husband's immigration status and her second miscarriage with ongoing childlessness, it may well be that this episode will not be fully resolved unless Mr M is granted permission to remain in the UK as a spouse. As part of the ongoing treatment for her moderate depressive episodes she requires the continued support of her husband.

5.4 At present, due to her husband's support, Mrs K presents a low risk of suicide or self-harm. However it is difficult to predict how this risk might change if her husband is deported to Pakistan. My concern would be that her risk of suicide may increase if her husband was deported. In addition, given that childlessness is a maintaining factor in this depressive episode, and the cultural implications of childlessness within a Muslim culture for a married woman, Mrs K's depressive episode may deteriorate if she is forced to remain in the UK alone.

5.5 From the information given to me by Mr M and Mrs K in my opinion currently being able to visit the grave of her miscarried foetus is beneficial to Mrs K's mental health, although this activity alone will not result in a recovery from the depressive episode."

14. A second report dated 9th May 2015 has been provided from an Islamic Scholar who has been asked to comment upon the Islamic ruling in Adoption and the weight it holds in Islam. It is said the content of the report is not based upon the author's personal understanding of Islamic beliefs, but rather demonstrates an understanding of Islam with reference to Quranic verses.

15. It is said adoption has no effect in Shariah although a person can adopt a child for his emotional and psychological satisfaction [2.1]. Adoption to provide a child shelter is said to be a virtuous deed which carries much reward in the hereafter but so far as the legal aspects are concerned, adoption has no consequence. A child should not be attributed except to the natural father, and not to the one who has adopted him [2.2].

16. In relation to artificial insemination (AI) it is recognised that modern techniques for AI were not available at the time the Quran was written and thus is silent on the issue [2.10]. It is said some scholars in Islam declare it absolutely impermissible for a couple to try and conceive a child where the sperm and egg is from another whereas others are of the view that provided the sperm and egg used to fertilise the ovum are from the same married couple, a child derived from AI can be recognised as the off-spring of the couple in Shariah Law [2.12].

17. In relation to the issue of exhumation, it is said to be unlawful to open the grave of a Muslim even though he or she may have been a child or insane as the sanctity of the dead is like that of the living and it is not permissible to subject graves to any disrespect [4].

18. It is also said that based upon Quranic verse and Hadith, it is inferred that the soul enters the foetus at around 4 months/120 days after gestation when the child becomes a living human being [8 – 17].

19. Copy letters have been provided as evidence of contact made with Nottingham City Council in relation to being accepted as proposed adopters and acceptance of the same.

Preliminary issue

20. Mrs Sood raised as a preliminary issue the fact there has been no consideration within the decision dated 12th June 2013 of the application outside the Rules which it is said makes the decision 'not in accordance with the law' such that it should be allowed. It is also stated that even despite the previous hearings and observations of the President in setting the decision of the First-tier Tribunal aside, there has been no response from the Respondent, meaning there is no evidence of the Secretary of State considering the claim based upon Articles 9 or 12. In paragraph 5 of the skeleton argument in which this point is set out it is said:

> 'The Appellant asks the court to find that the SSHD continues to err in law in failing to consider the relevance of Articles 8,9 and 12, and in maintaining the original position that there are no compelling circumstances to grant Leave to Remain outside the Immigration Rules, and in particular, that relocation, in the circumstances known of the importance or continuing physical contact with the grave of their child, would constitute "a non standard or particular feature demonstrating that removal will be unjustifiably harsh" per *Gulshan (article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC).*'

21. The position of the Respondent has always been known to those involved in this case, namely that the application for leave is rejected for the reasons provided in the refusal letter. There has been no additional decision or an indication of a change of view.

22. It was accepted by Mrs Sood that there is no prejudice to the Applicant for the nature of the case and reasons for the decision under appeal were known. Although there may be a general obligation upon parties to review cases they are involved in on an ongoing basis and inform all concerned of changes to their positions, it has not been shown a failure to make comment on additional material makes any difference to the position taken, outside the usual procedure for disclosure, pleadings, skeleton arguments etc., or makes a refusal/decision 'not in accordance with the law' to the extent that an appeal could or should be allowed on this basis. There is no direction from the Upper Tribunal for such a decision to be made with sanctions if not. The Tribunals are experienced at being the body tasked with making a decision in the first instance on many occasions where issues are raised in response to section 120 notices or during the course of an appeal process. In any event, neither article 9 nor 12 are absolute articles.

23. In Ullah and Do [2004] UKHL 26 Lord Bingham made it clear that, when considering the qualification of the right under Article 9.2 (and other qualified rights such as Article 8.2), the balance is heavily weighted in favour of the decision being proportionate and indicated that decisions in pursuance of immigration control will be proportionate in “all save a small minority of exceptional cases”.

24. In MB (Article 2 – Article 3) Algeria CG [2002] UKIAT 01704 the Appellant was a Berber and a Christian convert, who claimed to be at risk on the grounds that, for both reasons, he would attract the adverse attention of the GIA. That was not accepted by the Adjudicator who dismissed the asylum and Article 3 appeal because the Appellant had not been targeted to date. The Appellant sought to argue Article 9 on appeal. The Tribunal concluded that once persecution or ill-treatment contrary to Article 3 had been negated, it was difficult to envisage circumstances where the immigration control would be disproportionate. There may be difficulties, there may be a degree of hardship in manifesting the beliefs, but there would not be any prevention of that manifestation, or at least no prevention which would be effective because, unless there is some sanction such as penalty or detention or ill-treatment, there can be no effective sanction against the manifestation of that belief. In those circumstances the Tribunal concluded that it was almost impossible to see that there could be breach of Article 9 unless there was persecution or Article 3 ill-treatment.

25. No basis for finding in the Applicants favour on this basis was made out and the application refused.

26. The Articles being relied upon are:

27. Article 8 -

Article 8 provides a right to respect for one's "private and family life, his home and his correspondence", subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society". Furthermore, Article 8 sometimes comprises positive obligations: [20] whereas classical human rights are formulated as prohibiting a State from interfering with rights, and thus not to do something (e.g. not to separate a family under family life protection), the effective enjoyment of such rights may also include an obligation for the State to become active, and to do something (e.g. to enforce access for a divorced parent to his/her child).

28. Article 9 - conscience and religion -

Article 9 provides a right to freedom of thought, conscience and religion. This includes the freedom to change a religion or belief, and to manifest a religion or belief in worship, teaching, practice and observance, subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society"

29. Article 12 – marriage -

Article 12 provides a right for women and men of marriageable age to marry and establish a family.

Discussion

30. It is submitted the Applicant is able to succeed under the Immigration Rules as the Appellant cohabits with his wife who is a British citizen and who cannot relocate abroad, and , if not, under the ECHR.

31. It has not been disputed before me that the Appellant and his wife are lawfully married in English law and that the marriage is subsisting. The date of marriage is 10th December 2013 and the period of cohabitation in excess of the two years required by the Rules.

32. It has not been established that the Appellant has lost ties to Pakistan as he has close relatives there including his parents and siblings and his wife has admitted in the past to having family members there too. Both are fluent in Urdu.

33. The relevant Rules are Appendix FM and 276ADE. Insufficient evidence has been provided to show the financial requirements of the Rules can be met or that the Appellant can satisfy E-LTRP2.2. unless EX.1. applies.

34. EX.1. sets out the exceptions to certain eligibility requirements for leave to remain as a partner or parent in the following terms:

> EX.1. This paragraph applies if:
>
> (a) (i) the applicant has a genuine and subsisting parental relationship with a child who –
>
> (aa) is under the age of 18 years [or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied];
>
> (bb) is in the UK;
>
> (cc) is a British Citizen or has lived in the UK continuously for at least 7 years immediately preceding the date of application; and
>
> (ii) it would be unreasonable to expect the child to leave the UK; or
>
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

35. In relation to the term 'insurmountable obstacles' there are three relevant decisions which have been considered: R(on the application of Agyarko) [2015] EWCA Civ 440 it was held that the phrase "insurmountable obstacles" as used in this paragraph of the Rules

clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom. ...The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by Jeunesse v Netherlands (see para. [117]: there were no insurmountable obstacles to the family settling in Suriname, even though the applicant and her family would experience hardship if forced to do so). However, "although it involves a stringent test, it is obviously intended in both the case-law and the Rules to be interpreted in a sensible and practical rather than a purely literal way". Moreover, the "insurmountable obstacles" criterion is used in the Rules to define one of the preconditions set out in section EX.1(b) which need to be satisfied before an applicant can claim to be entitled to be granted leave to remain under the Rules. In that context, it is not simply a factor to be taken into account. However, in the context of making a wider Article 8 assessment outside the Rules, it is a factor to be taken into account, not an absolute requirement which has to be satisfied in every single case across the whole range of cases covered by Article 8. The mere facts that Mr Benette is a British citizen, has lived all his life in the United Kingdom and has a job here – and hence might find it difficult and might be reluctant to re-locate to Ghana to continue their family life there - could not constitute insurmountable obstacles to his doing so.

36. R (on the application of Onkarsingh Nagre) 2013 EWHC 720 Sales J at paragraphs 42 and 43 said "The approach explained in the Strasbourg case-law indicates that ... consideration of whether there are insurmountable obstacles to the claimant's resident spouse or partner relocating to the claimant's country of origin to continue their family life there, will be a highly material consideration. This is not to say that the question whether there are insurmountable obstacles to relocation will always be decisive.... Therefore, it cannot be said that in every case consideration of the test in Section EX.1 of whether there are insurmountable obstacles to relocation will necessarily exhaust consideration of proportionality, even in the type of precarious family life case with which these proceedings are concerned. I agree with the statement by the Upper Tribunal in Izuazu in the latter part of para. [56], that the Strasbourg case-law does not treat the test of insurmountable obstacles to relocation as a minimum requirement to be established in a precarious family life case before it can be concluded that removal of the claimant is disproportionate; the case-law only treats it as a material factor to be taken into account. Nonetheless, I consider that the Strasbourg guidance does indicate that in a precarious family life case, where it is only in "exceptional" or "the most exceptional" circumstances that removal of the non-national family member will constitute a violation of Article 8, the absence of insurmountable obstacles to relocation of other family members to that

member's own country of origin to continue their family life there is likely to indicate that the removal will be proportionate for the purposes of Article 8".

37. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) (Mr Justice Cranston) it was held that the term ”insurmountable obstacles” in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin). The SSHD addressed the Article 8 family aspects of the respondent’s position through the Rules, in particular EX1, and the private life aspects through paragraph 276ADE. The judge should have done likewise, also paying attention to the Guidance. Thus the judge should have considered the Secretary of State’s conclusion under EX.1 that there were no insurmountable obstacles preventing the continuation of the family life outside the UK.

38. The fact the Appellants wife is a British Citizen is not determinative. It is accepted that she is also a citizen of the European Union and that if she was to be removed this will deprive her of the opportunity of living in the Union, but this is not the case. The Respondent does not seek to remove the Appellant’s wife. It is not a case of a decision being made in such terms as this would be unlawful as a result of the wife’s citizenship unless the same was revoked. This is not a case of constructive removal as it has not been shown that if the Appellant was removed his wife would have no choice other than to follow to meet her basic needs to survive. She has family and support available in the UK and lived here without the Appellant until they met. If the Appellant’s wife chose to follow that is a voluntary matter not as a result of an action of the UK government directed against her.

39. It is accepted both the Appellant and his wife have family in the UK. Whilst the wife’s parents may have some medical issues it has not been shown they are totally dependent upon her as evidenced by the fact she lives with her husband. If the parents are British Citizens they will have access to the NHS and the support required, and it has not been shown the impact of their daughter leaving and following her husband is such as to amount to an insurmountable obstacle to family life continuing abroad.

40. It is accepted the Appellant has nephews and nieces in the UK who are his brother’s children. It is not disputed that the relationship is likely to be closer than some between an uncle and such relatives as a result of the time the Appellant spent as a member of his brother’s household as the children grew up. It has not been shown, however, that the best

interests of these children are other than to remain in the UK living with their parents who are their primary carers. The Appellant is no longer a member of the children's household and has lived elsewhere for some time. It has not been made out that the impact of his moving has had an effect upon the children that is suggestive of far greater harm if their uncle is removed to Pakistan that cannot be managed by their parents or with professional assistance, if required. No insurmountable obstacle is established on the basis of the best interests of the children.

41. The appointment of the Appellant as the children's guardian in the event of the death or incapacity rendering the parents incapable of providing care is noted but this is an expression of intent in the event of circumstances which have not yet arisen. The appointment of such is a matter for the parents and is not determinative or capable of amounting to an insurmountable obstacle on the facts whilst the conditions required to give effect to the appointment have not occurred. It has not been shown the children could not live with their uncle in Pakistan, if required, or that other family in the UK could not assist or, if none were available, able, or willing, Social Services.

42. It is said the Appellant has provided support for his sister following the diagnosis of cancer but he has not made out that no other support is available, that the impact of withdrawing such support will have a serious effect upon the prognosis for the sister's survival, or that alternative support is not available from the NHS or any of the first class cancer groups/services that exist in the UK.

43. In relation to the issue of fertility, it is accepted that the UK has services that can diagnose causes of infertility and loss of pregnancy, provide assisted reproduction, and provide the physical and psychological support required, some of which is referred to in the reports. It has not been shown that such assistance is not available in Pakistan or that the Appellant and his wife will be unable to access the same if they lived in that country.

44. It has not been shown that if returned the Appellant or his wife will suffer destitution. They both originate from Pakistan and grew up there until early adulthood. They are fluent with the language and educated. Family have not been shown to be unwilling to assist and it has not been shown that, notwithstanding the understandable problems in establishing themselves, the practical reality of continuing life together in Pakistan gives rise to any insurmountable obstacles. It has not been shown that remunerative employment is not available.

45. In relation to the application to Nottingham County Council regarding adoption, there is no right to adopt in law. A letter dated 27th September 2014 from Calico Social Work Consultancy Ltd refers to an appointment on 9th October 2014 for the purposes of Part 1 of the assessment to Foster with Nottingham Country Council. A person wishing to adopt or foster is required to undergo an assessment to see if they are suitable

to provide care for other people's children. It is a lengthy and personal piece of work, which impacts on and involves everyone who lives in the applicant's home.

46. In addition to establishing whether an applicant meets the requirements to care for a child it also assesses whether it is the right time for an applicant and their household to be fostering a child, which may require an examination of motives and in relation to which the lack of settled status and any mental health issues may be problematic.

47. An assessment should also enable Nottingham County Council and the applicants to identify their family's skills and strengths, whilst giving them a realistic view about what it involves. After the first stage a report is prepared which will go to a panel for discussion. The report needs to demonstrate that an applicant is suitable to care for a child and that their home provides an appropriate environment.

48. Stage two, ordinarily, is a visit from a Fostering Supervising Worker. Stage three the checking of an applicant's suitability which includes checks on all adults who will be involved directly in the care of the child placed with agencies such as Health, Education, the Police, NSPCC, and Adults Services. There is also a medical and need for two people to act as referees (non-relatives). Stage four is the training stage for an applicant which forms part of the assessment process. Stage five is the home assessment during which a Social Worker will carry out a number of visits during which a lot of personal information is gathered about an applicant's history to date and which consists of approximately eight visits as well as visits to nominated personal referees and preparation of the report.

49. There is insufficient evidence to show all steps have been completed and the Appellants approved to foster. Even though it is an admirable intention, if for genuine reasons, it is an aspiration at this stage on the facts and no more.

50. Although a report was provided in relation to the Islamic teaching on the subjects referred to above, insufficient evidence has been provided to show that adoption is not available in Pakistan. The Tribunal has judicial notice that agencies do exists to facilitate adoption in Pakistan which is not prohibited in law, as do clinics who offer assisted reproduction services such as the Reproductive Research Laboratory and IVF Centre, 21-E, Fazle-e-Haq Road, Blue Area, G-6 (Opp. Federal Government Services Hospital), Islamabad, Pakistan. The desire to parent if other than by natural means of conception has not been shown to be an insurmountable obstacle.

51. In relation to the pregnancy issues, there is no evidence from a Consultant Gynaecologist relating to the causation of unsuccessful pregnancies. Prevalence of miscarriage in pregnancy is more common that many realise, the NHS stating that miscarriages are quite common

in the first three months of pregnancy and around one in five confirmed pregnancies ends this way. Many early miscarriages happen because there is something wrong with the baby, such as a chromosomal abnormality. There can be other causes of miscarriage, such as medical problems, infection, a poorly developed placenta or a weak cervix that opens too early in the pregnancy.

52. In R (on the application of Erimako) v SSHD [2008] EWHC Civ 312 Burnton J said that it was not disproportionate to remove the Appellant, whose wife, in her 40's had leave to remain, when they were undergoing fertility treatment here that would not be as effective in his home country, particularly in this case where the prospects were at best uncertain.

53. The remaining issue is that of the presence of the grave in the UK where the Appellants stillborn child is buried. It is accepted that the grave cannot be opened and the child reburied in Pakistan as that is said to be contrary to Islamic beliefs. The evidence of a weekly visit to the grave side was not contested. Notwithstanding the teaching in Islam, a foetus is not a 'person' to whom the ECHR applies in their own right until they are born, a position mirrored in English law. It is accepted that even if family life cannot be enjoyed with a child who has not been born the foetus would have formed part of the private life of his mother during his time in the womb and to a lesser existent his father at that age.

54. It has not been shown in the evidence that there is a need to fulfil a fundamental religious belief to attend the grave and/or to undertake a particular ceremony. The material supports the claim that the reasons for the visits are the most understandable in cases such as this, which is to grieve and seek comfort and to be with their child. It is accepted this will not be possible if the Appellant is removed to Pakistan and is joined with his wife. It has not been shown, however, that the wife cannot return to visit as she is a British citizen and has a right to do so or that a visit visa could to be obtained if the requirements for the same could be met for the Appellant.

55. It is accepted that the Appellants' wife in particular will have strong memories and emotions in relation to the loss, as the foetus is no doubt in her mind a child in the true sense as if born who has been lost to her, and she may find the prospect of not being able to visit the grave an unacceptable proposition at this time. Counselling has been provided and many who experience such loss do learn to lead normal lives with only their memories. The report refers to the assistance the appellant's wife will gain from ongoing assistance and drug treatment for her depressive symptomology but it has not been shown such is not available in Pakistan where she will be with her husband and where they can continue to try for a family by natural or assisted means and pursue their wish to foster or adopt if this is the only solution available to them.

56. There is insufficient evidence to show that the impact upon the Appellant and his wife of being unable to visit the grave is such that it can be said this element creates an insurmountable obstacle. It is an issue of personal grief and deep feelings following the finality of the prospect of life for this child.

57. The report refers to the risk of self-harm but it has not been shown that medical treatment is not available in the UK and Pakistan to assist and manage the same if required. What is more important to the Appellants wife, the depth of love for her husband and desire to be with him and to have children together, or the need to be able to visit the grave in the UK on a regular basis? On the basis of the evidence given to the Perinatal Physiatrist the need to be with her husband and to have a child appears to be the determinative issue.

58. I do not find the evidence made available established the existence of insurmountable obstacles and accordingly that it has not been established that the exceptions to be found in EX.1. can be met. The appeal under the Immigration Rules must therefore be dismissed.

59. It was not suggested this is a case in which there is no need to consider Article 8 ECHR although as the case has been assessed by reference EX.1 there is an overlap in the evidence to be considered. An additional element that is not engaged as part of the assessment under the Immigration Rules but which must be part of an Article 8 assessment is the statutory provision to be found in Part 5A of the 2002 Act.

60. By virtue of section 117A, in considering the public interest question, the tribunal must (in particular) have regard (a) in all cases, to the considerations listed in section 117B, and (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C. Subsection (2) provides that “the public interest question” means the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2). Section 117A(2) is mandatory. As the public interest provisions are contained in primary legislation they override existing case law. Section 117A(3) confirms that the Tribunal is required to carry out a balancing exercise. In other words, the Tribunal cannot just rely on the listed public interest factors as a basis for rejecting a claim but must carry out a balancing exercise where a person’s circumstances engage article 8(1) to decide whether the proposed interference is proportionate in all the circumstances. Section 117B sets out the public interest considerations applicable in all cases.

61. Section 117B reads: Article 8: public interest considerations applicable in all cases: (1)The maintenance of effective immigration controls is in the public interest; (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to

speak English, because persons who can speak English— (a) are less of a burden on taxpayers, and (b) are better able to integrate into society; (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons— (a) are not a burden on taxpayers, and (b) are better able to integrate into society; (4) Little weight should be given to — (a) a private life, or (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully; (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious; (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where— (a) the person has a genuine and subsisting parental relationship with a qualifying child, and (b) it would not be reasonable to expect the child to leave the United Kingdom.

62. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) (Ockelton) the Tribunal held that Parliament has now drawn a sharp distinction between any period of time during which a person has been in the UK "unlawfully", and any period of time during which that person's immigration status in the UK was merely "precarious"; those who at any given date held a precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or to remain. A person's immigration status is "precarious" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave; in some circumstances it may also be that even a person with indefinite leave to remain, or a person who has obtained citizenship, enjoys a status that is "precarious" either because that status is revocable by the Secretary of State as a result of their deception, or because of their criminal conduct. In such circumstances the person will be well aware that he has imperilled his status and cannot viably claim thereafter that his status is other than precarious.

63. In this case the Appellant entered the UK as a student which is a temporary status with no legitimate expectation of being entitled to remain without a further grant. As such his status has been precarious and remains so to date.

64. It is also submitted the Appellant has worked illegally in the UK and issue was made in relation to the wife's account given to the therapist at page 60 of the bundle in the psychologist report where it is recorded "Client stated she has no friends or family in Nottingham and she is always alone when her husband leaves for work". The Appellant had denied working in breach in his evidence which is contradicted by the evidence considered as a whole.

65. The Appellant speaks English and gave his evidence in the same but as found in AM (S 117B) Malawi [2015] UKUT 260 (IAC) (Ockelton) the Tribunal held that an appellant can obtain no positive right to a grant of

leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources.

66. It is accepted there is a private and family life in the UK. It is accepted that even if the relationship with other family members in the UK is not sufficient to satisfy the definition of family life under Article 8, it will form part of the Appellants private life.

67. It has not been shown to be unreasonable for the Appellant and his wife to continue their family or private life in Pakistan and whilst there is great sympathy for this couple in relation to their child, in MG (Serbia and Montenegro) 2005 UKAIT 00113 the tribunal stated that sympathy for an individual did not enhance a person's rights under Article 8.

68. The Respondent has discharged the burden upon her to prove, in relation to the fifth of the Razgar questions, that the decision is proportionate to the legitimate aim relied upon when the balancing act required by section 117 is properly undertaken. Article 8 does not enable a person to choose there they wish to live and it was known the Appellant did not have leave to remain when he was married and that his position and the prospect of being able to live in the UK was by no means certain.

69. An issue was raised in relation to the impact upon the Appellant's wife if she returns to Pakistan as a person in a second marriage who is childless. It is accepted that in some sectors of society in Pakistan there in an expectation of children within marriage and that a childless woman can experience harassment and discrimination. It has not been shown that in all of Pakistan such will be experienced or that any difficulties that may be encountered from such individuals is sufficient to make the decision disproportionate.

70. In relation to the claim under Article 9 ECHR, this provides a right to freedom of thought, conscience and religion. This includes the freedom to change a religion or belief, and to manifest a religion or belief in worship, teaching, practice and observance, subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society". It has not been shown the Appellant is unable to practice his religion as a Muslim if returned to Pakistan which is a predominantly Islamic society. It has not been shown that his faith requires him to remain in the UK or that if he is unable to visit the grave of his child as he does at this time that this is a disproportionate restriction on religious grounds.

71. Article 12, the right for women and men of marriageable age to marry and establish a family is pleaded but the appellant and his wife are married and it has not been shown the State is preventing them from having a family. To find that this provision permits the Applicant and his wife to choose the venue to have a child is in conflict with Article 8 which does not permit a person to choose there they wish to live. It has

not been shown the couple cannot have children in Pakistan or that if they cannot due to undefined problems, that this is something for which the UK government is responsible. As stated above, insufficient evidence of the cause of the failed pregnancies has been provided. It has not been shown this element makes the decision disproportionate.

72. The appeal under ECHR must therefore be dismissed.

Decision

73. The First-tier Tribunal Judge has bene found to have materially erred in law and his decision set aside. I remake the decision as follows. This appeal is dismissed.

Anonymity

74. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson
Dated the 29th July 2015