Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/05686/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 15 November 2018	**On 23 November 2018**

Before

Deputy Upper Tribunal Judge MANUELL

Between

Mr MUHAMMAD QASIM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Karim, Counsel
(instructed by AVVS Solicitors Ltd)
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. Permission to appeal was granted by First-tier Tribunal Judge Landes on 11 September 2018 against the decision to dismiss the Appellant's Article 8 ECHR appeal made by First-tier Tribunal Judge Ababrese in a decision and reasons promulgated on 1 June 2018. The

Appellant is a national of Pakistan, an overstayer whose last leave to remain expired in 2014. He relied on his relationship to his wife, a British Citizen by naturalisation originally from Pakistan. They married in 2016. They were childless at the date of the First-tier Tribunal hearing and were pursuing IVF treatment in the United Kingdom. The Respondent accepted that the marital relationship was genuine and subsisting. There was no reference to the financial requirements not being met in the reasons for refusal letter.

2. Judge Ababrese found that the eligibility requirements were not met, approaching the Article 8 ECHR appeal through the lens of the Immigration Rules. There were no insurmountable obstacles to the continuation of family life in Pakistan. There was no continuing risk for the Appellant's spouse from her father (on the basis of which she had been granted asylum in the United Kingdom in 2006) and IVF treatment was available in Pakistan, despite social disapproval.

3. Permission to appeal was granted because it was considered arguable that the judge had not fully considered the stigma of IVF in Pakistan and the length of time in which the Appellant's wife had been in the United Kingdom. The other grounds raised, i.e. that Appendix FM was met and the situation of the Appellant's wife's mother had not been fully considered, were not encouraged, although were not refused.

4. Mr Karim for the Appellant relied on the grounds submitted and the grant of permission to appeal. The judge had not engaged with the Chikwamba [2008] UKHL 40 argument which had been put before him, raised in the Appellant's witness statement. The point was that an entry clearance application would have been bound to proceed because the evidence showed that the financial requirements were met. This was a serious omission as Agyarko [2017] UKSC 11 had approved the Chikwamba principle.

5. The judge had also erred by failing to take into account societal attitudes in Pakistan towards IVF treatment. It met with considerable disapproval, which the judge had ignored.

6. The judge's approach to the Article 8 ECHR assessment was seriously flawed. He had not considered all relevant factual issues. These submissions were explored in

dialogue with the tribunal. Counsel argued that the onwards appeal should be allowed.

7. Mr Jarvis for the Respondent relied on the rule 24 notice dated 15 October 2018. The first ground of appeal, that Appendix FM had been met, such that Chikwamba applied, had not been raised before the judge. That could not give rise to an arguable error of law. In any event, Chikwamba had been considered by the Court of Appeal in Kaur [2018] EWCA Civ 1423 and considered to be an extreme case. The judge had been fully entitled to find that there had been a material change in circumstances since the grant of asylum to the Appellant's wife in 2006. She would, amongst other matters, now have the benefit of a male protector. There had not been enough evidence produced to support the Appellant's wife's Article 8 ECHR claim in respect of her mother. The undoubted fact that IVF treatment was available in Pakistan showed that societal disapproval was not decisive. Section 117B of The Nationality, Immigration and Asylum Act 2002 did not show more than neutral factors. The appeal should be dismissed.

8. The grant of permission to appeal was in the tribunal's view a generous one. This was a full, careful and balanced determination. The tribunal accepts the submissions made by Mr Jarvis. The claim that the judge had erred by failing to consider that the Immigration Rules (Appendix FM) had been met was unarguable because the Chikwamba point, such as it was, had not been pursued as an argument in any intelligible form before the First-tier Tribunal judge. It is not mentioned by him and there was no evidence from counsel who appeared below (e.g., a skeleton argument) to show that it had been. Mr Karim had not been involved and accepted he could not assist. His submission that it was such an obvious point that the First-tier Tribunal judge should have dealt with it mistakes the role of the judge. In any event, the issue was not the financial requirements but the eligibility requirements as the Appellant was an overstayer whose relationship was formed after he had no leave to remain. There had to be exceptional circumstances for that to be overcome and the judge found there were none on the evidence put forward. As Mr Jarvis pointed out, Chikwamba would not have assisted on the facts found, even if it had been argued, as (among other

matters) the Immigration Rules have changed substantially since 2008.

9. The judge was fully entitled to find that there had been a material change of circumstances in Pakistan such that the Appellant's wife could safely return as a married woman in 2018, despite having previously claimed asylum some 12 years before. The determination shows that the claim of continuing risk was closely examined and proper reasons were given for finding that there was no real risk in 2018.

10. The judge addressed the IVF issue fully, giving close attention to the expert's report. The inferences drawn about the availability of IVF treatment in Pakistan to the Appellant's wife were open to the judge. It is obvious that the Appellant's wife would have no need to disclose any medical treatment she chose to undergo in Pakistan, nor had the Appellant any need to mention her IVF treatment. It is also perhaps too obvious for the judge to have mentioned it, but there are a number of medical procedures available in the United Kingdom which do not meet with universal approval, whether cosmetic surgery or more serious matters. But there was no evidence to show that persons seeking IVF treatment in Pakistan face persecution or anything similar.

11. The other Article 8 ECHR claims which the Appellant raised, such as his wife's family relationships in the United Kingdom, fell short of demonstrating emotional between them and required no additional notice from the judge.

12. As with so many similar appeals, this was about choice, a personal choice which does not exist under Article 8 ECHR absent compliance with the Immigration Rules or very compelling/exceptional circumstances. Had the overstaying Appellant returned to Pakistan and applied for entry clearance application in accordance with the Immigration Rules long ago, he might have returned to the United Kingdom lawfully by now. Instead time and money have been wasted, and unnecessary anxieties created.

13. In conclusion, the tribunal finds that there was no error of law and the onwards appeal must be dismissed.

DECISION

The appeal to the Upper Tribunal is dismissed.

There was no material error of law in the First-tier Tribunal's decision and reasons, which stands unchanged.

Signed **Dated** 15 November 2018

Deputy Upper Tribunal Judge Manuell