Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25348/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 November 2018	**On 13 December 2018**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

UMBREEN [P]
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Ahmed, of Counsel, instructed by 12 Bridge Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Background

1. The appellant is a Pakistani national and was born on 8 November 1971. She entered the UK on 30 October 2000 as a Tier 4 migrant. With the absence of gaps in her residence between 4 December 2004 and 17 May 2005, and 30 September 2008 and November 2009 when her applications were refused, she had leave to remain until 30 November 2009. Her application for indefinite leave to remain

was refused on 14 January 2010 and appeal dismissed on 4 May 2010 by First-tier Tribunal Judge Baldwin. Another application made on article 8 grounds in April 2013, was refused on 29 May 2013. A third application made on 26 May 2015 was refused on 9 July 2015. That led to an appeal hearing before Judge Majid on 7 December 2016. The judge allowed the appeal on 10 February 2017, but it was set aside by Deputy Upper Tribunal Judge Norton-Taylor on 9 November 2017 because of an absence of reasoning. The matter then came before Judge Ross who allowed the appeal, but his determination has been in the most part set aside by my decision dated 13 September 2018 following a challenge by the respondent and a hearing before me at Field House.

2. I preserved the following findings made by Judge Ross: that the relationship is genuine and subsisting, that the appellant's husband has lived here since 2003 and is a British national, that he is a pastor and has a business, that the couple have undergone unsuccessful IVF treatment, that the appellant and her husband are involved in the Christian community in the UK and that the appellant's mother and brother remain in Pakistan. The appellant's immigration history is also not in dispute.

The hearing

3. The appellant and her husband both attended the hearing and gave oral evidence. At the commencement of the hearing, Mr Ahmed clarified that he would be pursuing three lines of argument: that the appellant qualified for leave under (1) EX.1, (2) paragraph 276ADE because in October 2019 she will have been for twenty years, and (3) article 8 grounds.

4. The appellant gave evidence first. She adopted her earlier witness statement and confirmed her current address. She stated that she had married in 2016; there had been no other kind of marriage. She was referred to the claim of a customary marriage and she stated that she had meant that her husband had gone to Pakistan to seek permission for the marriage from her mother and brother. There was no ceremony; her husband and his family accompanied him and an agreement was signed. She did not have it with her.

5. The appellant was asked about the fresh evidence she had adduced. She stated that it pertained to IVF treatment that had been done on 13 November 2018. She would now be under observation for 3-4 months. Due to her age and the presence of fibroids outside her uterus, she was at risk of miscarriage. If the treatment was unsuccessful, she would be allowed another attempt. In total there could be three cycles. The appellant confirmed that she had undergone IVF treatment in 2009. She had then waited before trying again because she wanted to resolve her immigration status. Then she saw a doctor and was advised to have the treatment quickly because of the fibroids. That completed examination-in-chief.

6. In response to Mr Melvin's questions, the appellant stated that she had met her husband in 2008 and they became a couple and started to live together in April 2009. They waited until 2016 to marry because although she was given a Talaq divorce in 2009, it was not accepted when they approached the local council with a view to marry in 2015. They waited until 2015 because the appellant's main focus was her immigration status. They had thought of returning to Pakistan and marrying there in the presence of their families but her application for leave was refused and so she had to keep making further applications. The appellant was asked why she had not returned to Pakistan to make an entry clearance application. She stated that was because she faced hurdles. She had been married to a Muslim in 2004. He returned to Pakistan and she faced threats because his family wanted her to convert from Christianity to Islam. She stated they had not asked the family for permission to marry. She stated she had been advised to claim asylum by the Home Office but she had said she did not "*deserve*" it and that she was a student which was completely different. She did not return to Pakistan because she was very afraid. She had previously visited Pakistan many times until 2009 without problems but she had not stayed with her in-laws. When asked what had changed, she said her ex-husband had said he "*would come for me*". Although they were divorced, she said that he could still threaten her and as a Christian she would have problems. She stated that her representative had told her she was not an overstayer because she had applications pending. She considered she had the right to remain under the ten year route.

7. The appellant stated that her husband had obtained indefinite leave to remain in 2014. She had not married him then and sought entry clearance as a spouse because his father died. She then stated that he had passed away in 2012.

8. The appellant clarified that the IVF cycles were every three months.

9. In re-examination the appellant clarified that the cycles lasted three months with a one-month wait in between.

10. In response to my questions, the appellant said that she had changed her mind about waiting for IVF until after surgery to remove the fibroids because there may have been complications. She stated that there were small fibroids within the uterus but a large one outside it. The first IVF treatment had taken place in September or October 2009. When asked why she had needed treatment so soon after she had commenced cohabitation with her husband, she explained it was because she wanted children so much. She had made no visits to Pakistan after 2007. Her husband had been in 2004 and then in 2014. He had three sisters and a brother in Pakistan; they were married with children. The appellant said she had last been threatened by her husband in 2010. He had sent her text messages after leaving and had said: "*when you come here, I'll see to you*". Whether asked why he had been angry with her, the appellant said that his behaviour had

changed. She did not know why. He had not told her about his first marriage and she had found out.

11. Mr Melvin had questions arising. He asked whether the appellant's first husband had entered the UK as a Tier 4 dependant. She confirmed he had. She agreed that after she had been refused indefinite leave to remain, the marriage became difficult. He had no basis to stay so he left. She did not know if that had made him angry.

12. Mr Ahmed also had further questions to put. The appellant said she and her husband had tried to conceive a child naturally but only for a short time. She was 38 when she had one cycle in 2009. She said she could have made an entry clearance application but the situation was worse now after the Asia Bibi case. She had also been making previous applications for leave and did not want to disrespect the Tribunal by not filing an appeal. There was no other reason she could not return and make an application. She then said her husband relied on her. They had a strong bond. Mr Ahmed asked if there were any other reasons. The appellant stated she did not know how long she would have to wait for the application to be decided. It would be difficult for her without her husband. Moreover, her mother lived with her brother who had five children and he did not have a large house. People would know she came from England. Mr Ahmed asked the appellant again whether there were any other reasons. She replied that there were none. That completed the appellant's evidence.

13. I then heard from [DS], the appellant's husband. He confirmed his address and adopted his statement. He stated that he had paid for the IVF treatment. It cost £7000. The next procedure would be blood tests and then a scan as the appellant was under observation. This was the only clinic that would treat her. She could have a total of three cycles.

14. The witness stated that if the appellant had to go to Pakistan and seek entry clearance, he would have to take time off work and as he was on a zero hours contract, he would not be paid. Moreover, the standard of treatment there would be different. He was asked whether he would receive a refund if the appellant did not have the additional cycles. He said that he would not. When I pointed out that he had not yet paid £7000, he agreed he had not.

15. In cross-examination, the witness confirmed he had met the appellant in 2008. They began a relationship and started to live together in 2008/2009. It was around the time her visa expired. They commenced the IVF course soon afterwards because they had tried for a baby but had not succeeded. He had been on a work permit at that time. He denied that the IVF treatment was to enhance the appellant's chances of a successful claim. He said that there had been a gap of ten years in IVF treatment because of the appellant's status.

16. The witness confirmed that he had obtained indefinite leave to remain in 2014. They waited until 2016 to marry because of the appellant's status. They had to apply to the Home Office. She could not go to Pakistan to make an entry clearance application because her brother did not have a big house and because she was waiting for her status to be resolved. When asked what prompted them to marry in 2016, the witness stated it was because they loved each other. He had last been to Pakistan in 2015 for a family visit and also to ask the appellant's brother for permission to marry her. He stayed for four weeks. He visited his own family too. He had a document relating to the permission to marry which he stated had been submitted. He stated they could have gone to Pakistan and she could have made an entry clearance application but they did not know how long it would take. Additionally, they wanted children and she also helped him with work and cooked and cleaned and washed for him. He stated that he had to wait ten years for the next attempt at IVF because he had to save the money. If the appellant had to make an entry clearance application, there would be the fee to pay and the costs of the accommodation. They had never made any enquiries as to the time factor involved. He was not trying to frustrate the process by litigation. He called one clinic in Lahore about IVF but they told him it would not be of the same standard as the treatment in the UK. He stated that he had experienced some problems on his return to Pakistan but had not referred to these in his statement because this was not an asylum appeal. He said that the appellant would not make an asylum application if this appeal failed. He said no one was giving the appellant "a hard time" so there was no reason to make a claim. That completed cross-examination.

17. In re-examination, the witness clarified that the reference to a customary marriage document was the written consent he had received from the appellant's family. He confirmed it had been submitted to the Home Office. He said they had been for an interview in 2016 and were then given permission to marry. That completed the oral evidence.

18. I then heard submissions. Mr Melvin submitted that the appellant could be expected to return to Pakistan and make an entry clearance application. He submitted that no legal representative would suggest that it was an abuse of the system not to appeal. There was no barrier to return, with or without the husband. There was no persecution of the Christian community and the issue appeared to be one of finance but a large sum had been spent on IVF treatment. Mr Melvin submitted that had been obtained to bolster the claim, particularly given that the medical advice was to deal with the fibroids first. There was no evidence that IVF treatment would not be available in Pakistan. The couple had entered into the three cycles with a view to prolonging the appellant's stay so that she could make a 20 year claim in a year. There had been repeated attempts to frustrate removal. The correct procedure should be followed. There were no insurmountable obstacles to the continuation of family life overseas. There were no very significant obstacles to integration and the appellant and her husband had family there. Whether the matter was considered in the round outside the

rules, it would be proportionate to expect the appellant to return to Pakistan and make an entry clearance application.

19. Mr Ahmed submitted that there had been no challenge to the relationship which began in 2008 and to the cohabitation which commenced in 2009. The appellant's leave had expired in November 2009 and so the relationship had not commenced during a period of overstaying. The first attempt at IVF was in October 2009 and so it was wrong to say that this was used to bolster her chances of a successful application. Conception had become more difficult with age. That was why they pursued IVF. It had previously been halted so that they could sort out the appellant's immigration status. The application was refused in March 2015 and litigation had taken three years. The appellant could not be blamed for that. It was not realistic to expect them to return to Pakistan and start another cycle of IVF there. The time line had meant urgent action had been required otherwise there had been no intention to commence IVF treatment this year. This was an insurmountable obstacle. The information about visa processing times made little sense. This was not a case where the appellant had sought to frustrate removal but if the respondent took that view, then it was possible the ECO would take the same view when considering any entry clearance application. The sponsor had a business. He had been back to Pakistan in 2004 and 2015; it was unrealistic that he would fit in now. He was making a positive contribution to the economy. The appellant had been entitled to apply for indefinite leave to remain when her leave expired. She had made appropriate applications. The appellant could not return to Pakistan because of her IVF treatment and in October 2019 she would have completed twenty years of residence. Whilst IVF treatment was available in Pakistan, it was of a different standard. This was the last chance. Her relationship and the treatment amounted to very significant difficulties for re-integration. It would be proportionate for her appeal to be allowed. Reliance was placed on Agyarko and Ikuga [2017] UKSC 11 and it was argued that the financial requirements could be met, the appellant had gained qualifications during her time here and had been here lawfully. She had taken a language test and a Life in the UK test. If the application was certain to be granted, the public interest in removal was reduced. Section 117B factors were met. She was not a burden on the state. The appeal should be allowed.

20. That completed the hearing. I reserved my decision which I now give with reasons.

Discussion and findings

21. I have considered the submissions made by both sides with care and I have had regard to the evidence before the Tribunal. My findings are not set out in any order of priority. I confirm that I have considered all the evidence as a whole before reaching a decision and that I have had regard to the fact that the burden

lies on the appellant to make out her case to the civil standard at the date of the hearing.

22. Under EX.1. of the Immigration Rules, the appellant has to show that she *"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"*. Under paragraph 276 ADE(vi), she must show that she is *"aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but that there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK"*.

23. The Tribunal is also required to consider s. 117A and B of the Nationality, Immigration and Asylum Act 2002 (as amended). This provides:

117A:
(1)This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –
(a)breaches a person's right to respect for private and family life under Article 8, and
(b)as a result would be unlawful under section 6 of the Human Rights Act 1998.
(2)In considering the public interest question, the court or 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.
(3)In subsection (2), "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).

117B 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.
……..

24. I have not been provided with copies of the appellant's earlier applications for leave in November 2009 and April 2013, but I have the decision letters in respect of those applications and the determination of 2010. This appeal arises from the refusal of an application made for indefinite leave to remain outside the rules on 26 March 2015.

25. The appellant relies on her relationship with [DS] whom she married in September 2016 subsequent to the making of the application and its refusal. The application itself was based on her long residence (fifteen years at the time), the relationship, and her fear of returning to Pakistan which she described as a "*back up*" (RB:A6 & C1). In her 2015 application, the appellant refers to a customary marriage conducted by her husband and his and her families but no evidence of this is included in the documents before me. This point was pursued at the hearing as it was not clear what had been meant by this but I am no clearer on the matter. It appears to have been a visit by the appellant's partner to her mother and brother during which their approval for the marriage was sought. I am at a loss to understand why this was referred to as a customary marriage by the appellant and her partner in the written evidence and no clear explanation was provided in oral evidence.

26. There are also inconsistencies in the evidence as to when they met. In her evidence to Judge Ross, the appellant stated that she had known her husband in Pakistan as he came from her village but he said they had met in 2009. In the sponsor's written statement, he maintained they had met in college in 2003, even before she married her first husband (AB:27). She claimed that they had met in 2006 (AB:54). In oral evidence before me, both claimed to have met in 2008. I also note that at the hearing of her appeal before Judge Baldwin in 2010, the appellant was still said to be married to her first husband and the relationship with her new partner (now her husband) was mentioned for the first time at the hearing itself. Although these matters are not directly material to the outcome of this appeal, as the respondent has accepted the relationship as genuine and subsisting, they do suggest that the full truthful picture has not been provided. Further, whilst it is still not clear to me why there was such a delay in getting married, that, too, does not impact upon the outcome of this appeal.

27. The appellant has not sought asylum at any point although she maintains that she cannot safely return to Pakistan. In her current application, she complains that her former husband (whom she married in December 2003, according to C3, but in 2004 according to her oral evidence and [DS]'s evidence at AB:27) and who joined her in the UK in October 2004, held a grudge against her. She

claims that the divorce deed of 17 March 2009 cites her as the petitioner and that this would place her at risk on return. It is maintained that he has returned home to the same village where the appellant's family live and that he could find her there or anywhere in Pakistan.

28. There are serious issues arising over this claim. The first is that the appellant told Judge Baldwin in April 2010 that she was still married and that no steps had been taken to formally end the marriage (AB:54, paragraph 12). There is no explanation for why she would have said this if there had been a divorce deed issues over a year earlier. The second problem is that at the hearing before me, the appellant did not make any mention of problems arising from the divorce deed and its contents. She suggested there had been some altercation following her discovery of his previous marriage and because of general problems faced by Christians in Pakistan. Once again, I find that the appellant has not been truthful in her evidence.

29. In any event, there have been no threats against her since 2010. There is no basis for the claim that the ex-spouse would be able to trace her anywhere in Pakistan and if she wished to avoid him, she could relocate with her current husband. I shall address the issue of his return later. He, in fact, stated that no one had given her "*a hard time*" and that she would not need to seek asylum although he referred generally to difficulties for Christians. The appellant has returned to visit her family on numerous occasions and no problems have arisen. Her partner has also visited and does not mention any problems arising in his witness statement. There is no suggestion that any of their respective family members have faced any problems either despite the appellant's evidence that her family are well known evangelists (at C5). I also note that her studies were funded by a UK church with links to Pakistan. On the available evidence, I am not satisfied that the appellant would have any cause to fear returning to Pakistan on account of her former husband or her religion. That is not, therefore, either an insurmountable obstacle to the enjoyment of family life in Pakistan or a very significant obstacle to re-integration.

30. I turn now to the IVF treatment the appellant has received. This was put forward in Mr Ahmed's submissions as the main factor for meeting both the tests under EX.1 and 276ADE(vi). I note that there is no reference to the previous treatment of 2009 in the appellant's application of 2015 and it was not put forward as a reason for not being able to return to Pakistan; nor was it suggested that it would be sought in the future. It was also not mentioned to Judge Baldwin and I have not seen any evidence that it was carried out. The only evidence relating to IVF in the appellant's initial bundle was to October 2015.

31. It is said that the first cycle of IVF treatment was undertaken in 2009 just a few months after the couple commenced cohabitation. The next, for which there is evidence, commenced shortly before this appeal hearing. I note the submissions made by both parties on this point. Whilst Mr Ahmed is right to say that the appellant's student visa had not expired at the time of the treatment, it is also right that the said treatment commenced the month before it expired and so Mr Melvin's submission on its timing is, on the face of it, a valid one. The difficulty with Mr Melvyn's argument is, however, that the appellant did not apparently rely on any relationship when making her application in 2009. Indeed, as I have mentioned, there was no mention at all of any partner until the date of the hearing in April 2010 so if IVF treatment had been received in 2009, and I have not seen any evidence of it, then it was not a factor relied upon in the appellant's application for leave at that time.

32. The same cannot, however, be said for the most recent treatment obtained just before the appeal hearing. This followed a lengthy gap of nine years, for which she and her husband both gave different reasons. The appellant, in oral evidence, stated they had been waiting for her immigration status to be resolved before seeking treatment but that it became urgent because she had fibroids in and on the uterus. In her witness statement, she referred only to the uncertainty of her status. Her husband's evidence, however, was that he had needed to save up to pay for the costs, although I note from the evidence that he already had sufficient funds to pay for the treatment in 2016 (AB:181). Whatever the motivation, and I accept that the couple are anxious to have children, this does not constitute an obstacle either to the enjoyment of family life in Pakistan or to the appellant's re-integration. The evidence from the appellant's husband is that treatment is available in Pakistan and indeed he spoke to a clinic offering IVF but that the standard in the UK was better. That assertion is based on a single call but even if it were the case, it is well established in the case law on health cases that a differential in the standard of available care is inadequate as the basis for a successful appeal. Where the case law goes against individuals even with serious illnesses and life-threatening conditions, it is difficult to see how a wish for children, and to receive treatment in the UK, can result in a successful outcome for the appellant. My finding is reinforced by the Supreme Court judgment in Agyarko and Ikuga (relied on by Mr Ahmed) where the employment of Mrs Ikuga's partner and the fact that she was receiving fertility treatment, were found not to even possibly meet the required tests.

33. The other factors put forward for the EX.1 test are the appellant's husband's work, the uncertainty of the visa process and the fact that in just under a year the appellant will be eligible for making an application for leave based on twenty years of residence. Essentially, this is a near miss argument and it is difficult to see how any of these factors can meet the insurmountable obstacles test; that is to say, they do not show that it would be unduly harsh for the couple to continue family life in Pakistan or for the appellant to return and seek

entry clearance through the proper channels. In most cases, a move would cause disruption and would interfere with employment in the UK. There is nothing in the circumstances of this appellant or her husband's circumstances which would result in unjustifiably harsh consequences or which makes their circumstances any different from any other married couple. It was also submitted that the appellant met the requirements of the Immigration Rules and that there was therefore no public interest in her removal. However, Mr Ahmed also submitted that entry clearance might not be granted because the ECO might take the view that she had sought to frustrate removal. The grant of entry clearance is not clear cut in the circumstances and I cannot find that the requirements of the rules have been met or that the Chikwamba principles would apply. The time period for applications to be decided are contained in the respondent's evidence. There is no undue delay involved and there are no children to be concerned about.

34. The appellant entered the UK as a student. She was always aware that the expectation would be that she would have to leave on completion of her studies. She obtained a degree and yet remained after her studies had been completed. She and her future husband commenced a relationship when her leave was nearing its end and as her husband, himself, stated in his supporting letter, he knew she was here on a temporary visa. Their relationship was therefore entered into knowing that her stay was precarious. Repeated applications were made after her first application was refused and her appeal was dismissed in 2010. Whilst Mr Ahmed submitted that the appellant had been entitled to make the application to remain on the basis of ten years' continuous, lawful residence, the evidence does not support that argument. As was conceded by experienced Counsel at the 2010 hearing, the respondent (at AB:44) was right to say that the appellant had a gap of 164 days in her leave (AB:55) and indeed, the appellant herself acknowledged as such (AB:26). The appellant should, therefore, have left the UK when her application was refused. She has, instead remained and made further unsuccessful applications.

35. I have also considered the claim outside the rules. I accept that there is family life between the appellant and her husband. In respect of private life, I accept that the appellant is undergoing IVF treatment, that she is well liked by friends and church goers, as the supporting letters indicate and that she has acquired educational qualifications as a result of her studies. I also accept that the appellant's removal would interfere with both private and family life. However, the appellant established both when her stay was precarious. Despite being refused further leave and losing her first appeal, she remained and made further applications. I accept that the recent few years of litigation were not of her making but she had already been told in 2010 that she did not qualify to remain. She achieved the qualifications she came here for and these are transferable to Pakistan where both she and her husband have close family. the appellant's husband maintains he cannot return to Pakistan because of his employment and his ties to the community but as the case law establishes, these

are not matters which render the decision disproportionate. In reaching my decision, I take account of the s.117B factors and accept that the appellant speaks English and would not be a burden on the state. However, these are neutral factors and the public interest still requires enforcement of the rules where, as in the appellant's case, private/family life is established during a period of precarious/unlawful stay. The appellant's stay has always been precarious and parts of it have been unlawful (i.e. in between the applications made). The fact that she will complete twenty years in late 2019 does not assist her; no authority was relied on to show that a shortfall of some 11 months can count as a near miss to justify a grant of discretionary leave.

36. In all the circumstances, the appellant can continue her private and family life overseas with her husband. Alternatively, she can should be expected to return to Pakistan, with or without him, and make a fresh application for entry clearance. No good reasons have been given for why she cannot do that.

Decision

37. The appeal is dismissed.

Anonymity

38. I make no anonymity order.

Signed

Upper Tribunal Judge

Date: 10 December 2018