Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: IA/40597/2013**

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 4 November 2014	**On 6 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant
and

AMANAT ALI

Respondent

Representation:
For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Ms M Malhotra, instructed by Berkleys Solicitors

DETERMINATION AND REASONS

1. Whilst this is an appeal by the Secretary of State for the Home Department, for convenience I will refer to the parties in the determination as they appeared before the First-tier Tribunal

2. The appellant is a national of Pakistan. He is the husband of Shabana Aslam, a British national and the sponsor in this appeal. The appellant applied for leave to remain as the spouse of a British national on 6 July 2012 and that application was refused by the Secretary of State on 19 July 2013 and a decision was made to remove the appellant from the UK. Judge of the First-tier Tribunal Gillespie allowed his appeal. The Secretary of State now appeals with permission to this Tribunal.

3. The background to this appeal, which is not in dispute, is that the appellant entered the UK in 2007 as a visitor. He overstayed after the expiry of his visa and met the sponsor in November 2010. According to her statement the sponsor was born in Pakistan but came to the UK with her family when she was 6 or 7 and is a British national because her father is British. Her extended family is in the UK. The sponsor qualified as a solicitor and is now a managing partner in her current firm. The relationship developed and in 2011 the appellant made an application to remain as the sponsor's partner. The couple married on 12 May 2012. The appellant and sponsor wish to have children but the sponsor suffers from a condition which affects her fertility and she has commenced hormone treatment with a view to undergoing further fertility treatment. At the time of the hearing the couple had been living together for three years and married for two. The sponsor was working and supporting the appellant.

4. The Judge found that the appellant could not meet the requirements of the Immigration Rules. He found that the appellant could not meet the requirements of Appendix FM because he is an overstayer or paragraph 276ADE as he has not been in the UK for 20 years and he still has ties in Pakistan. These findings are not challenged. The Judge considered whether there were arguably good grounds for considering the case under Article 8 and, having decided that there were, he went on to consider Article 8 and concluded that it would not be proportionate to remove the appellant.

5. The grounds of appeal to the Upper Tribunal contend that in this case there were no compelling circumstances not sufficiently recognised by the Immigration Rules to justify the Judge's decision to go on to consider the appeal under Article 8 outside the Immigration Rules. Mr Melvin submitted that the judge failed to give reasons for going on to consider the case outside the Rules.

6. The Judge did consider the relevant case law at paragraph 12 of the determination and the relevant principles at paragraph 13. He correctly identified the need to identify arguably good grounds for going on to Article 8 and at paragraph 15 he set out his reasons for deciding that there were. These were *'the existence of the individual circumstances of impaired fertility and the general consideration expounded in Chikwamba v Secretary of State for the Home Department [2008] UKHL 40'*. I am satisfied that the Judge did properly consider the case

law and did, as he was required to, did identify arguably or 'potential' [15] good grounds for considering the appeal outside of the Rules.

7. In considering Article 8 the Judge accepted that the appellant has a private and family life in the UK and that removing him would interfere with that family life. In considering proportionality the Judge considered a number of factors as weighing against the appellant. He took account of the appellant's extended unlawful presence and employment in the UK. I accept Ms Malhotra's submission that the Judge did not ignore this factor.

8. The Judge took account of the decision in Chikwamba although he acknowledged that the fact that there would be no separation from children reduced the exigency of the principle in Chikwamba in this case. Mr Melvin submitted that the decision in Chikwamba is not in keeping with the current case law in relation to proportionality. He submitted that the decision in SSHD v Hayat [2012] EWCA Civ 1054 watered down the principles in Chikwamba. This is not the case. In Hayat the Court of Appeal considered the case law, including Chikwamba and concluded;

> "a) Where an applicant who does not have lawful entry clearance pursues an Article 8 claim, a dismissal of the claim on the procedural ground that the policy requires that the applicant should have made the application from his home state may (but not necessarily will) constitute a disruption of family or private life sufficient to engage Article 8, particularly where children are adversely affected.
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> b) Where Article 8 is engaged, it will be a disproportionate interference with family or private life to enforce such a policy unless, to use the language of Sullivan LJ, there is a sensible reason for doing so.
>
> c) Whether it is sensible to enforce that policy will necessarily be fact sensitive; Lord Brown identified certain potentially relevant factors in *Chikwamba*. They will include the prospective length and degree of disruption of family life and whether other members of the family are settled in the UK.
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> d) Where Article 8 is engaged and there is no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant has no lawful entry clearance.
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> e) It will be a very rare case where it is appropriate for the Court of Appeal, having concluded that a lower tribunal has disproportionately interfered with Article 8 rights in enforcing the policy, to make the substantive Article 8 decision for itself. *Chikwamba* was such an exceptional case. Logically the court would have to be satisfied that there is only one proper answer to the Article 8 question before substituting its own finding on this factual question.

f) Nothing in *Chikwamba* was intended to alter the way the courts should approach substantive Article 8 issues as laid down in such well known cases as *Razgar* and *Huang*.
g) Although the cases do not say this in terms, in my judgment if the Secretary of State has no sensible reason for requiring the application to be made from the home state, the fact that he has failed to do so should not thereafter carry any weight in the substantive Article 8 balancing exercise."

9. In light of this analysis the Judge was right to consider the possibility of the appellant making application for entry clearance in Pakistan and it was open to him to take this into account as a relevant factor in considering the proportionality as he had accepted that the appellant meets all of the requirements of the Rules bar the requirement to have entry clearance. The Judge, as he was entitled to do, considered this in the proportionality assessment and attached reduced weight to the principles in Chikwamba in this case.

10. The Judge also took account of the fact that the appellant had made a 'protracted and conscientious attempt' to regularise his status since 2011. He took account of the sponsor's responsible position and the fact that her career path would be adversely affected by a return to Pakistan with her husband. The Judge took account of the appellant's overstaying but also considered that this history may lead to a refusal of entry clearance and a prolonged period of separation should the sponsor choose to not return to Pakistan because of her career. However against all of this the Judge considered that the parties could voluntarily agree to separate to pursue the application for entry clearance.

11. The Judge considered the current recourse to fertility treatment and the likely effect of a separation upon this treatment as the matter which tipped the balance in favour of the appellant in this case. Mr Melvin submitted that the Judge failed to give adequate reasons for his findings and that there was inadequate evidence in relation to the fertility treatment which was mentioned for the first time at the hearing. However it is clear from the determination that the Judge accepted the oral evidence from the appellant and the sponsor as to the fertility treatment.

12. Mr Melvin submitted that the Judge's finding that the plans of the appellant and the sponsor to have a baby amounted to exceptional circumstances was irrational. I do not agree. The Judge, having considered all relevant factors, gave clear reasons for finding that this issue tipped the balance in the appellant's favour. This was a finding open to the Judge on the evidence before him.

13. In summary I am satisfied that the Judge considered all of the evidence before him. In conducting the proportionality assessment he took into account all relevant considerations and his conclusions were not irrational.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

Signed Date: 4 November 2014

A Grimes
Deputy Judge of the Upper Tribunal