Upper Tribunal
(Immigration and Asylum Chamber)

Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 00063 (IAC)

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham	**Determination Promulgated**
On 14 th November 2013 and 15 th January 2014	.....

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

SHAZIA SABIR

Respondent

It is plain from the architecture of the Rules as regards partners that EX.1 is “parasitic” on the relevant Rule within Appendix FM that otherwise grants leave to remain. If EX.1 was intended to be a free- standing element some mechanism of identification would have been used. The structure of the Rules as presently drafted requires it to be a component part of the leave granting Rule. This is now made plain by the respondent’s guidance dated October 2013.

Representation :

For the Appellant: Ms E Martin at Bennett House, Stoke on Trent (14 th November 2013); Mr N Smart, Senior Home Office Presenting Officer (15 th January 2014)

For the Respondent: Mr K Thathall of UK Immigration Law Chamber

DETERMINATION AND REASONS

1.
This is an appeal against a determination by First-tier Tribunal Judge Ghaffar who allowed an appeal against a decision by the appellant (hereafter the SSHD) against a decision to refuse to vary leave to remain in the UK dated 13 th March 2013 pursuant to an application dated 26 th November 2012.

2.
The SSHD had also taken a decision dated the same date to remove Ms Sabir (hereafter the claimant) from the UK pursuant to s47 of the Immigration, Asylum and Nationality Act 2006. Judge Ghaffar had failed to reach any decision upon the appeal against this element of the decision. Before me on 14 th

November 2013 Ms Martin acknowledged that the decision to remove under s47 was unlawful and she withdrew that decision.

3.
Judge Ghaffar found that the claimant did not meet the requirements of paragraph 284 of the Immigration Rules and dismissed her appeal on that ground; found that she did meet the requirements of paragraph EX.1 of Appendix FM of the Immigration Rules in as much as there were insurmountable obstacles to the claimant and her spouse relocating to Pakistan and allowed the appeal on that ground and allowed the appeal on human rights grounds.

4.
Permission to appeal was sought by the SSHD, and granted, on the grounds that the judge had misdirected herself as to the meaning of "insurmountable obstacles" in EX.1 and had failed to undertake an adequate Article 8 assessment; in particular had failed to consider the SSHD's interest in maintaining an effective immigration policy and failed to take account of the income threshold.

ERROR OF LAW (heard and decided on 14 th November 2013)

5.
Mr Thathall, who submitted a helpful and thorough skeleton argument for the hearing on 14 th November 2013 with copies of the relevant documents to which he referred including the relevant Immigration Rules and the SSHD's policy as to their interpretation, submitted, in essence, that paragraph EX.1 was a free-standing paragraph of the Rules and that the judge's decision that the couple faced insurmountable obstacles in living together as husband and wife in Pakistan was a decision reasonably open to him on the evidence before him and the facts found. He made particular reference to [16] of the First-tier Tribunal determination which he said was a finding that the claimant would be subjected to a forced marriage if she returned to live in Pakistan.

6.
Ms Martin submitted, in essence, that paragraph EX.1 was not free-standing but had to be read as a requirement of R-LTRP. Furthermore she relied upon the grounds seeking permission to appeal as regards Article 8 and that the judge had predicated his decision on an assumption that the couple would be returning to live in Pakistan rather than considering the situation whereby the claimant would return to Pakistan in order to make an application for entry clearance under the Immigration Rules. She sought to distinguish Chikwamba [2008] UKHL 40 (relied upon by Mr Thathall) on the basis that in Chikwamba it was plain that the claimant in that case met the requirements of the Rules and it was therefore a 'pointless exercise' to require her to leave the UK to apply for entry clearance which would be granted. In this case, the claimant did not meet the financial requirements of the Rules. The claimant had not applied for asylum.

Immigration Rules

7.
The claimant had been granted entry as a visitor for six months. She sought a variation to remain on the basis of her relationship with the sponsor, a British citizen settled and working in the UK. Although the First-tier Tribunal Judge dismissed the appeal under paragraph 284 of the Immigration Rules on the grounds that she could not meet the maintenance requirements it is also correct to say that she could not meet paragraph 284 (1) (a) or (b) because she had been admitted as a visitor.

8.

Appendix FM applies to the application made by this claimant. Appendix FM Gen is the preamble that sets out the SSHD's view that it reflects the Article 8 balance to be struck between the right to respect for family and private life and the legitimate aim of protecting the economic wellbeing of society. Section R-LTRP sets out the requirements to be met for limited leave to remain as a partner. In so far as is relevant to this claimant the Rules are as follows:

"Section R-LTRP: Requirements for limited leave to remain as a partner

R-LTRP.1.1. The requirements to be met for limited leave to remain as a partner are-

(a) the applicant and their partner must be in the UK;

(b) the applicant must have made a valid application for limited or indefinite leave to remain as a partner; and either

(c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and

(ii) the applicant meets all of the requirements of Section E-LTRP:

Eligibility for leave to remain as a partner; or

(d) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and

(ii) the applicant meets the requirements of paragraphs E-LTRP.1.2-1.12. and E-LTRP.2.1.; and

(iii) paragraph EX.1 applies.

Relationship requirements

E-LTRP.1.2. The applicant's partner must be-

(a) a British Citizen in the UK;

(b) present and settled in the UK; or

(c) in the UK with refugee leave or as a person with humanitarian protection.

E-LTRP.1.3. The applicant must be aged 18 or over at the date of application. E-LTRP.1.4. The partner must be aged 18 or over at the date of application.

E-LTRP.1.5. The applicant and their partner must not be within the prohibited degree of relationship.

E-LTRP.1.6. The applicant and their partner must have met in person.

E-LTRP.1.7. The relationship between the applicant and their partner must be genuine and subsisting.

E-LTRP.1.8. If the applicant and partner are married or in a civil partnership it must be a valid marriage or civil partnership, as specified.

E-LTRP.1.9. Any previous relationship of the applicant or their partner must have broken down permanently, unless it is a relationship which falls within paragraph 278(i) of these Rules.

E-LTRP.1.10. The applicant and their partner must intend to live together permanently in the UK and, in any application for further leave to remain as a partner (except where the applicant is in the UK as a fiancé(e) or proposed civil partner) and in any application for indefinite leave to remain as a partner, the applicant must provide evidence that, since entry clearance as a partner was granted under

paragraph D-ECP1.1. or since the last grant of limited leave to remain as a partner, the applicant and their partner have lived together in the UK or there is good reason, consistent with a continuing intention to live together permanently in the UK, for any period in which they have not done so.

E-LTRP.1.11. If the applicant is in the UK with leave as a fiancé(e) or proposed civil partner and the marriage or civil partnership did not take place during that period of leave, there must be good reason why and evidence that it will take place within the next 6 months.

E-LTRP.1.12. The applicant's partner cannot be the applicant's fiancé(e) or proposed civil partner, unless the applicant was granted entry clearance as that person's fiancé(e) or proposed civil partner.

Immigration status requirements

E-LTRP.2.1. The applicant must not be in the UK-

(a) as a visitor;

(b) with valid leave granted for a period of 6 months or less, unless that leave is as a fiancé(e) or proposed civil partner, or was granted pending the outcome of family court or divorce proceedings; or

(c) on temporary admission or temporary release (unless paragraph EX.1 applies).

E-LTRP.2.2. The applicant must not be in the UK in breach of immigration laws (disregarding any period of overstaying for a period of 28 days or less), unless paragraph EX.1 applies.

Section D-LTRP: Decision on application for limited leave to remain as a partner

D-LTRP.1.1. If the applicant meets the requirements in paragraph R-LTRP.1.1.(a) to (c) for limited leave to remain as a partner the applicant will be granted limited leave to remain for a period not exceeding 30 months, and subject to a condition of no recourse to public funds, and they will be eligible to apply for settlement after a continuous period of at least 60 months with such leave or in the UK with entry clearance as a partner under paragraph D-ECP1.1. (excluding in all cases any period of entry clearance or limited leave as a fiance(e) or proposed civil partner); or, if paragraph E-LTRP.1.11. applies, the applicant will be granted limited leave for a period not exceeding 6 months and subject to a condition of no recourse to public funds and a prohibition on employment.

D-LTRP.1.2. If the applicant meets the requirements in paragraph R-LTRP.1.1.(a), (b) and (d) for limited leave to remain as a partner they will be granted leave to remain for a period not exceeding 30 months and subject to a condition of no recourse to public funds unless the Secretary of State deems such recourse to be appropriate, and they will be eligible to apply for settlement after a continuous period of at least 120 months with such leave, with limited leave as a partner under paragraph D-LTRP.1.1., or in the UK with entry clearance as a partner under paragraph D-ECP1.1. (excluding in all cases any period of entry clearance or limited leave as a fiancé(e) or proposed civil partner), or, if paragraph E-LTRP.1.11. applies, the applicant will be granted limited leave for a period not exceeding 6 months and subject to a condition of no recourse to public funds and a prohibition on employment.

D-LTRP.1.3. If the applicant does not meet the requirements for limited leave to remain as a partner the application will be refused.

Section EX: Exception

EX.1 This paragraph applies if

(a) (i) the applicant has a genuine and subsisting parental relationship with a child who- ….

……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."

9.
In order to establish whether the claimant meets the requirements of Appendix FM it is necessary to proceed through the Rules in a consecutive manner. If the claimant fails to meet a particular requirement of the Rules in that process, then she fails to meet the criteria in Appendix FM and thus her application under the Rules fails.

10.
The first analysis is in respect of R-LTRP.1.1. In order to meet this she has to meet either R-LTRP.1.1. (a) and (b) and (c) or R-LTRP.1.1. (a) and (b) and (d). She meets R-LTRP.1.1. (a) and (b). She does not meet R-LTRP.1.1.(c) because she does not meet all the requirements of E-LTRP: eligibility for leave to remain as a partner. Specifically she does not meet E-LTRP.2.1.(a) because she was, at the date of application, in the UK as a visitor.

11.
The claimant does not meet R-LTRP.1.1.(d) because although she meets the requirements of E-LTRP. 1.2-1.12 she does not meet E-LTRP.2.1 – she was in the UK as a visitor.

12.
I asked Mr Thathall to direct me to the relevant section in the Immigration Rules that stated that EX.1 was a free-standing paragraph in the Rules such that if an applicant met those requirements leave to remain would be granted. He was unable to direct me to such a paragraph. He relied upon the policy issued by the SSHD on the interpretation of Appendix FM but was again unable to direct me to any relevant section of the policy document that referred to EX.1 as a free-standing route to entitlement for the grant of leave.

13.
The policy referred to by Mr Thathall (dated October 2013) states (1.0, third paragraph) (with emphasis added)

".….first caseworkers must consider whether the applicant meets the requirements of the rules, and if they do, leave under the rules should be granted. If the applicant does not meet the requirements of the rules, the caseworker must move on to a second stage: whether, based on an overall consideration of the facts of the case, there are exceptional circumstances which mean refusal of the application would result in unjustifiably harsh consequences for the individual or their family such that refusal would not be proportionate under Article 8. If there are such exceptional circumstances, leave outside the Rules should be granted. If not the application should be refused.

The two stage approach has been endorsed ….in Nagre [1] . In the judgement Sales J finds that our regime of rules coupled with the Secretary of State's published policy on exceptional circumstances "…fully accommodates the requirements of Article 8" [paragraph 36] and "…there is full coverage of an individual's rights under Article 8 in all cases by a combination of the new rules and (so far as may be necessary) under the Secretary of State's residual discretion to grant leave to remain outside the Rules" [paragraph 35]. Details of how to consider exceptional circumstances are set out below.

3.2.7 …….. Paragraph EX.1 is not to be considered in isolation. It is not a route in itself, but the basis on which applicants with family life in the UK can be granted leave to remain…..

3.2.8 **Exceptional circumstances**

Where an applicant does not meet the requirements of the rules under Appendix FM and/or Appendix FM-SE, refusal of the application will normally be appropriate. However leave can be granted outside the rules where exceptional circumstances apply. Where an applicant fails to meet the requirements of the rules, caseworkers must go on to consider whether there are exceptional circumstances.

"Exceptional" does not mean "unusual" or "unique". Whilst all cases are to some extent unique, those unique factors do not generally render them exceptional… "exceptional" means circumstances in which refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal of the application would not be proportionate. That is likely to be the case only rarely….."

14.
The question of whether paragraph EX.1 applies does not arise; the conjunctive link, "and", requires her to meet paragraph R-LTRP.1.1.d(i) and (ii) before requiring her to meet (iii). EX.1 is not free-standing but is accessible only to those who have successfully navigated their way through the 2 nd of the alternative routes through R-LTRP. Put another way, whereas there are two parts of the requirements to be met under R-LTRP.1.1.(c), under R-LTRP.1.1.(d) there are three.

15.
It is plain from the architecture of the Rules that EX.1 is "parasitic" on a Rule within Appendix FM that otherwise grants leave to remain. If EX.1 was intended to be a free- standing element irrespective of R-LTRP it would have been identified as R-LTRP.1.1.(e) or some other mechanism of identification would have been used. The structure of the Rules as presently drafted requires it to be a component part of R-LTRP.1.1.(d).

16.
The First-tier Tribunal judge erred in law in finding that EX.1 was a free-standing paragraph to be considered irrespective of the other requirements of Appendix FM.

Article 8

17.
Broadly speaking MF (Nigeria) [2013] EWCA Civ 1192 and Nagre make clear that the Immigration Rules as now in force are to be read as incorporating Article 8 of the ECHR but, of course, that existing jurisprudence continues to bind the decision maker and the courts in its interpretation of those Immigration Rules. Put another way a decision purporting to be made in compliance with the Rules will only be sustainable if it is reconcilable with those legal principles as well as the structure of the Rules itself. Otherwise the decision maker will have failed to apply the respondent's policy, set out above, that refusal of the application must not result in unjustifiably harsh consequences such as to be disproportionate under Article 8.

18.
It is plain that the claimant in this case does not and cannot meet the Immigration Rules as set out in Appendix FM.

19.

Paragraph 276ADE considers the requirements to be met by an applicant for leave to remain on the grounds of private life. This claimant does not seek to remain on that basis. In any event there is no suggestion that she meets the requirements of the Rules in that respect.

20.
The judge found there were insurmountable obstacles to the claimant returning to live in Pakistan with her partner. Although in [16] of the determination the judge "accepts the evidence of the Appellant's brother and ....find[s] that he will not assist the couple" this is a finding far from an acceptance that the claimant will be subjected to forced marriage on her return to Pakistan. She has not applied for asylum. Even if she were to be so subjected there is no consideration of the possibility of her and the sponsor living elsewhere than with her brother or other family members save to refer to the sponsor having a job in the UK. There is no assessment of accommodation or jobs other than an unreasoned blanket statement that there is no accommodation or means to maintain them. There is no indication from the determination of the level or nature of care that the sponsor's mother requires or why the other daughter in law could not resume such care as she required. Overall the assessment as to insurmountable obstacles is bereft of sustainable reasoning and on that basis discloses legal error.

21.
Furthermore the judge reached her decision on the basis of the couple returning to live in Pakistan and gave no consideration to the return of the claimant to Pakistan for a short period of time during which she would be able to apply for entry clearance to the UK as a spouse. Of course although the claimant does not meet the requirements now for a variation of leave to remain, an out of country application for entry clearance is subject to different requirements and would be determined on the basis of the facts at the time of the decision.

22.
The judge has failed to factor in to her assessment the required consideration of the SSHD's interest in maintaining immigration control, the failure of the claimant to meet paragraph 284, the failure of the claimant to meet the financial and residence requirements of the Rules and the failure to meet the criteria in Appendix FM. She has failed totally to consider the proportionality of requiring the claimant to return to Pakistan for just a short period in order to apply for entry clearance. These also amount to errors of law.

23.
I conclude that the errors of law identified above are plainly material such as to require that the decision of the First-tier Tribunal is set aside to be re-made .

24.
I gave directions that the following findings of fact are preserved:

i.
The claimant cannot demonstrate that the couple have an annual income of £18,600;

ii.
The claimant has not met the English language qualification;

iii.
The claimant was in the UK with leave to enter and remain as a visitor at the date of application;

iv.
The claimant does not meet the requirements of paragraph 284 of the Immigration Rules;

v.
The claimant and the sponsor are in a subsisting and genuine marriage;

vi.
The claimant's father has died since her arrival in the UK, leaving her brother as head of the family;

vii.
The claimant's brother does not approve of the marriage and considers she has brought dishonour to the family;

viii.
The sponsor was born in the UK, has lived all his life in the UK and lives in his mother's home which is owned outright.

25.
The claimant was further directed to file and serve such witness statements as were to be relied upon.

Resumed hearing on 15 th January 2014

26.
I received witness statements from the claimant, her sister and her husband and heard oral evidence from each of them. Mr Thathall relied upon his previous skeleton argument; Mr Smart submitted an extract from the guide to visa processing times from the UKBA website extracted on 14 th January 2014 and my attention was specifically drawn to Hayat [2012] EWCA Civ 10 and Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC).

27.
All of the witnesses' evidence was that the claimant could not return to Pakistan for fear of her brother. (Mr Thathall confirmed, as he had at the earlier hearing, that an asylum claim had not been made.) The alleged fear was not explained other than that he was opposed to the marriage and had wanted her to marry someone else. It was agreed that the claimant had avoided being married to anyone else despite the desire on the part of her family that she should marry. All the witnesses stated that it was not possible for the claimant to return to Pakistan for a short period of time whilst awaiting a decision on the grant of entry clearance (which according to the extract from the UKBA website was likely to be somewhere in the region of between 60 and 120 days) and stay at a sibling's home because her brother would find out and kill her. All the witnesses stated that the claimant could not live alone in Pakistan.

28.
The claimant has one step brother (the oldest brother, in the UK), 2 brothers (one in the UK and one in Pakistan) and 8 sisters (3 in the UK and five in Pakistan). The step brother (same father) is the oldest of the siblings but, it was said, was not the head of the family, the next oldest brother was. The witnesses confirmed that the claimant's marriage had taken place whilst her father was alive and he had not objected to the marriage. Shakila Bibi (the claimant's sister) with whom the claimant stayed when she initially came to the UK as a visitor and through whom she met her husband, said that she and her husband were the head of her family but that the elder brother in Pakistan (not the step brother) was the head of the claimant's family. She said that when she goes to Pakistan she lives in her husband's family home. She also confirmed that when married, the wife effectively becomes a part of the husband's family. The claimant's husband said he had no family in Pakistan. It was asserted that the claimant was required to remain in the UK in order to look after and care for her husband's

mother. Although medical evidence was produced showing that her husband's mother had some minor health problems, there was no evidence produced suggestive of the need for a carer. There was no witness statement from the mother.

29.
I was not provided with any or any reasonable or credible explanation why, despite the father agreeing to the wedding several months prior to his death, the older (full) brother has now been able to usurp the position of the claimant's husband and become the head of her family. I was not given any credible explanation why the brother did not accept that the marriage should have taken place; nor was any evidence led or given why, the father having agreed to the marriage prior to his death and the marriage having taken place, it was now the subject of such disagreement from her brother. Nor was I provided with any credible explanation why the claimant could not stay with siblings in Pakistan whilst she awaited the outcome of her entry clearance application. Nor was I provided with any detail of the care the claimant provides for her husband's mother and why it is necessary for her to be in the UK; there was no suggestion that an alternative carer would have to be hired, or that she would become reliant on social services or that her husband would have to give up work to look after her. There was no evidence before me as to the extent that the claimant's mother in law would have difficulties if the claimant were absent for a few months whilst awaiting the outcome of an application for entry clearance.

30.
There was no evidence from any of the claimant's siblings who live in Pakistan stating she could not stay with them or outlining the difficulties or the reasons why the older brother does now object to the marriage or why the older brother has the power or influence to so object given that she is in fact married. There was no explanation why given that she is married her husband is not now head of her family rather than that her brother continues as head of the family; particularly since her marriage took place prior to her father's death when her brother was not in any sense head of the family.

31.
Applying the lower standard of proof applicable to a protection claim (although the appeal was not argued on that basis) I am not satisfied on the basis of the evidence both oral and documentary:

a.
that the claimant's presence in the UK is necessary for the care of her husband's mother either in the short or long term.

b.
That the claimant's brother in Pakistan is head of her family, given that she is now married and in the light of her sister's evidence;

c.
That her brother has decided, contrary to their father's consent and support, that he does not agree with the marriage despite it having taken place when her father was alive and with his consent and, according to her evidence, support;

d.
That her brother will kill her if she returns to Pakistan;

e.

That she would be unable to stay with a sibling in Pakistan whilst awaiting the outcome of an entry clearance application.

32.
The claimant is not subject to a removal decision but Article 8 is to be considered both on the basis of a theoretical removal and the decision as a refusal of leave to remain. In Patel [2013] UKSC 72 Lord Carnwath said:

"55. Thus the balance drawn by the rules may be relevant to the consideration of proportionality……

56. Although the context of the rules may be relevant to the consideration of proportionality….this cannot be equated with a formalised "near-miss" or "sliding scale" principle…..Mrs Huang's case for favourable treatment outside the rules did not turn on how close she had come to compliance with rule 317, but on the application of the family values which underlie that rule and are at the heart of article 8. conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit.

57. It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of States' discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right…."

33.
The public policy of requiring a person to apply under the Immigration Rules from abroad is not the only matter weighing in the SSHD's side of the balance. There are cogent reasons for requiring the claimant to return to Pakistan to make an application for entry clearance and I conclude it would be proportionate for her to dos so. The claimant arrived in the UK as a visitor. She does not meet the requirements of the Rules and it was clear at the time of the marriage that she could not do so; she would be expected to leave the UK and return to Pakistan to make an application for entry clearance absent circumstances such that such a course of action would be unreasonable or harsh, contrary to her right to respect for her family and private life. The likelihood or otherwise of her being able to meet the requirements of the Rules for entry clearance is not a relevant consideration – see SB (Bangladesh) v SSHD [2007] EWCA Civ 28. There has been no evidence before me that could lead to a conclusion that the proposed interference (namely her hypothetical removal to Pakistan from where she would make an application for entry clearance to return as a spouse) in the claimant's right to respect for her family and private life as a woman married to a British citizen living and working in the UK is anything other than proportionate to the competing public interest issues.

34.
The appeal is dismissed.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of errors on a point of law.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.

Date 30 th January 2014

Judge of the Upper Tribunal Coker

[1] Nagre v Secretary of State of the Home Department [2013] EWHC 720 (Admin)