



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/38364/2013

**THE IMMIGRATION ACTS**

Heard at Bradford  
On 10<sup>th</sup> April 2014

Determination Promulgated  
On 01<sup>st</sup> May 2014

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

RAFIKHUSEN HABIBULLA RANGREJ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms Hasmi of Counsel, instructed by Kingswell Watts Solicitors  
For the Respondent: Mr Diwnycz, HOPO

**DETERMINATION AND REASONS**

1. This is the Appellant's appeal against the decision of Judge Grimshaw made following a hearing at Bradford on 6<sup>th</sup> January 2014.

**Background**

2. The Appellant is a citizen of India born on 17<sup>th</sup> April 1977.

3. He has a lengthy immigration history. He entered the UK on 2<sup>nd</sup> June 2000 as a visitor using a forged passport in a false name claiming to be Rafick Wadee, a South African national. Before his visa expired he applied for, and was granted, leave to remain as a student until 30<sup>th</sup> January 2002. Further periods of leave as a student were subsequently granted until 30<sup>th</sup> June 2009. Since that time he has remained in the UK as an overstayer.
4. In September 2006 the Appellant was given a certificate of approval to marry Mrs Riaz, a British citizen, but the marriage did not take place. He married the Sponsor in this case, Jamila Wells Patel, on 27<sup>th</sup> May 2009 having been issued with a second certificate of approval in March 2009. He then made an application for leave to remain as a spouse on 17<sup>th</sup> September 2009 which was refused on 21<sup>st</sup> March 2010. He was served with illegal entrant papers on 26<sup>th</sup> February 2011 and placed on reporting restrictions with which he failed to comply. He filed an application for JR on 10<sup>th</sup> April 2013 and by consent it was agreed on 8<sup>th</sup> July 2013 that the Respondent would reconsider his case.
5. On 2<sup>nd</sup> September 2013, the Respondent set out her reasons for refusal in the following terms. The letter acknowledged that the Appellant made an application for his case to be reconsidered under Article 8 ECHR on 2<sup>nd</sup> March 2009, 9<sup>th</sup> November 2009, 6<sup>th</sup> April 2010, 16<sup>th</sup> May 2011, 12<sup>th</sup> July 2011, 21<sup>st</sup> November 2012 and 24<sup>th</sup> July 2013. The application could not succeed under paragraph 287 of the Immigration Rules because the Appellant had not been granted admission to the UK with a view to settlement as the spouse of a person present and settled in the UK. It was accepted that the Appellant intended to live permanently with Jamila Wells Patel but she had not provided evidence of her employment and could not meet the maintenance and accommodation requirements of the Rules. Neither had he demonstrated knowledge of the English language.
6. The Respondent considered whether the Appellant could succeed under Article 8 with respect to Appendix FM of the Immigration Rules specifically in relation to family life with a partner and family life as a parent. It was not accepted that he could succeed under R-LTRP.1.1 because, although the Appellant had a genuine and subsisting relationship with a British partner, it was not accepted that there were insurmountable obstacles to family life with that partner outside the UK. He therefore did not meet the requirements under paragraph E-LTRP.1.2.
7. Neither did he qualify for leave to remain as a parent under paragraph E-LTRPT.2.2 because there was no evidence to suggest that it would not be reasonable to expect the Appellant's two daughters and a son to return to India with their step-father/father and mother.
8. The Respondent then considered paragraphs EX1 in the following way. It was acknowledged that the children were born in the UK but there was no evidence to suggest that it would not be reasonable to expect them to return to India with their mother and remain as a family unit. The best interests of the children were considered and it was not sought to remove them from the UK. The Appellant had

not submitted sufficient evidence to demonstrate that he had a relationship sufficient to engage Article 8 with his stepdaughter and daughter and son and had failed to adequately substantiate how his proposed removal would adversely impact upon the children's wellbeing and development. The Appellant would have the opportunity to apply for entry clearance from abroad.

9. The Appellant did not meet the requirements of Rule 276ADE, and the Respondent did not accept that the existence of private and family life was a sufficiently compelling reason for making them an exception to the normal practice of removing those who have remained in the UK unlawfully.
10. Finally, the letter cites paragraph 353B, which deals with fresh claims for asylum, and refers to the Appellant's immigration offences, in particular obtaining leave using a forged passport and entering and remaining in the UK using a deceptive identity.

### **The Judge's Determination**

11. The judge recorded that the Appellant had no prospect of succeeding under paragraph 287 of the Immigration Rules. He submitted his application in September 2009 when he had no leave and accordingly had no in-country right of appeal against the adverse decision made by the Respondent on 21<sup>st</sup> March 2010. He did however have a right of appeal against the decision of 2<sup>nd</sup> September 2013 because he had made a human rights application based on his relationship with the wife and children.
12. The judge, in a careful determination, considered the factors in favour of the Appellant including the significant fact that he had joint parental responsibility for three young children who were British citizens and established in nursery and primary school education. She said that it would be unreasonable to expect them to leave the country of their birth for a country which was unfamiliar and where the standard of living would be poorer. The best interests of all the children were for the Appellant to remain in the UK so that they could enjoy the benefit of family life together.
13. She nevertheless dismissed the appeal because of the strong factors relied upon by the Respondent i.e the Appellant's immigration history, and whilst the best interests of the children were a primary consideration, they were not the sole primary consideration. It would not be unjustifiably harsh to expect Mrs Wells Patel to make a matrimonial home with the Appellant and their children in India if the couple wish to cohabit and enjoy family life without a period of separation.

### **The Grounds of Appeal**

14. The Appellant sought permission to appeal on the grounds that the judge had materially erred in law in failing to consider the Appellant's claim in accordance with

paragraph EX1 of the Appendix FM to the Immigration Rules, had conducted a flawed approach to Article 8 and had made perverse and irrational findings on matters material to the outcome.

15. The findings in the determination at paragraphs 24 and 25, namely that the Appellant was in a genuine and subsisting relationship with a British citizen and it would be unreasonable for the three British children to leave the UK, established that the requirements of EX1 had been satisfied.
16. The judge had also erred in her consideration of Article 8 which did not reflect a necessary, proportionate and fair balance between the Appellant and his children's rights to family life and the public interest. There was no evidence that the judge had identified the particular public interest in question and had not considered the relevant case law in particular EB Kosovo [2008] UKHL 41 and ZH Bangladesh [2009] EWCA Civ 818.
17. Permission to appeal was granted by Judge De Haney on 5<sup>th</sup> February 2014 with respect to paragraph EX1 only. He stated that the lengthy grounds, in the most part, amounted to no more than a disagreement with the findings of the judge.

### Submissions

18. Ms Hasmi firstly submitted that the decision in Sabir (Appendix FM – EX1 not freestanding) [2014] UKUT 00063, was wrongly decided. Sabir held that it was plain from the architecture of the Rules as regards partners, that EX1 is parasitic on the relevant Rule within Appendix FM that otherwise grants leave to remain. The Appellant in that case failed because he could not meet the requirements of E-LTRP.2.1 since he had leave to remain in the UK as a visitor.
19. More profitably Ms Hasmi then submitted that Sabir was distinguishable because there, the Appellant was unable to navigate his way through one of the alternative routes through R-LTRP, but in this case, he could.
20. She also sought to reopen her grounds with respect to the judge's consideration of Article 8.
21. Mr Diwnycz said that if the judge ought to have considered paragraph EX1 then, on the basis of the findings of the judge, Ms Hasmi's submissions had force.

### Findings and Conclusions

22. The relevant requirements of Appendix FM 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 to 1.12 and E-LTRP.2.1.; and
    - (iii) paragraph EX.1 applies.”

23. Section E-LTRP.1.2 sets out the relationship requirements, none of which are in issue in this appeal.

24. Section E-LTRP.2.1 sets out the immigration status requirements as follows:

“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 the 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 EX1 applies.”

“Section 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;
  - (bb) is in the UK;

- (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
- (ii) it would not be reasonable 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.”

25. In Sabir the Tribunal held that the First-tier judge erred in finding that EX1 was a freestanding paragraph to be considered irrespective of the other requirements of Appendix FM.

26. They wrote as follows:

“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<sup>nd</sup> 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.

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).”

27. The relevant requirement in Sabir was E-LTRP2.1, and the Appellant in that case, who had been granted leave to remain as a visitor, could not meet it.

28. Ms Hasmi established that the Appellant in this case has been able to navigate his way through Section R-LTRP(d)(i)-(iii) in the following way.

29. No issue has been raised with respect to R-LTRP.1.1(a), (b) and (c)(i). The appellant and his partner are in the UK and have made a valid application for limited leave. Perhaps surprisingly, Section S-LTR, the suitability requirement, was not raised either. There is a puzzling reference in the refusal letter to paragraph 353B, which on the face of it has no application, and Mr Diwncyz, when asked, stated that he was not raising suitability now.

30. So far as Section E-LTRP, eligibility for leave to remain as a partner is concerned, no issue was raised with respect to E-LTRP.1.2 - 12. The relationship between the Appellant and Sponsor is unchallenged. E-LTRP.2.1 does not apply.
31. E-LTRP.2.2 states in terms that the applicant must not be in the UK in breach of Immigration laws, unless paragraph EX1 applies. Accordingly the Appellant is entitled to rely upon paragraph EX1.
32. The judge found that it would not be reasonable to expect the three British children who are established in nursery and primary school education to leave the UK and live in an unfamiliar country where the standard of living would be poorer. No challenge was made by Mr Diwncyz to her conclusions. Although she later said in connection with her consideration of Article 8 generally that it would not be unjustifiably harsh to expect the whole family to relocate to India that is not the test imposed by Section EX1(a)(ii).
33. The judge erred in law in failing to consider whether Section EX1 applied. It does, and on her findings, the Appellant succeeds under the Rules.

**Decision**

34. The original judge erred in law and the decision is set aside. The following decision is substituted. The appeal is allowed.

Signed

Date

Upper Tribunal Judge Taylor