Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04593/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 January 2018	**On 9 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MS KIRAN [H]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Lee, Counsel instructed by Kent Immigration & Visa Advice
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. I refer to the Upper Tribunal's decision in error of law dated 25 November 2017 whereby this Tribunal found a material error of law and issued directions for remaking of the decision including hearing evidence from a witness not then available. I rely on the appellant's background set out in that error of law decision which is appended to this decision and reasons.

Appellant's Claim

2. The appellant's claim is set out in her witness statements which were before me. As indicated in the error of law decision, the judge's findings at paragraphs 1 to 20 of the decision of the First-tier Tribunal promulgated on 17 February 2017, are preserved. It is accepted therefore, including by Mr Tufan, that the appellant and her partner are in a genuine relationship.

3. In addition, although one of the significant issues before the Judge of the First-tier Tribunal was that he did not accept that it had been shown that the previous relationships had broken down (both the appellant and the sponsor having been previously married, the sponsor still being formally married but not in a relationship with his wife), further evidence has how been produced including a witness statement from the sponsor's first wife and the appellant's divorce certificate and translation. As a result, Mr Tufan indicated that the respondent accepted that the previous relationships of the appellant and her partner had broken down (as required by E-LTRP.1.9 of Appendix FM).

4. It was Mr Lee's submission that the relevant Immigration Rules were met at the date of the respondent's decision.

5. The respondent refused the appellant's application under Appendix FM, five year route, due to not only the lack of evidence that the previous relationships had broken down, but in addition in relation to the financial requirements not being met and specifically as set out in the refusal letter (and discussed at the hearing before me). The specific requirements of Appendix FM-SE were not met.

6. I heard oral evidence and submissions from both representatives. At the end of the hearing I reserved my decision.

Findings and Reasons

7. Contrary to the findings of the First-tier Tribunal Judge I am satisfied that the requirements of R-LTRP.1.1 are met as follows:

   (i) The applicant must not fall for refusal under Section S-LTR suitability of leave to remain – such was not disputed; and

   (ii) The applicant meets all the requirements of Section E-LTRP: eligibility for leave to remain as a partner.

8. Paragraphs E-LTRP1.7, E-LTRP1.9 and E-LTRP1.10 of the Immigration Rules provide as follows:

   "E-LTRP.1.7. The relationship between the applicant and their partner must be genuine and subsisting – on the basis of the preserved findings of the Judge of the First-tier Tribunal Sethi. I am satisfied that this requirement is met.

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 – as already indicated Mr Tufan adopted the position at the hearing that this requirement was met and I am satisfied that that is the proper approach on the basis of the evidence before the Tribunal.

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 – again, on the basis of Judge Sethi's adopted findings I am satisfied that this requirement is met.

9. In addition, E-LTRP.3.1 and E-LTRP.3.2(a) of the Immigration Rules provide:

"E-LTRP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-LTRP.3.2., of –

(a) a specified gross annual income of at least –

(i) £18,600;

(ii) an additional £3,800 for the first child; and

(iii) an additional £2,400 for each additional child; alone or in combination with

(b) specified savings of –

(i) £16,000; and

(ii) additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph E-LTRP.3.2.(a)-(f) and the total amount required under paragraph E- LTRP.3.1.(a); or

(c) the requirements in paragraph E-LTRP.3.3.being met, unless paragraph EX.1. applies."

10. It is not disputed that at the date of decision the appellant did not meet these financial requirements due to a failure to provide the specified information required in Appendix FM-SE; Mr Lee submitted that she was not well-served by her representatives in this regard.

11. The respondent was not therefore satisfied that the appellant could meet the requirements of R-LTRP1.1(c) for leave under the five year settlement route. The respondent went on to consider, in the Reasons for Refusal Letter dated 12 August 2015, whether the appellant qualified under Appendix FM EX.1. of the Rules, which required that an applicant must meet all the requirements of R-LTRP.1.1(a), (b) and (d) in order for EX.1. to apply.

12. The requirements of Appendix FM are – LTRP.1.1(d) under the ten year route are that –

> "(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) Paragraphs EX.1. and EX.2. apply."

13. The requirements of EX.1 and EX.2 are as follows:

> "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 seven 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.
>
> EX.1.2 For the purposes of paragraph EX.1(b) 'insurmountable obstacles' means the very or significant difficulties which are to be faced by the applicant or their partner in continuing their family life outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

14. Although it was not disputed before me that the appellant now satisfied the eligibility requirements, it was conceded by Mr Lee that the appellant does not have

a genuine and subsisting parental relationship, at the date of application or indeed the date of decision, with a qualifying child in the UK.

15. Therefore, Mr Tufan was correct in his submission, that in order to demonstrate that the appellant met the requirements of Appendix FM at the date of decision, the appellant would need to demonstrate that there were insurmountable obstacles to the appellant and partner continuing family life outside the UK which could not be overcome but would entail very serious hardship for the appellant or their partner.

16. In reaching my findings I have considered the relevant case law including **Agyarko and Ikuga R (on the applications of) v Secretary of State for the Home Department [2017] UKSC 11** which confirms that the test of insurmountable obstacles is a stringent one.

17. Mr Lee sought to rely on the findings of Judge Sethi, at paragraph 37 of the Decision and Reasons of the First-tier Tribunal, where Judge Sethi was satisfied that the sponsor was a British citizen as are his children and that the sponsor is fully integrated in British society. The judge of the First-tier Tribunal accepted that the sponsor was fully integrated into British society, this is where he had his home and business and his children with whom he continues to have a genuine and subsisting relationship. The judge accepted that he had family life with his two youngest children and at the date of the First-tier Tribunal decision his youngest child was a minor and the other an unmarried 19 year old.

18. All of the sponsor's children are now adults but I accept that the situation has continued as it was before the First-tier Tribunal Judge where his adult children continue to live with their mother, his estranged wife, with regular contact with the sponsor. I have considered the relevant jurisprudence including **Kugathas [2003] EWCA Civ 31** and I am satisfied, given that the adult children continue to live in their mother's family home, albeit financially supported by the sponsor and to some extent emotionally dependent on their father, that family life exists.

19. However, there is no best interest consideration required in relation to adult children. The adult children of the sponsor's previous relationship continue to live with their mother and as noted have contact with their father and I accept there is family life. There is no evidence before me to suggest that the financial support the sponsor gives his children would cease if he were required to go to Pakistan. There was evidence before me that the sponsor has had and continues to have a number of restaurant businesses in the UK and he indicated in oral evidence before me that he was about to purchase another such business, having sold some of his previous businesses.

20. In finding as Judge Sethi did that it would not be reasonable to expect family life to continue in Pakistan Judge Sethi applied the wrong test. Although there is one family life and it may present difficulties to the sponsor in maintaining family life, such as it continues to be, given that all his children are adults and will increasingly lead their own independent lives, if the sponsor returns to Pakistan with the appellant, I am not satisfied that it has been demonstrated that such is an

insurmountable obstacle. I have taken into consideration that it was the consistent evidence before me of all the witnesses that the sponsor sees his adult children once every week or once every ten days and that he speaks to them on the telephone two to three times a week. There was no evidence to suggest that the telephone contact could not continue and that his relationship with his children could continue 'through visits and communication means'. In so finding, although modern communication means is normally not a substitute for family life continuing in the same country, this must be considered in the context of adult children who will be increasing in their independence; there was evidence before me that his youngest child is on a gap year and his second youngest child is in her second year at university and as already noted the children continue to live with their mother.

21. In assessing whether there are very significant difficulties in the appellant and the sponsor moving to Pakistan I have taken into consideration the evidence before me. This includes evidence in relation to the sponsor's business. I accept that the sponsor has a viable ongoing business in the UK consisting of a number of restaurants. I have also taken into consideration that the sponsor is a British citizen and that he has lived in the UK since the age of 16. However I rely on the guidance given by the Court of Appeal in **Agyarko & Others R (on the application of) v Secretary of State for the Home Department [2015] EWCA Civ 440** and in the Supreme Court in **Agyarko.** At paragraph 25 of the Court of Appeal decision, it was outlined the mere fact that a sponsor is a British citizen, has lived all their life in the UK and has a job here and hence may find it difficult and might be reluctant to relocate could not constitute insurmountable obstacles.

22. I have also taken into consideration the evidence of both the appellant and the sponsor that they have concerns as to maintaining their relationship abroad as the sponsor is originally from Bangladesh and the appellant is from Pakistan and their families are not supportive of the relationship. However, as Mr Tufan pointed out there is a large Bengali population in Karachi. Although it was indicated that the appellant's family are from Lahore, that in itself, even when considered cumulatively with all the other factors, would not constitute insurmountable obstacles in requiring the couple to relocate to Pakistan. There was no independent evidence before me to suggest that there would be such difficulties. I have taken into consideration that the sponsor has demonstrated an ability to establish businesses in the UK and there was no adequate evidence before me to suggest that he would not be able to deploy his entrepreneurial abilities in a similar capacity in Pakistan. Although I accept that the sponsor would need to obtain a visa, there was no evidence before me to suggest that he would be unable to obtain one or that this process would amount, when considered cumulatively, to insurmountable obstacles to family life.

23. In reaching this finding I have taken into consideration that the sponsor had a heart attack in 2016. Such was not disputed. Although he indicated that he needed his wife with him, there was no medical evidence to support his need for her ongoing presence and I have taken into consideration that he continues to run and indeed establish new businesses. Although I accept, despite the lack of medical evidence, that he may require ongoing medication and monitoring I am not satisfied, and there

was no evidence to suggest, that he could not receive any care that he needs in Pakistan if the couple were returned there. Equally, I have also taken into consideration that the sponsor is originally from Bangladesh and there was no adequate evidence to support the appellant's claim that she could not go and live there because of the history between the two countries and that she had never been there. Again, there was no adequate evidence before me that obtaining a visa would amount to insurmountable obstacles if the couple decided to relocate there. I am not satisfied that it has been shown that there would be "very serious hardship" to family life continuing outside of the UK.

24. I also consider that there would be no insurmountable obstacles to the appellant and the sponsor continuing family life in Pakistan whilst the appellant applies for entry clearance or on a more extended basis. There was no cogent evidence that the sponsor's businesses could not continue in his absence or that, as already indicated, he could not establish himself business or employment-wise outside the UK. The appellant told me that her younger sister is still in Pakistan as well as extended family. Although she told me that her family were unhappy about her relationship there was no adequate information to suggest that this would prevent the appellant and the sponsor establishing themselves in Pakistan either on a temporary or a more permanent basis.

25. I accept that there was evidence that on the face of it the sponsor appears to meet the financial threshold. However, although Mr Lee valiantly submitted that some of the correct evidence (in terms of Appendix FM-SE) was before the Upper Tribunal, this appeared piecemeal at best and he did not continue with those submissions when I pointed to the various issues which had been raised in the refusal letter relation to Appendix FM-SE. It cannot be said therefore that the appellant has demonstrated that she does meet the provisions of Appendix FM

26. I am also of the view that there were no compelling reasons before me that could lead to a decision in the appellant's favour outside the provisions of Appendix FM. I have nevertheless applied the five stage approach recommended in **Razgar [2004] UKHL 27.** The key question is one of proportionality and I have considered a 'balance-sheet' approach (see **Hesham Ali v SSHD [2016] UKSC 60).**

27. I have taken into consideration that although the appellant now meets the requirements in relation to her relationship with the sponsor they have not demonstrated that they meet the financial requirements including in terms of Appendix FM-SE. I have taken into consideration what was said Paragraph 76 of **MM (Lebanon) [2017] UKSC 10**, that the tribunal should attach considerable weight to judgments made by the Secretary of State in the exercise of her responsibility for immigration policy. However:

"not everything in the rules need be treated as high policy or peculiarly within the province of the Secretary of State, nor as necessarily entitled to the same weight. The tribunal is entitled to see a difference in principle between the underlying public interest considerations, as set by the Secretary of State with the approval of

Parliament, and the working out of that policy through the detailed machinery of the rules and its application to individual cases. The former naturally include issues such as the seriousness of levels of offending sufficient to require deportation in the public interest (**Hesham Ali**, para 46). Similar considerations would apply to rules reflecting the Secretary of State's assessment of levels of income required to avoid a burden on public resources, informed as it is by the specialist expertise of the Migration Advisory Committee. By contrast rules as to the quality of evidence necessary to satisfy that test in a particular case are, as the committee acknowledged, matters of practicality rather than principle; and as such matters on which the tribunal may more readily draw on its own experience and expertise."

28. I have taken into consideration that this is not a case where the appellant is an overstayer. However I have taken into consideration, as I must, the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002. I accept that the appellant speaks English and that she is financially independent and therefore no public interest attaches to these limbs of the test although at best they are neutral factors. However I remind myself that the maintenance of effective immigration controls in itself is in the public interest. I am not satisfied, relying on my findings above in relation to Appendix FM Ex.1, that requiring the appellant and her husband to relocate to either Pakistan or Bangladesh would be a disproportionate interference with that family life.

29. I have also considered the submissions of the parties in relation to **Chikwamba v SSHD [2008] UKHL 40**. It was Mr Lee's submission that any application for Entry Clearance would succeed. I have taken into consideration what was said in the Supreme Court in **Agyarko** including at paragraph 51 as follows:

> "Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*."

30. Although I have attached considerable weight to the fact that the appellant was in the UK lawfully and that the appellant appears to meet the financial threshold, I agree with Mr Tufan's submission that there was no certainty that the appellant would be granted entry clearance. In doing so, I have considered what was said by this Tribunal in **Chikwamba**: **R (on the application of Chen) IJR [2015] UKUT 189 (IAC)** which confirmed that there may be cases where there are no insurmountable obstacles to family life (which I have found to be the case in this appeal), but where temporary separation may be disproportionate. However:

> "in all cases it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case law concerning **Chikwamba v SSHD [2008] UKHL 40**".

31. In my findings the appellant has not demonstrated, taking into account all the factors, that requiring her to make such an application in this case would be disproportionate.

Notice of Decision

32. The decision of the First-tier Tribunal contains an error of law and was set aside to the extent set out in my error of law decision. I remake the appeal as follows. The appellant's appeal is dismissed on all grounds.

No anonymity direction was sought or is made.

Signed Date: 7 February 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed and I make no fee award.

Signed Date: 7 February 2018

Deputy Upper Tribunal Judge Hutchinson

APPENDIX

IAC-FH-LW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04593/2015

THE IMMIGRATION ACTS

Heard at Field House
On 8 November 2017

Decision & Reasons Promulgated

……

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

KIRAN [H]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Lee, Counsel instructed by Kent Immigration & Visa Advice
For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on [ ] 1979. She appealed to the First-tier Tribunal against the respondent's decision dated 12 August 2015 to refuse her leave to remain in the United Kingdom on human rights grounds as the partner of a British citizen. In a decision promulgated on 17 February 2017, following a hearing on 20

January 2017, Judge of the First-tier Tribunal Sethi dismissed the appellant's appeal under the Immigration Rules and on human rights grounds.

2. The appellant appeals with permission on the following grounds:

   (a) the First-tier Tribunal Judge materially erred in her analysis as to whether the appellant's and her partner's previous marriages had permanently broken down, in circumstances where the judge had accepted that the appellant and sponsor had lived together in a genuine and subsisting relationship since 6 September 2012 and that they intended to permanently live together in the UK;

   (b) the judge wrongly applied the case of **R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189**, when considering proportionality given that the judge has accepted that there were insurmountable obstacles to family life continuing abroad and that the appellant was lawfully in the UK and was entitled to make the application she did within the UK to switch categories.

Decision on Error of Law and Directions

3. For the reasons set out below I am satisfied that the judge materially erred in law, such that her conclusions fall to be set aside. It was not disputed by Ms Willocks-Briscoe that the judge's findings in relation to the genuineness of the relationship between the appellant and her sponsor were adequate and could stand. I therefore preserve the judge's findings up to and including paragraph [20] of the Decision and Reasons.

4. The judge accepted, at [17], that the appellant and her partner (LR) had given a truthful account of their relationship having had the benefit of oral evidence from the appellant and her partner as well as oral evidence from the sponsor's daughter. She accepted that they had cohabited in a genuine and subsisting relationship akin to marriage since September 2012 and that it was their intention to continue to live together permanently in such a relationship, paragraph [20]. As already noted there was no dispute as to those findings.

5. However, the judge went on to find at [24] that notwithstanding that she was satisfied that:

   > "the appellant and the sponsor have been in a genuine and subsisting relationship as an unmarried couple since 2012 that the requirements of E-LTRP 1.9 were not shown to have been satisfied at the date of the application."

6. E-LTRP.1.9. requires as follows:

   > "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."

7. Both the appellant and the sponsor were previously married. The judge noted, at [23], that the appellant was married in Pakistan in 2000 and she stated at paragraph 9 of her witness statement that she got divorced about a year later, although the judge noted that there was no evidence submitted to show that she was not still legally married. The judge noted that the appellant gave oral evidence at the appeal that her previous relationship had ended in a divorce, however the judge went on to find that there was no evidence with the application to show that her previous relationship had permanently broken down. The judge went on to find in the same paragraph that:

> "Equally in relation to the sponsor it is not in dispute that he married in 1987 and that at the date of the appellant's application, as at the date of hearing, he remains legally married to [JR], a British Citizen living in the UK."

8. Although the respondent's Rule 24 notice dated 24 September 2017 and Ms Willocks-Briscoe sought to maintain that the judge's findings were open to her, albeit that Ms Willocks-Briscoe did not pursue this argument with any great force, I am of the view that the judge's findings disclose a material misunderstanding of E-LTRP.1.9., in that the judge conflates the requirement that any previous relationships must have broken down permanently, with a requirement that the parties must provide documentary evidence that the relationship has been legally dissolved.

9. The respondent's own guidance, at page 22 of the Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0a Family Life (as a Partner or Parent) and Private Life 10-Year Routes August 2015 provides as follows:

> "**Note:** An applicant whose marriage or civil partnership to a previous partner (or that of the applicant's partner) has not been legally dissolved, may qualify under Appendix FM as an unmarried partner or same sex partner, provided that they meet the criteria of paragraph GEN.1.2. ... and they provide evidence that the new relationship is genuine and subsisting and that the previous relationship has broken down permanently."

10. With respect to the appellant's previous relationship, the judge's findings at [23] in my view disclose an error in that she equates the lack of evidence of the divorce with a lack of evidence that the previous relationship had broken down. The judge accepted that the appellant was living with the sponsor and there was no evidence before the judge and no findings to suggest anything otherwise in relation to any continuing relationship between the appellant and her previous husband. The fact that the judge specifically refers to no evidence being submitted "to show that she was not still legally married" highlights that error on the judge's part.

11. With respect to the relationship between the appellant's sponsor and his first wife, the judge made a finding at [23] that the sponsor remains legally married to [JR] which, in effect, led the judge to find that the appellant could not meet E-LTRP.1.9. at [24]; in addition in the judge's findings in respect of Article 8, whilst I note that the judge made no further comment or findings in relation to the appellant's previous

relationship (which in my view further underlines her mistake at [23] in requiring evidence of a formal divorce), the judge did make findings including at [39] and [40] as to the sponsor's first marriage.

12. The judge considered the sponsor's evidence that he and his wife are estranged and considered a witness statement from the sponsor's wife in which [JR] stated:

> "Our relationship broke down permanently in 2012".

However, the judge noted that [JR] was not present at the hearing and her evidence had not been tested and attached limited weight to the written evidence. The judge bore in mind that the sponsor's daughter had given evidence, which the judge accepted as credible, that the sponsor and the appellant cohabited as a couple. However, the judge went on to find that although the sponsor and appellant cohabit as unmarried partners, this was insufficient in itself to cause her to be satisfied that the sponsor's marriage had in fact ended permanently. The judge took into account paragraphs 17 and 18 of [JR]'s statement where it was said that:

> "17. [LR] still comes to our house maybe once or twice a week to collect his mail and see the children.
>
> 18. He supports us financially and he has a key to the house."

13. The judge found that there was no good reason why the sponsor would still have a key to his wife's home and/or be collecting personal mail from this property five years on, in circumstances where it is said that his marriage has ended and he has lived permanently with the appellant since 2012. The judge found this to be especially so where [JR] described, at paragraph 15 of her statement, that she had recently moved house. The judge went on, at [40], to consider the sponsor's evidence that he and his wife were not divorced because his wife had agreed to the relationship with the appellant on the basis that he did not divorce her and the sponsor's daughter also gave evidence that she "likes the idea of her parents being married" and that she and her siblings would be upset if her father and mother divorced. The judge accepted that it was a matter of personal choice for the sponsor and his family as to whether he and his wife divorced, but went on to find that there was no evidence to demonstrate that there were any legal or religious barriers that would prevent the sponsor and his wife from seeking the dissolution of their marriage and that equally there appeared to be no legal or religious barriers to their choosing to effect a legal separation. The judge went on to find, at [41], that the position in the present case was that the parties had elected to form an additional or alternative family unit and, at [42], that although the judge was satisfied that the appellant and sponsor had a genuine subsisting relationship and intended to live together permanently, she was not satisfied without further that this meant his relationship with his wife had ended permanently.

14. The judge's effective requirement, at [40], for a document showing either a legal dissolution or a legal separation of the sponsor's marriage infects her findings as summarised above, including at [39], as to whether the sponsor's first marriage had

permanently broken down. Although Ms Willocks-Briscoe submitted that the judge was entitled to consider that the relationship had not broken down, especially since the sponsor's wife had moved house and the sponsor still had a key, and it was her submission that emotional dependency could be inferred, if that was the judge's finding, it was incumbent on her make such findings and give reasons for reaching those conclusions. In light of her unchallenged findings as to the genuineness of the sponsor and appellant's relationship (including at [37] that it would not be reasonable for family life between the appellant and sponsor to continue in Pakistan), it was incumbent on the judge to provide adequate reasons for nevertheless finding that the sponsor's first relationship had not permanently broken down.

15. There were, for example, no findings as to any physical relationship between the sponsor and his first wife. There was also no discussion as to the definition of what a relationship that has permanently broken down means. Its meaning is not in my view inconsistent with continued contact between the parties, or indeed regular visits (and the holding of a key) in circumstances where the parties had children and the sponsor was supporting his first wife financially and providing accommodation. As Mr Lee put it, it is highly unlikely that the Secretary of State or any Tribunal would accept an assertion of the existence of a genuine and subsisting relationship in circumstances where the applicant held a key and visited his alleged partner once or twice a week to collect mail or visit children whilst cohabiting with another partner on a full-time basis.

16. As I have already indicated there is no need to show a formal dissolution of a previous marriage in order to qualify under EX-1 of Appendix FM and the judge in effect found that without such a formal dissolution neither the appellant nor her sponsor could show that the previous relationship had broken down permanently, which is inconsistent with the Rules and guidance. The judge has failed to provide adequate reasoning in this context to support her finding that the relationship between the sponsor and his first wife had not permanently broken down. I take into account that there was no finding with regard to a physical relationship and no finding with regard to any continued emotional dependency and I do not accept Ms Willocks-Briscoe's submission that such a finding of emotional dependency was implicit. I reiterate that in view of the judge's very clear findings of the strength and genuineness of the relationship between the appellant and the sponsor it was essential that the judge make clear findings as to why the first relationships had not permanently broken down.

17. In these circumstances there is a material error of law such that the judge's conclusions had to be set aside.

Re-making of the decision

18. I was initially disposed to remaking the decision at the hearing. The appellant and the sponsor were present and available to give evidence. However, the sponsor's daughter who gave evidence at the first hearing, [SR], was not available; I was told she was at university.

19. Although I indicated that I was minded to preserve the judge's findings up to and including paragraph [20], given that the Tribunal will have to reach further findings of fact, including specifically with regard to whether the previous relationships have broken down permanently and whether there are insurmountable obstacles to family life with the sponsor continuing outside the UK, I shared Ms Willocks-Briscoe's concern as to the absence of the third witness.

Notice of Decision on Error of Law

The First-tier Tribunal's determination contains an error of law capable of affecting the outcome of the appeal and is set aside. The judge's findings of fact up to and including [20] are to be preserved

The decision on the appeal will be remade by the Upper Tribunal.

Directions

A. The appellant is to file and serve a consolidated bundle of evidence so that it is received no later than 11 December 2017. The bundle is to separately tabulate: (i) the evidence relied upon before the First-tier Tribunal; and, (ii) the additional evidence that it is now sought to rely upon before the Upper Tribunal. The bundle must contain any evidence relied on to address both the issue of whether the previous relationships have broken down and how the additional requirements of Appendix FM, EX.1 are satisfied or how it is contended that the appellant can otherwise succeed (and I note that the sponsor's youngest child is now 18). The Tribunal would be assisted by further evidence including oral evidence at the hearing from the sponsor's wife and it is anticipated that the aforementioned bundle will include updated witness statements from all witnesses to be called, to stand as their evidence-in-chief.

B. The Secretary of State is to file and serve, by no later than 18 December 2017, any evidence relied upon that is not contained within the bundle she relied upon before the FtT.

Any failure to comply with these directions may lead the Tribunal to exercise its powers to decide the appeal without a further oral hearing, or to conclude that the defaulting party has no relevant information, evidence or submissions to provide.

No anonymity direction is sought or is made.

Signed Date:

Deputy Upper Tribunal Judge Hutchinson