Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18270/2013

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court	**Determination Promulgated**
On 9 June 2014	**On 26 August 2014**

Before

UPPER TRIBUNAL JUDGE COKER
DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FARZANA KAUSAR

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Mr T Khan, St Pauls Chambers, Birmingham

DETERMINATION AND REASONS

Immigration and appeal history

1. Ms Kausar was born on 15 June 1971 and is a citizen of Pakistan. She arrived in the UK on 13 September 2011 with entry clearance as a visitor that acted as leave to enter to 29 February 2012. On 23 February 2012, she applied to vary her leave so as to remain in the UK to care for her three children, born in 1994, 1998 and 1999, who are all British citizens.

2. Ms Kausar's children were brought to the UK by their father, also a British citizen, in November 2009. He and Ms Kausar married in 1993 in Pakistan but were divorced

on 20 September 2012. Ms Kausar had given permission for her children to be brought temporarily to the UK and it was as a result of their father refusing to return them to Pakistan that prompted her to seek entry clearance as a visitor so she could be reunited with them. Her intention was simply to visit; however, soon after arriving here she discovered that the children's father was not providing adequate care. It was this discovery that led Ms Kausar to seek permission to remain in the UK, the children having been abandoned by their father.

3. On 7 May 2013, the Secretary of State refused to vary Ms Kausar's leave. The reasons given for this decision were that the requirements set out at paragraph EX.1. of appendix FM to the immigration rules were not met because she had failed to demonstrate that she was enjoying a genuine and subsisting parental relationship with her children. The basis for this decision was the lack of documentary evidence to show contact between Ms Kausar and her children, despite a request on 13 March 2013 for such evidence to be provided.

4. At the same time, the Secretary of State made a decision to remove the appellant by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006.

5. In making her decision not to vary leave, the Secretary of State relied on paragraph R-LTRPT.1.1.(d) of appendix FM. For convenience, we set out the provisions of section R-LTRPT: Requirements for limited leave to remain as a parent as they were at the date of decision in the annex to this determination. As will become clear below, central to the issues we have to resolve is how those provisions are to be interpreted and applied.

6. Ms Kausar appealed to the First-tier Tribunal against the Secretary of State's decisions as she was entitled to do under s.82(1) of the Nationality, Immigration and Asylum Act 2002. At the hearing of her appeal, the Secretary of State withdrew the s.47 removal decision because she accepted she did not have power in law to make that decision (the amendments to s.47 of the 2006 Act introduced by the Crime and Courts Act 2013 entering into force on 8 May 2013). Thus the appeal was limited to consideration of the refusal to vary leave.

7. The parties raised a number of issues before and during the hearing. Ms Kausar said she met the requirements of paragraph EX.1 of appendix FM to the immigration rules but if she could not benefit from those provisions, then her appeal should succeed on article 8 ECHR applied directly. The Secretary of State argued that Ms Kausar could not benefit from paragraph EX.1 as she had leave to enter as a visitor. As such, she did not meet the immigration requirements set out in paragraph E-LTRPT.3.1. For convenience, article 8 and paragraph EX.1 are set out in the annex to this determination although, as will be seen, we do not need to consider the content of either in detail.

8. After setting out the competing positions, the Judge of the First-tier Tribunal made the following observation:

> "However, in my interpretation of the rules, even though [Ms Kausar] came here as a

visitor she can benefit from the rules if she meets the criteria of paragraph EX.1 …"

The judge went on to find that Ms Kausar met the requirements of paragraph EX.1 and allowed the appeal on that basis. Despite the alternative basis on which the appeal was pursued, the judge did not consider article 8 ECHR directly and made no finding as to whether article 8(1) was engaged or whether the immigration decision was proportionate in all the circumstances.

9. Because there was a lack of explanation as to why the judge decided paragraph EX.1 applied to Ms Kausar's case, the Secretary of State applied for permission to appeal to the Upper Tribunal, such permission being granted on 27 February 2014.

10. There are a couple of preliminary points we need to make before we can address the issues arising in the appeal.

11. We recognise that at some point between the making of the immigration decisions and the hearing, the Secretary of State changed the case against the appellant. Although she had stated in her reasons for refusal letter of 7 May 2013 that the variation application was refused because the requirements of paragraph EX.1 were not met, at the hearing the submissions made on her behalf were that Ms Kausar could not access any benefit of paragraph EX.1 because she was in the UK as a visitor.

12. Although we are concerned that the failure of a case worker to properly apply the immigration rules is somewhat misleading, we accept that it was open to the Secretary of State to correct the basis for refusing to vary leave to remain at the hearing before the First-tier Tribunal Judge. It does not appear that the change in the reasons for refusal was detrimental to Ms Kausar's case and there is no argument that the judge's decision to proceed was unfair in any way.

13. We mention that the Secretary of State's grounds of appeal inadvertently refer to the provisions in section R-LTRP: Requirements for limited leave to remain as a partner of appendix FM and not R-LTRPT. We accept that this reference was unintended and that the issues we need to consider relate to section R-LTRPT. It may be that any findings we reach will by analogy apply to section R-LTRP and other provisions within appendix FM but this should not be regarded as being automatic for reasons we identify below.

Submissions

14. Mr Mills clarified the Secretary of State's position. He stated that paragraph E-LTRPT.3.1 meant that Ms Kausar's immigration status as a visitor prevented her from accessing paragraph EX.1. This was a deliberate measure introduced to preserve the integrity of the visitor route. The visitor route meant people coming to the UK with an intention to leave did not have to meet the requirements for settlement. If it were possible to switch within the immigration rules to a long term category after arrival, then the requirements to enter as a visitor would have to be strengthened.

15. As Ms Kausar could not meet the immigration status requirement, Mr Mills argued

that she could not meet the requirements for leave to remain as a parent. He argued that the judge had no basis in law for interpreting paragraph E-LTRPT.3.1 in the way he had; paragraph EX.1 did not apply to Ms Kausar because she was a visitor.

16. Mr Mills acknowledged that in circumstances where there are exceptional circumstances, then the Secretary of State would exercise her discretion "outside the rules". In this case that had not been done because at the date of decision the Secretary of State had concluded that there was insufficient evidence to show that Ms Kausar had a parental relationship with her children.

17. Mr Mills accepted that the position was now somewhat different in light of the judicial findings made in the First-tier Tribunal, which are unchallenged. Mr Mills was satisfied on the findings made that this was an exceptional case and Ms Kausar should succeed under article 8 ECHR applied directly.

18. Mr Khan argued (as he had submitted in the First-tier Tribunal) that the words in parenthesis at the end of paragraph E-LTRPT.3.1 applied to all three indents (i.e. (a), (b) and (c)) and not just to (c) as alleged by Mr Mills. As such, the judge's interpretation, that paragraph EX.1 could be applied even though the appellant had leave to enter as a visitor, was correct and there was no error on a point of law. In the alternative, he accepted Mr Mills's concession regarding the direct application of article 8.

Discussion

19. This case raises the issue of the interpretation and application of the immigration rules relating to private and family life rights. We recognise that since this appeal was heard the Immigration Act 2014 s19 has come into force. Because we find that Ms Kausar cannot succeed under Appendix FM ie under the Immigration Rules in force at the date of the decision for reasons we set out below and because it is conceded by Mr Mills that Ms Kausar succeeds under Article 8 because of the particular circumstances of her case, we have not set out in detail arguments and submissions that were put to us at the hearing. The fact that this determination has not been promulgated until after 28th July 2014 does not impact on the concession by Mr Mills that Ms Kausar succeeds in her appeal against the decision on human rights grounds and would thus be eligible for the grant of discretionary leave to remain.

20. In order to understand the competing arguments and to be able to explain our conclusions, we begin by summarising our discussions. We have divided these into three areas, each of which has an impact on how we are to interpret and apply the immigration rules.

Discussion (1): Interpreting the immigration rules

21. Our discussions began by identifying how we should interpret the immigration rules. We established there was no dispute regarding the following points.

The authoritative versions of the immigration rules

22. The only authoritative version of the immigration rules are those contained in the Statements of Changes to Immigration Rules made from time to time and as presented to Parliament.

23. In this respect, we must have regard (at the date of the decision the subject of the appeal) to two Statements of Changes in Immigration Rules, those presented to Parliament on 13 June 2012 (HC 194) and on 22 November 2012 (HC 760). The former introduced appendix FM, including the first version of section R-LTRPT. The latter included amendments to that section (paragraph s 377 to 393). As we have already indicated, the annex to this determination contains the provisions as they were at the date of decision.

Interpretation of legislation: the Human Rights Act 1998

24. When interpreting any primary or subordinate legislation, we must have regard to s.3 of the Human Rights Act 1998 and ensure that any legislation is read and given effect in a way which is compatible with the rights protected under the ECHR insofar as they are incorporated into the laws applicable in the UK.

25. However, we recognise that this does not permit us to alter the meaning of any legislation even if it is incompatible. This is clear from the application of sections 3(2) and 6(2) of the 1998 Act, bearing in mind that the Statement of Changes in Immigration Rules are provisions made under s.3(2) of the Immigration Act 1971.

Natural and ordinary meaning

26. The Supreme Court confirmed the proper approach to interpreting the immigration rules in Mahad and others v SSHD [2009] UKSC 16, [2010] Imm AR 203. Lord Brown advised:

> 10. There is really no dispute about the proper approach to the construction of the Rules. As Lord Hoffmann said in *Odelola v Secretary of State for the Home Department* [2009] 1 WLR 1230, 1233 (paragraph 4):
>
> > "Like any other question of construction, this [whether a rule change applies to all undetermined applications or only to subsequent applications] depends upon the language of the rule, construed against the relevant background. That involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy."
>
> That is entirely consistent with what Buxton LJ (collecting together a number of dicta from past cases concerning the status of the rules) had said in *Odelola* in the Court of Appeal ([2009] 1 WLR 126) and, indeed, with what Laws LJ said (before the House of Lords decision in *Odelola*) in the present case. Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy. The respondent's counsel readily accepted that what she

> meant in her written case by the proposition "the question of interpretation is . . . what the Secretary of State intended his policy to be" was that the court's task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended. After all, under section 3(2) of the Immigration Act 1971, the Secretary of State has to lay the Rules before Parliament which then has the opportunity to disapprove them. True, as I observed in *Odelola* (para 33): "the question is what the *Secretary of State* intended. The rules are her rules." But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State's intention to be discovered from the Immigration Directorates' Instructions (IDIs) issued intermittently to guide immigration officers in their application of the rules. IDIs are given pursuant to paragraph 1(3) of Schedule 2 to the 1971 Act which provides that:
>
> > "In the exercise of their functions under this Act immigration officers shall act in accordance with such instructions (*not inconsistent with the immigration rules)* as may be given them by the Secretary of State . . ." (emphasis added).

27. We, of course, are bound to follow this approach.

Discussion (2): The interrelationship between the immigration rules and article 8 ECHR

28. The second area of discussion considered the relationship of the provisions in the immigration rules describing private and family life rights and article 8 ECHR. We need to bear in mind how these provisions relate in order to interpret the text we are considering because we must interpret those provisions in context.

29. There is of course much case law on this subject, most recently set out by the Court of Appeal in R(MM (Lebanon)) v SSHD [2014] EWCA Civ 985. Although that judgment was handed down after we heard this appeal, it is of course highly relevant in helping us to understand how we should interpret the relationship between the provisions in the immigration rules and in article 8 directly.

30. We draw attention to paragraph 135 of MM(Lebanon):

> 135. Where the relevant group of IRs [immigration rules], upon their proper construction provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although reference to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the *Huang* tests and UK and Strasbourg case law."

31. As this describes the agreement we reached with the parties during the hearing, even though we rely on an authority not available to the parties during the hearing, there has been no need to recall the hearing or ask for further submissions.

Is appendix FM a "complete code"?

32. The Secretary of State has argued in many cases that the provisions relating to private and family life rights now contained in paragraph 276ADE of and appendix FM to the immigration rules form a "complete code", by which we understand her to be saying that there is nothing else to consider in relation to article 8. Where it is not a complete code, then it may be that a decision made under the immigration rules is unsustainable.

33. The Upper Tribunal and senior courts have considered this general proposition in a number of cases, most recently synthesised in Shahzad (Art 8: legitimate aim) [2014] UKUT 85 (IAC). The Upper Tribunal discussed this issue in paragraphs 23 to 31 of its determination. It concluded in paragraphs 30 and 31:

> 30. It follows from the other part of the ratio of *MF* [MF (Nigeria) [2013] EWCA Civ 1192] - that the new rules on deportation of foreign criminals are a complete code because they contain an express provision requiring consideration in the Article 8 context of "exceptional circumstances" and "other factors" - that any other rule which has a similar provision will also constitute a complete code (rule S-EC.1.4, dealing with exclusion, would seem to be a further example);
>
> 31. Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

34. Where there is an express requirement to have regard to exceptional circumstances and other factors, such provisions are likely to be a complete code. In relation to appendix FM, the provisions relating to exceptional circumstances and other factors are set out in paragraph EX.1. They reflect the factors that would have to be considered in relation to article 8 when considering family life issues involving partners and children. A decision made under paragraph EX.1 will, therefore, usually inform the Tribunal as to whether a decision is lawful or not in relation to protected human rights and it will usually be unnecessary to determine any human rights issues separately as to do so would be to repeat the task already completed.

35. But where there are factors relevant to a person's private and family life rights which are not considered under the immigration rules, then the Tribunal will consider them as there will be good reason to apply article 8 directly. It will be for the Tribunal to decide what factors might be relevant and will have regard to the guidance given in paragraph 31 of Shahzad to do so.

36. There is no requirement for the Tribunal to consider each and every possible factor raised by an appellant because many points will not reach the appropriate threshold. As the Court of Appeal identified in VW (Uganda) [2009] EWCA Civ 5, [2009] Imm AR 436, which at paragraph 31 concluded:

> 31. … the correct test is now to be found in EB (Kosovo) [2008] UKHL 41. But recognition should be given … to the conclusion at which the AIT arrived (§44) that, if a removal is to be held disproportionate, "what must be shown is more than a mere hardship or a mere difficulty or mere obstacle. There is a seriousness test which requires the obstacles or difficulties to go beyond matters of choice or inconvenience."

37. Where it is shown that there will be more than mere hardship or a mere difficulty or mere obstacle, then the threshold suggested in Nagre and Gulshan is likely to be met. It is, of course, for an appellant to show that this threshold is met and if that is not established, then there is no reason for the Tribunal to apply article 8 directly.

Paragraph EX.1 not free standing

38. The Upper Tribunal identified in Sabir (Appendix FM – paragraph EX.1 not free standing) [2014] UKUT 63 (IAC) the following approach to the immigration rules:

> 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.

39. It is accepted that in terms of appendix FM of the immigration rules, the only provision that permits consideration of compassionate and other factors is paragraph EX.1. In light of Shahzad, if paragraph EX.1 is not engaged, then the decision under the immigration rules will not have considered any compassionate or other factors and the Tribunal will have to consider whether it is necessary to apply article 8 directly for these issues to be addressed. If the factors to be considered meet the "seriousness test" we have already described and the Tribunal decides article 8 must be considered, then it will use the tried and tested step-by-step approach set out in R (Razgar) v SSHD [2004] UKHL 27, [2004] Imm AR 381 in an appeal where a person relies on article 8 rights in relation to family life in order to decide if the immigration decision is lawful or not.

40. In other words, the Tribunal will move from considering the ground of appeal relating to whether the immigration decision is in accordance with the immigration rules to considering whether the immigration decision is unlawful under s.6 of the 1998 Act.

41. We focus here on family life rights merely because it is on those that we were addressed during the appeal. Although a similar approach may apply to considerations of private life rights, the structure of the immigration rules is wholly different and we make no assumptions about how those provisions relate to article 8.

Discussion (3): The structure of appendix FM

42. There is one further aspect of our discussions that is of relevance to our consideration of the proper interpretation of paragraph E-LTRPT.3.1 of appendix FM and that is

how it and appendix FM as a whole are structured.

43. A person seeking leave to remain as a parent under section R-LTRPT must meet various requirements, which are set out under separate headings in appendix FM. To meet the requirements as a parent, a person will have to meet the requirements relating to:

    a. Suitability (see paragraph R-LTRPT.1.1.(c) or (d));
    b. Relationship (see paragraph E-LTRPT.2.2 to 2.4);
    c. Immigration status (see paragraph E-LTRPT.3.1 to 3.2);
    d. Financial (see paragraph E-LTRPT.4.1 to 4.2); and
    e. English language (see paragraph E-LTRPT.5.1 to 5.2).

    Reading through the provisions contained in these sections, it is clear that in any one section paragraph EX.1 might apply. There is reference to paragraphs EX.1 in all five sections.

44. The structure of appendix FM shows that it is necessary for a person to meet the requirements of each section. If a person does not meet the specifications in one section and paragraph EX.1 is not available to them, then they cannot meet the requirements of that section. As a result, such a person cannot meet the requirements of the immigration rules. Therefore, as an example, the fact that paragraph EX.1 might apply where a parent cannot meet the financial requirements does not mean that EX.1 applies to the whole of their application or appeal. In other words, the fact that paragraph EX.1 applies in relation to the financial requirements does not permit it to be read across as applying in the other sections. Each set of requirements has to be treated independently.

45. In the present appeal, the arguments relate to whether Ms Kausar was able to access paragraph EX.1 in relation to the immigration status requirements. The fact that she may have been entitled to expect paragraph EX.1 to have been applied in relation to any or all of the other sets of requirements is immaterial because each section contains discrete provisions.

Our findings: Error on a point of law

46. Having identified with the parties the context in which we have to consider the immigration rules and the various factors we have to consider, we can consider their opposing arguments regarding the meaning of paragraph E-LTRPT.3.1.

47. We recognise that if we can read paragraph E-LTRPT.3.1 in a way that makes it possible for a person in the UK as a visitor to access paragraph EX.1, then it would mean that the Tribunal would be able to consider exceptional circumstances and other factors when assessing whether the requirements of the immigration rules had been met in terms of the immigration status requirements. This would, in effect, mean that any consideration of private and family life rights would fall within the immigration rules and it would be unnecessary to have regard to article 8 directly unless exceptional circumstances are shown.

48. However, we also recognise that we cannot change the natural and ordinary meaning of the immigration rules to achieve this end. We acknowledge Mr Mills's submission that there is a specific reason which justifies why the immigration status requirements prevents a person in the UK as a visitor benefitting from paragraph EX.1. The question, therefore, is whether the natural and ordinary meaning of the relevant provision is open to more than one interpretation. If there is, and one interpretation is more compatible with the human rights convention, then that will be a reason to prefer that interpretation.

49. We move to consider the wording of paragraph E-LTRPT.3.1. The provision was introduced into the immigration rules by the Statement of Changes in Immigration Rules (HC 194) presented to Parliament on 13 June 2012. The full text is set out in the annex to this determination; the relevant part reads:

> **Immigration status requirement**
> E-LTRPT.3.1. 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;
> (c) on temporary admission.

As introduced it is clear that there was no exception or alternative to these provisions. There was no route to paragraph EX.1.

50. In addition, we recognise that the three provisions relate to separate categories of immigration status. Although (a) and (b) are not mutually exclusive because a visitor will usually have leave for a period of 6 months or less, they are independent of each other. A visitor is a person who has been granted leave to enter or remain under part 2 of the immigration rules (paragraphs 41 to 56ZG). Not all visitors will have leave granted for a period of six months or less; similarly, not all those granted leave for six months or less will be visitors. Of course, a person on temporary admission cannot be a visitor or a person granted leave (see paragraph 21 of schedule 2 to the 1971 Act).

51. It follows that if a person fell within (a), (b) or (c), then they would not be able to meet the immigration status requirement and therefore would not be able to benefit from the provisions relating to parents in the immigration rules.

52. For clarity, we mention that the only reference to paragraph EX.1 under the heading immigration status requirement was in paragraph E-LTRPT.3.2. A person whose immigration status fell into paragraph E-LTRPT.3.1 (a), (b) or (c) would not be able to access paragraph EX.1 through paragraph E-LTRPT.3.2 because that avenue is only open to someone who is in the UK in breach of immigration laws. A person falling within paragraph E-LTRPT.3.1 is not in breach of immigration laws.

53. On 22 November 2012, another Statement of Changes in Immigration Rules (HC 760) was presented to Parliament. Paragraphs 385 and 386 of that Statement amended paragraph E-LTRPT.3.1 in two ways.

> 385. In Appendix FM paragraph E-LTRPT.3.1.(b) after "less" insert ",unless that leave

was granted pending the outcome of family court or divorce proceedings".

386. In Appendix FM paragraph E-LTRPT.3.1.(c) after "temporary admission" insert "or temporary release (unless paragraph EX.1 applies).".

These amendments result in paragraph E-LTRPT.3.1. reading as follows:

Immigration status requirement
E-LTRPT.3.1. 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 was granted pending the outcome of family court or divorce proceedings;
(c) on temporary admission or temporary release (unless paragraph EX.1 applies).

54. As we have indicated, the Statements of Changes in Immigration Rules presented to Parliament are the only authoritative versions of the immigration rules. How third parties might choose to set them out does not lend any weight to how they are to be interpreted.

55. The fact that the changes in HC 760 make separate changes to paragraphs E-LTRPT.3.1.(b) and (c) indicates to us that the amendments apply specifically to each provision as stated and not to the whole of paragraph E-LTRPT.3.1. This is the natural and ordinary meaning of the changes. This leads us to find that the phrase in parenthesis applies solely to those on temporary admission and temporary release. In addition, we see nothing in HC 760, including its explanatory memorandum, that suggests significant changes were being made to paragraph E-LTRPT.3.1. The amendments to (b) and (c) merely provide exceptions to those provisions whilst retaining the overall structure originally brought in. We have already identified that the three indents as introduced are independent provisions and as that structure is preserved it is not possible to link the words, "unless paragraph EX.1 applies" to any provision other than temporary admission and temporary release.

56. The fact that each of the provisions in paragraph E-LTRPT.3.1 is independent means that we cannot consider drawing any parallels with other parts of appendix FM such as paragraph E-LTRPT.5.1 where it is accepted that the words, "unless paragraph EX.1 applies" applies to all four indents. Paragraph E-LTRPT.5.1 sets out the English language requirement. Although it concludes with the same phrase, its structure is different to paragraph E-LTRPT.3.1.

57. In addition, we recall that the fact that a person might be able to access the provisions in paragraph EX.1 in relation to any or all of the other requirements in section R-LTRPT does not assist as it is necessary to meet each set of requirements. Ms Kausar was unable to meet the immigration status requirement and therefore could not meet the requirements of section R-LTRPT: Requirements for limited leave to remain as a parent.

58. As we find there is only one natural and ordinary meaning to paragraph E-LTRPT.3.1., it prevents a person in the UK as a visitor switching immigration status to that of a parent, even though this may not, in some circumstances, be compatible

with article 8. For these reasons we reject Mr Khan's argument regarding the interpretation of paragraph E-LTRPT.3.1. This means that the appellant could not rely on the application of paragraph EX.1 to meet the immigration status requirement.

59. Since we heard the appeal, we have identified that changes made to the immigration rules on 10 July 2014 will alter paragraph E-LTRPT.3.1 and 3.2 from 28 July 2014. Paragraphs 60 to 64 of the Statement of Changes in Immigration Rules (HC 532, 10 July 2014) provides:

> 60. In Appendix FM at the end of paragraph E-LTRPT.3.1.(a) insert "or".
> 61. In Appendix FM delete paragraph E-LTRPT.3.1.(c).
> 62. In Appendix FM for paragraph E-LTRPT.3.2. substitute: "E-LTRPT.3.2. The applicant must not be in the UK –
> (a) on temporary admission or temporary release, unless paragraph EX.1. applies; or
> (b) in breach of immigration laws (disregarding any period of overstaying for a period of 28 days or less), unless paragraph EX.1. applies.".

60. We make no assessment of these changes because they do not apply to the appeal we are determining. However, we note that the changes reflect Mr Mills's submission that a person with leave to enter as a visitor or for a period of six months or less cannot benefit from paragraph EX.1 of appendix FM.

61. From all that we have considered, it follows that we find the First-tier Tribunal Judge erred on a point of law because he has misinterpreted the law. He had no power to find that the immigration decision was not in accordance with the immigration rules.

Setting aside and remaking the decision

62. As we have already identified, the First-tier Tribunal Judge determined the appeal solely by application of paragraph EX.1. The fact that the judge had no power to do so means that the decision has to be set aside because there are insufficient reasons given for allowing the appeal.

63. We have found that Ms Kausar cannot meet the immigration status requirement of section R-LTRPT of appendix FM. She accepts that she cannot meet the private life requirements contained in paragraph 276ADE or any other provisions of the immigration rules. For these reasons we can only conclude that the immigration decision is in accordance with the immigration rules.

64. Given the concession by Mr Mills that Ms Kausar succeeds in her appeal on human rights grounds given the particular circumstances of her appeal we allow her appeal on human rights grounds and find that the immigration decision is contrary to Ms Kausar's protected family life rights.

Decision

The determination of the First-tier Tribunal Judge contains an error on a point of law and is set aside.

We remake the decision to

1. dismiss the appeal under the Immigration Rules
2. allow the appeal on human rights grounds against the immigration decision of 7 May 2013.

Signed Date

Deputy Upper Tribunal Judge McCarthy

Annex: extracts from appendix FM to the Immigration Rules as at the date of decision

Section R-LTRPT: Requirements for limited leave to remain as a parent

R-LTRPT.1.1. The requirements to be met for limited or indefinite leave to remain as a parent or partner are-

(a) the applicant and the child must be in the UK;
(b) the applicant must have made a valid application for limited or indefinite leave to remain as a parent or 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 ELTRPT: Eligibility for leave to remain as a parent, or
(d) (i) the applicant must not fall for refusal under S-LTR: Suitability leave to remain; and
(ii) the applicant meets the requirements of paragraph s E-LTRPT.2.2-2.4. and E- LTRPT.3.1.; and
(iii) paragraph EX.1. applies.

Section E-LTRPT: Eligibility for limited leave to remain as a parent

E-LTRPT.1.1. To qualify for limited leave to remain as a parent all of the requirements of paragraph s E-LTRPT.2.2. to 5.2. must be met.

Relationship requirements

E-LTRPT.2.2. The child of the applicant must be-

(a) under the age of 18 years at the date of application, or where the child has turned 18 years of age since the applicant was first granted entry clearance or leave to remain as a parent under this Appendix, must not have formed an independent family unit or be leading an independent life;
(b) living in the UK; and
(c) a British Citizen or settled in the UK; or
(d) has lived in the UK continuously for at least the 7 years immediately preceding the date of application and paragraph EX.1. applies.

E-LTRPT.2.3. Either-

(a) the applicant must have sole parental responsibility for the child or the child normally lives with the applicant and not their other parent (who is a British Citizen or settled in the UK);or
(b) the parent or carer with whom the child normally lives must be-
(i) a British Citizen in the UK or settled in the UK;
(ii) not the partner of the applicant (which here includes a person who has been in a relationship with the applicant for less than two years prior to the date of application); and
(iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.

E-LTRPT.2.4.

(a) The applicant must provide evidence that they have either-
(i) sole parental responsibility for the child, or that the child normally lives with them; or
(ii) access rights to the child; and
(b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.

Immigration status requirement

E-LTRPT.3.1. 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 was granted pending the outcome of family court or divorce proceedings;
(c) on temporary admission or temporary release (unless paragraph EX.1. applies).

E-LTRPT.3.2. 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.

Financial requirements

E-LTRPT.4.1. The applicant must provide evidence that they will be able to adequately maintain and accommodate themselves and any dependants in the UK without recourse to public funds, unless paragraph EX.1. applies.

E-LTRPT.4.2. The applicant must provide evidence that there will be adequate accommodation in the UK, without recourse to public funds, for the family, including other family members who are not included in the application but who live in the same household, which the family own or occupy exclusively, unless paragraph EX.1. applies: accommodation will not be regarded as adequate if-

(a) it is, or will be, overcrowded; or
(b) it contravenes public health regulations.

English language requirement

E-LTRPT.5.1. If the applicant has not met the requirement in a previous application for leave as a parent or partner, the applicant must provide specified evidence that they-

(a) are a national of a majority English speaking country listed in paragraph GEN.1.6.;
(b) have passed an English language test in speaking and listening at a minimum of level A1 of the Common European Framework of Reference for Languages with a provider approved by the Secretary of State;
(c) have an academic qualification recognised by UK NARIC to be equivalent to the standard of a Bachelor's or Master's degree or PhD in the UK, which was taught in English; or
(d) are exempt from the English language requirement under paragraph ELTRPT. 5.2, unless paragraph EX.1. applies.

E-LTRPT.5.2. The applicant is exempt from the English language requirement if at the date of application-

(a) the applicant is aged 65 or over;
(b) the applicant has a disability (physical or mental condition) which prevents the applicant from meeting the requirement; or
(c) there are exceptional circumstances which prevent the applicant from being able to meet the requirement.

Section EX: Exception

Paragraph 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, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
  (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.