



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/02260/2014

THE IMMIGRATION ACTS

Heard at Field House
On 4 December 2014

Determination Promulgated
On 12 December 2014

Before

**THE HON. MRS JUSTICE CARR DBE
UPPER TRIBUNAL JUDGE MOULDEN**

Between

**MRS AICHA AL BADAOUY
(No anonymity direction made)**

Appellant

and

ENTRY CLEARANCE OFFICER - RABAT

Respondent

Representation:

For the Appellant: Mr Daniel Sills of Counsel instructed by Garth
Coates Solicitors
For the Respondent: Mr Ian Jarvis a Senior Home Office Presenting
Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Morocco who was born on 7 April 1990. She has been given permission to appeal the determination of First-Tier Tribunal Judge R G Walters ("the FTTJ") who dismissed her appeal against the respondent's decision of 15 January 2014 to refuse her entry clearance as the

spouse of her husband and sponsor under the provisions of Appendix FM of the Immigration Rules.

2. The respondent refused the application for one reason only, the appellant had not established that she met the English language requirement of paragraph EC-P.1.1 (d) of Section E-ECP of the Immigration Rules. In her application form the appellant had said that she was “illiterate and cannot read or write in Arabic... or learn a new language such as English in either speaking or listening.” The respondent considered the exemption which could assist someone who had a physical or mental impairment which would prevent them from meeting this requirement but concluded that the appellant had not shown that she met this requirement.
3. The appellant appealed. The FTTJ heard the appeal on 6 August 2014. Both parties were represented, the appellant by Mr Sills who appears before us. The FTTJ heard evidence from the husband.
4. In her witness statement the appellant said that she believed she had an underlying learning difficulty which had been diagnosed in April 2014 by a psychiatrist in Morocco. The husband’s evidence was that so far as he was aware the appellant had not had treatment for learning difficulties and in any event they could not afford treatment.
5. The FTTJ concluded that the report from the psychiatrist in Morocco did not establish that the appellant had a medical condition which either prevented her from taking an acceptable English language test or learning English. She had not shown that she was able to bring herself within the exemption to the English language requirements in the Rules. The appeal failed under the Immigration Rules.
6. The FTTJ went on to consider the Article 8 human rights grounds under the Rules and the best interests of the children under section 55 of the Borders, Citizenship and Immigration Act 2009. The appellant and her husband married on 31 May 2007 and she applied for entry clearance on 29 May 2008. This was refused and there was no appeal.
7. On 27 November 2008 the 21 year minimum age requirement was introduced. The appellant and her husband’s daughter Iliyah was born on 7 May 2009. She is a British citizen. The English language requirement was introduced on 1 October 2010. The husband has another daughter, Yasmin, born as a result of a former relationship. Yasmin is a British citizen and the husband is her main carer.
8. The FTTJ applied the principles set out in Razgar, R (on the Application of) v. Secretary of State for the Home Department [2004] UKHL 27. In relation to the first test he found that: “the appellant has family life with the

sponsor and their daughter Yasmin. The sponsor, I found, has family life with Iliyah, the appellant and Yasmin. All parties have private lives.”

9. As to the second, third and fourth tests the FTTJ found that the proposed exclusion of the appellant would be an interference with the exercise of her right to respect for private and family life and would have consequences of such gravity as potentially to engage the operation of Article 8. However, it would be in accordance with the law and necessary in the interests of the economic well-being of the country through the maintenance of immigration control.
10. In relation to the last test, whether such interference would be proportionate to the legitimate public end sought to be achieved, the FTTJ accepted that Yasmin’s best interests would be to be brought up by the appellant and the sponsor. The sponsor could not relocate to Morocco with Iliyah which would deprive her of the benefits granted to British citizens and take her away from her mother. He found that it would be in the best interests of both children to be brought up by both parents in the UK. Those best interest could not be met if the appellant was excluded.
11. The FTTJ took into account section 19 and section 117B of the Immigration Act 2014 in relation to the public interest. Whilst the best interests of the children were a primary consideration, the public interest in the maintenance of immigration control and the economic necessity of a person’s ability to speak English outweighed these interests. The FTTJ concluded that it would be proportionate to exclude the appellant. What she needed to do was to provide satisfactory psychiatric evidence to establish her claimed mental condition.
12. The appeal was dismissed under the Immigration Rules and on human rights grounds. No anonymity direction was made.
13. The appellant applied for and was granted permission to appeal. It is unfortunate that in Mr Sills’ grounds of appeal whilst the paragraphs are numbered, the grounds are not separately identified or numbered and issues are to some extent intermixed. We have sought to bring some order to the issues by separating and numbering what appear to us to be the individual grounds. These tally with the identification and numbering of the grounds of appeal in Mr Jarvis’ skeleton argument.
14. It is argued that there are a number of errors of law.
15. Ground 1 (paragraphs 2 and 3). The FTTJ failed to follow Alvi (Alvi, R (on the application of) v Secretary of State for the Home Department [2011] EWCA Civ 681) principles by treating the respondent’s policy guidance as a mandatory requirement rather than considering the provisions of the Rules.

16. Ground 2 (paragraph 4). He made a factual error in concluding that on a future application the appellant might be able to provide psychiatric evidence to show that she met the exception to the English language requirement. The grounds return to this point in paragraph 12 where it is argued that in relation to proportionality the FTTJ erred in taking into account hypothetical future evidence or findings.
17. Ground 3 (paragraphs 5-7). He failed to compare the in country and out of country requirements and take into account the fact that the out of country requirements, being more strict than the in country requirements, were less able to fully address private and family life issues under Article 8. For Article 8 purposes whether the case related to entry clearance rather than removal was irrelevant. The fact that in in country cases the English language requirement could be waived in circumstances relating to the best interests of the child was a material factor in considering Article 8 in entry clearance appeals where there was no similar waiver under the Rules.
18. Ground 4 (paragraph 8). The FTTJ's reasoning was inadequate. Whilst there was reference to the provisions of section 119 and section 117B of the Immigration Act 2014 it was not clear how those provisions had been addressed and applied. In particular section 117B (6) had not been addressed.
19. Ground 5 (paragraph 9). In finding that the public interest in the maintenance of immigration control and the economic necessity of a person's ability to speak English outweighed the interests of the children the FTTJ had failed to take into account Parliament's assessment of the public interest set out in section 117B. There had been a failure to take into account the fact that the appellant and her British citizen child were outside the UK.
20. Ground 6 (paragraphs 10-12). The proportionality assessment was flawed because the only reason given for concluding that exclusion would be proportionate was the appellant's inability to meet the English language requirements of the Rules.
21. Ground 7 (paragraph 13). There was a failure to consider a number of relevant factors in assessing proportionality including the length of time the appellant and her husband had been separated, in part by the application of an "unlawful" immigration rule imposing a 21 year age requirement and that the appellant had been able to meet the onerous financial requirements of the Rules.
22. Ground 8 (paragraph 14). There was a failure to consider the case of Bibi which upheld the lawfulness of the English language requirement but

pointed out that the Secretary of State had accepted that an individual case with favourable facts could still succeed.

23. Ground 9 (paragraphs 15–16). There had been a failure to apply the principles set out in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 in reaching the conclusion that the English language requirements were inherently more significant than the best interests of the children.
24. We have the skeleton arguments submitted by Mr Sills for the hearings before the FTTJ and before us. The latter addresses points raised in Mr Jarvis' skeleton argument. We have a skeleton argument from Mr Jarvis addressing the grounds of appeal to the Upper Tribunal.
25. We heard submissions from both representatives building on their grounds of appeal and skeleton arguments. We reserved our determination.
26. Ground 1 (paragraphs 2 and 3). The Immigration Rules state:

“English language requirement

E-ECP.4.1. 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 E-ECP. 4.2.

E-ECP.4.2. 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 prior to entry to the UK.”

27. The respondent's policy is set out at Annex FM 1.21 of the Immigration Directorate Instruction as follows:

“The applicant is exempt from the requirement if:

they are aged 65 or over (see Section 5), or

they have a disability (physical or mental condition) which prevents them from meeting the requirement (see Section 6), or

there are exceptional circumstances which prevent them from meeting the requirement (see Section 7)....

6. Disability exemption

6.1 Criteria

The applicant is exempt from the English language requirement if the decision maker considers that the applicant has a disability: that is a physical or mental condition that prevents them from meeting the requirement.

6.2 Definition of disability

This exemption will apply only where the applicant has a physical or mental condition which prevents them from learning English or taking an acceptable English language test. This is not a blanket exemption. Some disabled people will be capable of learning English and taking an English language test and some will not.

6.3 Evidence required to demonstrate disability

To qualify for this exemption, the applicant must apply for it in their application and submit satisfactory medical evidence from a medical practitioner who is qualified in the appropriate field which sets out the relevant physical or mental condition and from which it may be concluded that exemption on those grounds is justified. Each application for an exemption on this basis will be considered on its merits on a case-by-case basis.

6.4 Authorisation of exemption

Authorisation of this exemption should be agreed by a senior caseworker or equivalent or an entry clearance manager.

7. Exceptional circumstances exemption

The applicant is exempt from the English language requirement if the decision maker considers that there are exceptional circumstances that prevent the applicant from meeting the requirement.

This exemption is only applicable where there are exceptional circumstances specifically relating to the ability of the applicant to meet the English language requirement.

An applicant granted an exemption on the basis of exceptional circumstances at the entry clearance stage will be required to meet the English language requirement when they apply for further leave to remain after 30 months, unless they remain exempt on this or another basis.

On 24 July 2014 the automatic exemption for an applicant who is a long-term resident of a country with no approved A1 test provision was withdrawn.

7.1 Consideration of exceptional circumstances

Each application for an exemption on the basis of exceptional circumstances will be considered on its merits on a case-by-case basis.

The applicant must demonstrate, in box 8.1 in part 8 of the VAF4A form for an entry clearance application as a partner or parent, that as a result of exceptional circumstances they are unable to learn English before coming to the UK or it is not practicable or reasonable for them to travel to another country to take an approved English language test. Partners of members of HM Forces must demonstrate this in box 9.1 of the VAF4A form.

Evidence of the nature and impact of the exceptional circumstances must be clearly provided, e.g. of previous efforts to access learning materials or to travel overseas to take an approved test and the obstacles to doing so. This must include evidence provided by an independent source (e.g. an appropriately

qualified medical practitioner) or capable of being verified by the decision maker.

Examples of situations in which, subject to the necessary supporting evidence, the decision maker might conclude that there were exceptional circumstances, might include where the applicant:

is a long-term resident of a country in international or internal armed conflict, or where there is or has been a humanitarian disaster, including in light of the infrastructure affected.

has been hospitalised for several months immediately prior to the date of application.

is the full-time carer of a disabled child also applying to come to the UK.

is a long-term resident of a country with no approved A1 test provision and it is not practicable or reasonable for the applicant to travel to another country to take a test (see section 7.2 below).

Lack of or limited literacy or education will not be accepted as exceptional circumstances.

It will be extremely rare for exceptional circumstances to apply where the applicant is in the UK. However, in an exceptional case, the applicant must set out the relevant circumstances in box 8.6 in section 8 of the FLR(M) form for partners, in box 8.8 in section 8 of the FLR(FP) form for parents (5-year route) or in box 8.6 in section 8 of the FLR(AF) form for partners of a member of HM Forces, and submit relevant supporting evidence."

28. We find that the FTTJ did not treat the policy guidance as a mandatory requirement. He made reference to it because Mr Sills relied on it (see paragraph 18 of the determination). We can find no indication that it was treated as a mandatory requirement in preference to the requirements of the Rules. We agree with Mr Jarvis that the possibility of showing exceptional circumstances appears in both the Rules and the policy guidance. It is not clear what "exceptional circumstances" the appellant relies on to show why she was not able to meet the English language requirements and the grounds of appeal do not challenge the FTTJ's assessment of the appellant's disability. In paragraph 5 of Mr Sills' skeleton argument which was before the FTTJ it is conceded that the appellant could not show exceptional circumstances under the policy guidance and we can find nothing to suggest that it was argued she could do so under the Rules.
29. Ground 2 (paragraph 4). This ground is misconceived. In paragraph 40 of the determination the FTTJ said; "On the question of proportionality, I find that the appellant's inability to pass the English language test may well be accepted by an ECO if satisfactory evidence from a psychiatrist is presented to him in future application. Obviously, a properly reasoned or comprehensive psychiatric report is required." This is not a factual error. In the light of the undisputed finding that the appellant could not bring herself within the exception to the English language requirement and the reasons for this conclusion, largely relating to the inadequacies of the psychiatric

report, it was relevant to the assessment of proportionality to observe that a future application might succeed if accompanied by satisfactory psychiatric evidence. It indicated that there was an avenue which the appellant could still pursue in her efforts to obtain entry clearance for settlement and the unification of the family in the UK. She was not in a situation where she had no prospect of ever being able to do so except through an Article 8 claim.

30. Ground 3 (paragraphs 5-7). Mr Sills relies on paragraph 30 of Nagre, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 720 (Admin). This states

"I agree with the guidance given by the Upper Tribunal in *Izuazu* at paras. [40]-[43], as follows:

"40. We accordingly further endorse the Upper Tribunal's observation in [*MF (Article 8 – new rules) Nigeria* [2012] UKUT 00393 (IAC)] that judges called on to make decisions about the application of Article 8 in cases to which the new rules apply, should proceed by first considering whether a claimant is able to benefit under the applicable provisions of the Immigration Rules designed to address Article 8 claims. If he or she does, there will be no need to go on to consider Article 8 generally. The appeal can be allowed because the decision is not in accordance with the rules.

41. Where the claimant does not meet the requirements of the rules it will be necessary for the judge to go on to make an assessment of Article 8 applying the criteria established by law.

42. When considering whether the immigration decision is a justified interference with the right to family and/or private life, the provisions of the rules or other relevant statement of policy may again re-enter the debate but this time as part of the proportionality evaluation. Here the judge will be asking whether the interference was a proportionate means of achieving the legitimate aim in question and a fair balance as to the competing interests.

43. The weight to be attached to any reason for rejection of the human rights claim indicated by particular provisions of the rules will depend both on the particular facts found by the judge in the case in hand and the extent that the rules themselves reflect criteria approved in the previous case law of the Human Rights Court at Strasbourg and the higher courts in the United Kingdom."

The only slight modification I would make, for the purposes of clarity, is to say that if, after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it is clear that the consideration under the Rules has fully addressed any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not

have to go on, in addition, to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the Rules.”

31. We find that this passage addresses the question of when it is necessary to consider Article 8 grounds outside the Rules. There is nothing in this passage or anywhere else in the judgement which supports the proposition that there needs to be a comparison between in country and out of country requirements or that any differences between them should impinge on an Article 8 assessment. Mr Jarvis argues that the Secretary of State is entitled to formulate different policy depending on the context of the immigration routes in question. We agree. In his oral submissions Mr Sills accepted that the Secretary of State was entitled to formulate and apply different policies, adding that they should not be “so different”, but without explaining how different they could or could not be. We find that the FTTJ followed what Nagre required of him and considered the Article 8 human rights grounds outside the Rules. The FTTJ was not required to make a comparison between the requirements for in country and out of country cases to see whether there were any differences and if so to consider how these might impinge on or nuance his assessment of the Article 8 grounds.
32. Ground 4 (paragraph 8). The provisions of the Immigration Act 2014 set out where the public interest lies in paragraphs 117A, 117B, 117C (not applicable here as it relates to foreign criminals) and 117D as follows

“117A Application of this Part

- (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –
- (a) breaches a person’s right to respect for private and family life under Article 8, and
 - (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
- (2) In considering the public interest question, the court or tribunal must
- (in particular) have regard –
- (a) in all cases, to the considerations listed in section 117B, and
 - (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
- (3) In subsection (2), “the public interest question” means the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to –
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.
- (6) In the case of a person who is not liable to deportation, the public interest does not require the person’s removal where –
 - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
 - (b) it would not be reasonable to expect the child to leave the United Kingdom.

117D Interpretation of this Part

- (1) In this Part –

“Article 8” means Article 8 of the European Convention on Human Rights;

“qualifying child” means a person who is under the age of 18 and who –

 - (a) is a British citizen, or
 - (b) has lived in the United Kingdom for a continuous period of seven years or more;

“qualifying partner” means a partner who –

 - (a) is a British citizen, or
 - (b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 – see section 33(2A) of that Act).
 - (2) In this Part, “foreign criminal” means a person –
 - (a) who is not a British citizen,
 - (b) who has been convicted in the United Kingdom of an offence, and
 - (c) who –

- (i) has been sentenced to a period of imprisonment of at least 12 months,
 - (ii) has been convicted of an offence that has caused serious harm, or
 - (iii) is a persistent offender.
- (3) For the purposes of subsection (2)(b), a person subject to an order under –
- (a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),
 - (b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or
 - (c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),
- has not been convicted of an offence.
- (4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time –
- (a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);
 - (b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;
 - (c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and
 - (d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.
- (5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it.”

33. The ground submits that FTTJ’s reasoning was inadequate because, whilst there was reference to the provisions of section 19 and section 117B of the Immigration Act 2014, it was not clear how those provisions had been addressed and applied and in particular section 117B (6) had not been addressed. We find no merit in this ground. As the wording makes clear s 117B (6) relates to a situation where an individual is facing removal from the UK. It deals with in country not out of country cases. It was sufficient for the FTTJ to say that he had regard to these provisions particularly as the only example the appellant provides relates to a provision which does not apply.
34. Ground 5 (paragraph 9). Section 117B (6) does not apply for the reasons we have already given. We find that the FTTJ did take into account and make a proper assessment of the factors in section 117B which do apply, in particular; “(1) The maintenance of effective immigration controls is in the

public interest. (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—(a) are less of a burden on taxpayers, and (b) are better able to integrate into society.” The FTTJ gave proper weight to the assessment of the public interest set out in primary legislation. It is clear that throughout his assessment the FTTJ was well aware of and took into account the fact that this was an out of country application.

35. Ground 6 (paragraphs 10–12). The FTTJ did not say that the only reason for concluding that exclusion would be proportionate was the appellant’s inability to meet the English language requirements of the Rules. What he said in paragraph 46 relied on the wider issue of “the public interest in the maintenance of immigration control” as well as “the economic necessity of a person’s ability to speak English”. Mansoor R (on the application of) v Secretary of State for the Home Department [2011] EWHC 832 (Admin) does not assist because it needs to be viewed in the context of the Rules in force at the time and does not reflect the later provisions of the Immigration Act 2014 setting out Parliament’s assessment of where the public interest lies.
36. Ground 7 (paragraph 13). We find that there was no failure to consider relevant factors in assessing proportionality. As appears from paragraphs 30 to 34 of the determination the FTTJ was aware of and took into account when the marriage had taken place, how long the appellant and her husband had been apart and the difficulties they had encountered in seeking entry clearance because of changes in the Rules. It is equally clear that the FTTJ was aware that the only grounds for refusal related to the English language requirement which meant that all the other requirements including the financial requirements were met. As Mr Jarvis points out in his skeleton the appellant has made more than one application for entry clearance and could have appealed an earlier decision or made a fresh application before the 21-year-old age requirement came into force.
37. Ground 8 (paragraph 14). We can find no merit in the submission that there was a material failure to consider the case of Bibi or that this could amount to a material error of law. As is accepted by the appellant Bibi upheld the lawfulness of the English language requirement but pointed out that the Secretary of State had accepted that an individual case with favourable facts could still succeed. There is nothing in the determination to indicate that the FTTJ took a different approach or failed to take into account the favourable facts.
38. Ground 9 (paragraphs 15–16). We do not accept that the FTTJ treated “the English language requirements as inherently more significant than best (sic)

interests of the child". This is not an accurate summary of the reasoning or conclusion. ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 was heard before the English language requirements and the Immigration Act 2014 came into force. We do not consider that any relevant principles can usefully be drawn by seeking to compare or distinguish the facts in this appeal with those in ZH or EV Philippines and Ors v Secretary of State for the Home Department [2014] EWCA Civ 874. The authorities do not support the proposition put forward by Mr Sills in his latest skeleton argument that "the children's best interests rank higher than any other factor". The FTTJ reached the conclusions that the best interests of the children were a primary consideration. Yasmin's best interests would be to be brought up by the appellant and the sponsor. The sponsor could not relocate to Morocco with Iliyah which would deprive her of the benefits granted to British citizens and take her away from her mother. It would be in the best interests of both children to be brought up by both parents in the UK. Those best interest could not be met if the appellant was excluded.

39. The FTTJ did not make an anonymity direction. We have not been asked to do so and in the absence of any explanation as to what good reasons there might be we do not make such a direction.
40. We find that the FTTJ reached conclusions open to him on all the evidence. There is no material error of law and we uphold the determination.

.....

Signed
Upper Tribunal Judge Moulden

Date 10 December 2014