



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/15836/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 13 November 2019

Decision & Reasons Promulgated  
On 2 January 2020

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

NAJET SAADI  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER,  
Sheffield

Respondent

**Representation:**

For the Appellant: Ms Katambala of Ben Darlington Solicitors  
For the Respondent: Mr Tufan, Senior Presenting Officer

**DECISION AND REASONS**

1. The appellant is an Algerian national who was born on 23 November 1979. She appeals, with permission granted by First-tier Tribunal Judge Saffer, against a decision which was issued by First-tier Tribunal Judge Lucas on 4 July 2019. In that decision, Judge Lucas ("the judge") dismissed the appellant's appeal against the respondent's refusal of her application to enter the United Kingdom as the spouse of a British citizen.
2. The sponsor is Lahcene Chafai, a British citizen who was born on 21 June 1970. The appellant and the sponsor married in Algeria on 29 August 2013. They have three British children: S (aged 4), M (aged 3) and A (aged 2). The children live with the appellant in Algeria.

3. The appellant applied for entry clearance on 13 March 2018. She gave her details and those of the sponsor and their children. She stated that she planned to live permanently with the sponsor and their children at his address in North London. The sponsor was said to be in receipt of benefits which disappplied the Minimum Income Requirement ("MIR") in Appendix FM of the Immigration Rules. The appellant was said to be exempt from the English Language Requirement in that Appendix because she had learning difficulties.
4. The respondent refused the application on 5 July 2018. Although she accepted that the appellant was exempt from the MIR because the sponsor was in receipt of relevant benefits, she did not accept that there was available to the family a sum which was adequate when compared to the amount which would be received by a family of comparable size on income support. The respondent then considered the English Language requirement. She noted that the appellant had dyslexia and dysgraphia but she was not satisfied that this diagnosis would have an impact on the appellant's ability to take an appropriate English language test. The application was accordingly refused under Appendix FM. The refusal went on to consider, in what can only be described as pro-forma terms, the question of whether the ongoing exclusion of the appellant was in breach of Article 8 ECHR. The respondent concluded that it was not.

### **The Appeal to the First-tier Tribunal**

5. The grounds of appeal to the FtT noted that the respondent had failed to give adequate consideration to Article 8 ECHR, particularly given that the appellant had fallen short of the sum considered to be adequate by only £33 per week. The grounds asserted that the medical certificate had not been considered by the ECO. These grounds were reviewed by an Entry Clearance Manager on 17 January 2019 but the ECM was not persuaded to alter or reverse the decision.
6. The appeal came before the judge, sitting at Taylor House on 11 June 2019. The appellant was represented by a solicitor (not Ms Katambala), the respondent was neither present nor represented. The judge was presented with a bundle of 36 pages from the appellant. He heard evidence from the sponsor, who merely adopted his short witness statement. The appellant's solicitor made a brief submission after which the judge 'reserved the appeal for determination'. I am unable to attribute that part of the judge's decision to a specific paragraph because he eschewed paragraph numbers in favour of bullet points throughout his decision.
7. In his reserved decision, the judge found that the ECO had erred in her consideration of the Financial Requirements because, in calculating whether the available funds were adequate, she had taken account of the children. The judge held that this was an error on the part of the ECO

because the children were 'UK citizens and have the same benefits of citizenship as any other citizen'.

8. Turning to the English Language Requirement, the judge accepted (as had the ECO) that the appellant suffers from dyslexia and that she may have some difficulty with comprehension when writing or understanding words. There was no evidence to show what, if any efforts had been made by the appellant to take the test. Dyslexia, he noted, did not prevent a person from taking examinations. There was no evidence from an independent third party to show that she was 'physically prevented' from taking the test. Then, above the final sentence of the decision, there is this paragraph:

It is accepted that the Appellant is married to the sponsor. However, the Appellant lives in Algeria with her three children and cannot yet satisfy the Rules with regard to English Language. It is also accepted that the sponsor has some medical issues but he is assisted with them by other family members in the UK.

### **The Appeal to the Upper Tribunal**

9. Permission to appeal was sought on the basis that the judge had failed to give any meaningful consideration to Article 8 ECHR or to the best interests of the British children involved. It was submitted that 'the entire edifice of the judge is vicious by material error of law and reconsideration is therefore sought'. (Ms Katambala apologised before me for the substitution of 'vicious' for 'vitiated' but it remains unclear why there is a reference to the process of reconsideration, which was removed from the 2002 Act nearly a decade ago.) Be that as it may, permission was ultimately granted by Judge Saffer, who was satisfied that the failure by the judge to consider the article 8 rights of the British children residing in Algeria with their mother was arguably a material error of law.
10. Before me, Mr Tufan accepted that the judge had materially erred in law in dismissing the appeal without any consideration of Article 8 ECHR or the best interests of the children. I considered that to be a concession properly made and indicated that I would set aside the judge's decision insofar as it purportedly dismissed the appeal on Article 8 ECHR grounds.
11. I asked the advocates whether I should remake the decision on the appeal for myself and, if so, whether there was a need for another hearing on a future date. Mr Tufan was content for me to remake the decision immediately. Ms Katambala was also content for me to do so.
12. The advocates agreed that there had been no appeal against the adverse findings in relation to the English Language Requirement. I suggested that it would be my task to consider the significance of that conclusion in

light of Bibi [2015] UKSC 68; [2015] 1 WLR 5055 and to balance all relevant considerations weighing for and against the appellant's admission. Unfortunately, Ms Katambala was unaware of the decision in Bibi and required some time to consider it, which I readily gave. On resuming the hearing, she confirmed that she was ready to proceed. She wished to adduce no further documentary evidence but she intended to call the sponsor to give evidence.

### **Oral Evidence**

13. The sponsor adopted the brief witness statement which he had made for the hearing before the FtT. He said that the appellant had tried to do the English test six or seven times but that she had dyslexia. The children were with her in Algeria. He was unable to look after them because of his own disabilities. The eldest child was due to start school next year.
14. Cross-examined by Mr Tufan, the sponsor stated that he and his wife had married in 2013 and had always lived apart. He stated that his wife had difficulty in learning French and could only speak Arabic. He said that she had been to English classes but she was unable to pass the test due to her dyslexia.
15. There was no re-examination. I asked the sponsor some further questions in order to understand the position of the children. He said that his wife and children lived in his father's house in Algiers. His father had disappeared in 1995, during the civil war. His mother had died in 2001. He has four sisters, two of whom lived in the house with his wife and children. He had paid for his wife to take private English lessons at a school. He thought that this was between 2012 and 2013 and that she had stopped the lessons in 2013.

### **Submissions**

16. Mr Tufan relied on [89] of SS (Congo) [2015] EWCA Civ 387; [2016] 1 All ER 706 and submitted that it was entirely proportionate to expect the appellant to make another application for entry clearance in which she sought to address the English Language Requirement ("ELR") properly. The decision in Bibi did not take matters any further; there might be cases in which it was disproportionate to refuse admission to a person who had failed the ELR but this was not one of those cases. The ELR existed to further the plainly legitimate aim of ensuring that immigrants were able to integrate into the UK. The real question was whether, in doing so, the ELR brought about unjustifiably harsh consequences in this particular case. Mr Tufan recognised that there were three British children involved and that the spirit of section 55 BCIA 2009 applied. But he submitted that none of them had been to the UK before. The significance of a child's British citizenship in such cases was to shortly to be considered by Lane P in a reported decision. This was not a case in which that decision would

be significant, however, since the real solution for the appellant was to take the ELR or to provide proper evidence to show that she could not.

17. Ms Katambala submitted that the appellant had clearly tried to take the test and had been unable to do so. The medical reports should be taken into account and it was relevant that she was unable even to learn French. It was relevant to recall what had been said by Baroness Hale at [27] of Bibi; there was a range of factors to take into account in deciding whether the decision in this case as proportionate. The respondent had published guidance which stated that it was never reasonable to expect British children to live abroad. In view of the appellant's medical condition, it was disproportionate to expect her to take the ELR.
18. I reserved my decision on the merits of the appeal.

### **Discussion**

19. As I have recorded above, the starting point for my consideration of this appeal are the findings which were made by the FtT regarding the Financial Requirements and the ELR. It was accepted by the judge that the amount of money available to the family was adequate for the purposes of Appendix FM. As a result of the sponsor's disability, the appellant is exempt from the Minimum Income Requirement which ordinarily applies. There is no appeal from these findings.
20. Nor is there any appeal against the finding made by the FtT that the appellant cannot satisfy the ELR. Plainly, she cannot satisfy the alternative requirements in paragraph E-ECP 4.1(a)-(c), which require her to demonstrate competence in the English language in one of three ways (including taking and passing a test at level A1). She seems to have contended before the FtT that she was exempted from that requirement as a result of E-ECP 4.1(d) and E-ECP 4.2 because she has a physical or mental condition which prevented her from meeting it. The judge was plainly correct to find that the appellant could not qualify for the exemption. There were two documents which were said to be relevant. The first is a letter from a psychologist and speech therapist in Algeria, dated 25 April 2019. This stated that the appellant has had speech therapy twice a week since 2009 and that she experienced difficulty in comprehension when writing. Then there is a longer letter dated 16 May 2019, which is also from a psychologist and speech therapist. This states that she has dyslexia. It continues by explaining that it is a language disorder identified by a proven and chronic reading difficulty'. The remainder of the letter states:

Hence, the treatment with her would be long and tedious making the results desired by the patient and the speech therapist hard to yield, but reachable by the will of the patient to overcome this impediment which is significantly affecting

her social life. [There is then a missing section of the letter, in both the original French and the English translation.] that consists of presenting a significant impairment in the acquisition and use of the reading and written language , expressed through a permanent impairment in the reading strategies linked with the auditory perception at the decoding of the auditory information and with a sensory-visual perception at the perception and decoding of the visual information; in other works [sic], the phonetic and visual confusion of some graphically and phonetically specific nearby letters and sounds (p/q, d/b, v/f, s/z, etc). This confusion causes her a difficulty in the pronunciation of words and sentences.

21. As the judge in the FtT held, these letters fall some way short of showing that the appellant is prevented from meeting the very basic level of English language required by EECp 4.1(b) (speaking and listening at level A1 of the CEFR): [9] and [21] of Bibi refer.
22. I heard further evidence from the sponsor about the appellant's attempts to learn English. He stated that she had taken English classes from 2012 to 2013 and that she had attempted to take the level A1 test six or seven times. There is no mention of any of this in his witness statement, or elsewhere in the documents. There is no documentary evidence of any classes or of any failed examinations. I am not prepared to accept these new assertions without any form of documentary evidence in support. The point has been squarely in issue since the ECO's decision, which was made more than a year ago. It remains the case that there is no proper basis upon which to conclude that the appellant's dyslexia prevents her from meeting the ELR.
23. I proceed, therefore, to undertake the task which the judge in the FtT failed to undertake. Article 8 ECHR is obviously engaged in its family life aspect in a case such as the present. It does not suffice simply to state that the ECO's decision does not represent an interference with the status quo. As the Upper Tribunal explained at [57] of TY (Jamaica) [2018] UKUT 197 (IAC):
 

"the obligation to respect family life requires not only that a State refrains from interfering with existing family life but may also entail a positive obligation to permit family life to develop."
24. In Bibi, during her consideration of Abdulaziz, Cabales & Balkandali v the UK (1985) 7 EHRR 471, Baroness Hale made similar observations regarding the scope of Article 8 in entry clearance cases, at [26]. The question, therefore, is whether the appellant's ongoing exclusion from the

UK is disproportionate under Article 8 ECHR or whether, as it is expressed at GEN 3.2(2) of Appendix FM, the refusal gives rise to unjustifiably harsh consequences.

25. In considering that question, the Supreme Court and the Court of Appeal have emphasised the benefit of adopting a 'balance sheet' approach, setting out the factors which militate for and against the appellant on the scales of proportionality. As a result of Hesham Ali [2016] UKSC 60; [2016] 1 WLR 4799, at [41], the starting point is the appellant's inability to meet the Immigration Rules for the reasons I have already set out. An inability to meet the Immigration Rules is a matter which militates against an individual under Article 8(2). In Agyarko [2017] UKSC 11; [2017] 1 WLR 823, Lord Reed stated that considerable weight was to be given, at a general level, to those statements of policy: [47].
26. I must have regard to the fact that Parliament has stated in s117B(1) NIAA 2002 that the maintenance of effective immigration control is in the public interest. In a case such as the present, however, it is both s117B(1) and s117B(2) which militate against the appellant because it is expressly stated to be in the public interest that people who seek to enter the United Kingdom are able to speak English. In Bibi, Lady Hale stated that the aim pursued by E-ECP 4.1 was undoubtedly an important one: [40]. That statement must apply equally to s117B(2). The appellant's failure to satisfy the Immigration Rules therefore militates against her in these ways when considering the respondent's side of the balance sheet.
27. In considering the matters on the appellant's side of the balance sheet, it is appropriate to turn first to the best interests of the three British children in this case. Their interests are a primary consideration, which means a consideration of substantial importance. Their interests may be outweighed by the cumulative impact of other considerations. In considering their best interests, their nationality is not a trump card but it is a consideration of particular importance, as Lady Hale explained at [30]-[32] of ZH (Tanzania) [2011] UKSC 4; [2011] 2 AC 166.
28. On the particular facts of this case, I consider the children's nationality to militate cogently in favour of their mother's admission. I reach that conclusion because it is difficult to see how the children could take advantage of their British citizenship unless they enter with their mother. I have thus far described their father as being disabled but it is necessary to descend into a little more detail in this connection. The sponsor suffers from a range of mental and physical health conditions. He has severely restricted mobility, as is clear from the letter from his GP dated 28 May 2019 and the Personal Independence Payment Statement of Entitlement dated 23 April 2018. He also suffers from PTSD, chronic depression with psychotic features and anxiety disorder. He is in no position to look after three young children on his own. In fact, as the PIP assessment makes

clear, he has difficulty in looking after himself and receives limited assistance from his family in the UK.

29. It is generally in the best interests of a child to be raised by both parents. Given the sponsor's physical and mental health problems, I do not consider that he is able to move to Algeria to raise his children with the appellant. He is clearly in receipt of a structured package of benefits and regular care from his GP (Dr Ho) and it would cause him very serious hardship to transfer to Algeria with the resultant disruption to (and potential severance of) this support. Realistically, therefore, the only way in which these young British children can be raised by both parents is if they enter the United Kingdom with their mother.
  
30. Despite those considerations weighing cogently in favour of the mother's admission, I do not see this as a case in which the best interests of the children point emphatically or overwhelmingly to that course. The children are separated from their father and the country of their nationality whilst they remain in Algeria. Both are significant considerations, but they are not determinative of the best interests assessment. It is necessary to take a holistic view, as has been emphasised in numerous authorities including EV (Philippines) [2014] EWCA Civ 874. The children are not said to have unmet needs in Algeria. They live in the family home in Algiers with their mother and other relatives. There is no suggestion that they are inadequately cared for in any way and they are in a familiar environment, surrounded by family. Their circumstances in the UK would, on any realistic view, be rather more precarious. Although they would be living with two parents, their father's capacity to provide care is greatly reduced for reasons beyond his control. Their mother speaks no English and would be unable – at least initially – to communicate with local services including schools and healthcare providers. Given their ages, these are not children who would themselves learn English rapidly, as Lady Hale considered at [38] of her judgment in Bibi. They are, instead, children who would be dependent upon their parent's ability to interact with those responsible for their health and wellbeing. Lady Hale emphasised the importance of that ability (in the context of adults themselves) at [41] of her judgment. Whilst the children would be able to live with both parents in the country of their nationality, therefore, there would potentially be wider concerns as to their wellbeing in the event that they entered the UK as matters presently stand. Adopting the holistic approach required, therefore, I consider that the best interests of the children militate in favour of the appellant's admission but not emphatically so. That is not a decisive consideration but it is one to which I give significant weight, in accordance with [109] of Jeunesse v The Netherlands (2015) 60 EHRR 17.
  
31. The severity of the consequences for the appellant and the sponsor is also a matter which militates in favour of admission. There has never been any



suggestion that this is anything other than a close and loving marriage and the births of three children underlines the strength of the relationship. There is no statement from the appellant before me but the sponsor's upset at the ongoing separation from his wife was obvious at the hearing. The importance attached to such family relationships in international human rights law was stressed by Lady Hale at [31] of her judgment in Bibi. Although the Convention does not provide a general obligation to respect a couple's choice of their country of matrimonial residence, this is a case in which the sponsor cannot feasibly relocate to Algeria, for the reasons I have already explained. For the time being, therefore, the family is fundamentally ruptured, in that they are required to live apart, with all the human consequences that entails for adults and children alike.

32. Drawing these threads together, it is clear that there are cogent matters weighing on each side of the scales of proportionality. On the respondent's side is the appellant's failure to meet the ELR, which in turn engages the statutory considerations in s117B(1) and (2) NIAA 2002. On the appellant's side is the best interests of the children and the severity of the consequences for the adults and children whilst they are required to carry on their family life on different continents.
33. Ultimately, I come to the clear conclusion that it is the considerations on the respondent's side which are altogether weightier. I do so for essentially the reason given by Mr Tufan in his submissions. The appellant can proportionately be expected to make another application for entry clearance, supported by proper evidence. It has not currently been shown that the appellant is unable to satisfy the pre-entry ELR. I have accepted that she has dyslexia and dysgraphia but the test is very basic; it is only in speaking and listening; and there is simply no proper evidential basis upon which I could conclude that she is unable to prepare for it or to take it.
34. This cannot properly be seen as a case in which a young family is permanently kept apart by an Immigration Rule they cannot hope to meet. The only proper way to view it, on the very limited evidence presented, is a case in which the family is kept apart because of their failure to come to grips with what is required by the Rules. If the appellant is able to apply herself and to pass the test, she will (all else being equal) be permitted to enter the UK, bringing the children with her. If she is not able to apply herself, she must present evidence which establishes that to be the case. Her diagnosis of dyslexia and dysgraphia will not suffice on its own, for the reasons which have been explained in the FtT and in my own decision. If she presents evidence in support of what I have been told by the sponsor, however, it is not difficult to see there being a good case for an exemption. If it can be shown by proper evidence that she has taken the A1 test six or seven times; that she tried to learn English for a year and made no progress whatsoever; and that she is not even able to learn any

French as a result of her disability, I find it difficult to imagine how an ECO could refuse to find that the exemption applied.

35. In the circumstances, I do not consider that the respondent's decision has currently been shown to give rise to unjustifiably harsh consequences. On the contrary, it pursues a legitimate and important aim and it has not been shown on the evidence before me that the pursuit of that aim results in a disproportionate interference with the family life at issue.

**Notice of Decision**

The decision of the FtT contained a legal error and is set aside to the extent described above. I remake the decision on the appeal and dismiss the appeal on Article 8 ECHR grounds.

No anonymity direction is made.

A handwritten signature in black ink, appearing to be 'MBL' followed by a long horizontal stroke.

MARK BLUNDELL  
Judge of the Upper Tribunal (IAC)  
31 December 2019