



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2023-005216  
UI-2023-005217

First-tier Tribunal No: HU/52104/2023  
HU/52108/2023

**THE IMMIGRATION ACTS**

Decision & Reasons Issued:

13<sup>th</sup> February 2024

**Before**

**UPPER TRIBUNAL JUDGE O'CALLAGHAN**

**Between**

**KAUSAR IFTIKHAR  
MALAIKA IFTIKAR**

Appellant

and

**ENTRY CLEARANCE OFFICER, SHEFFIELD**

Respondent

**Representation:**

For the Appellant: Mr M Schwenk, Counsel, instructed by Legal Chambers Solicitors

For the Respondent: Mr C Bates, Senior Presenting Officer

**Heard at Manchester Civil Justice Centre on 5 February 2024**

**DECISION AND REASONS**

**Introduction**

1. The appellants have been granted permission to appeal a decision of the First-tier Tribunal (Judge of the First-tier Tribunal N Malik) refusing their entry clearance appeal. The Judge's decision was sent to the parties on 6 November 2023.

### **Relevant Facts**

2. The first appellant is the wife of the sponsor Mr Iftikhar Ahmed, a British citizen. She is a national of Pakistan and aged 44. The second appellant is the daughter of the first appellant and the sponsor. She is a national of Pakistan and aged 18.
3. The first appellant and her husband have two additional children, both of whom are British citizens. The elder of the two children resides in the United Kingdom with his father. The second resides in Pakistan with her mother and sister.
4. The appellants sought to join their sponsor in this country by applications dated 5 November 2022. The first appellant's application was refused under the relevant Immigration Rule on the ground that she had failed to satisfy the English language requirement. The second appellant was refused in line.

### **Relevant Immigration Rule**

5. Relevant to this appeal is the exemption to the English language requirement under Appendix FM to the Immigration Rules:

"E-ECP.4.2. The applicant is exempt from the English language requirement if at the date of application-

(a) ...

(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."

### **First-tier Tribunal Decision**

6. The appeal came before Judge Malik sitting in the Virtual Region on 3 November 2023. The appellants were represented by Mr Richardson, Counsel. Mr Iftikhar attended and gave evidence.
7. The core of the appellants' case before the Judge was that the first appellant met the exemption to the relevant English language requirement as she fell within the scope of paragraph E-ECP.4.1 by

virtue of her satisfying paragraph E-ECP.4.2(b), namely that she “has a disability (physical or mental condition) which prevents the applicant from meeting the requirement”.

8. In respect of this element of the case, the Judge noted evidence relied upon by the appellants, at [15]-[16] of the decision:

“15. A1 relies on a letter from Dr Waheed Razzaq, Consultant Psychiatrist, of 14/11/22 which says she has been under treatment for generalized anxiety disorder since August 2021; her presenting complaints are apprehension, weeping spells, forgetfulness, insomnia, and restlessness; she has had various pharmacological and psychotherapeutic interventions and has shown poor to minimal response to treatment. Dr Razzaq says A1 has significant difficulty in registering and retaining new information and her anxiety worsens at times of the English language tests. A1 has attempted two tests in a year but could not pass them and this has contributed to her illness. Dr Razzaq says A1’s inability to pass the test and join her husband has become a maintaining factor of her illness. Dr Razzaq lists three medications that A1 takes. A further letter from Dr Razzaq of 07/04/23 repeats the narrative in his first letter, and that A1 had now attempted three tests following tuition at an English Academy and her inability to pass the test has contributed to her illness.

16. There is also a letter from Dawn Academy of 16/11/22 which says A1 has been a student of theirs from 01/09/21 to 14/09/22 - one year - and during this time she has had three-hour daily classes six days a week, been examined every week but was found to be confused, forgetful, suffering from anxiety, apprehension, and poor performance in speaking and listening in the English language. She has twice failed the English language test and was awaiting the result of a third test.”

9. The Judge concluded in respect of paragraph E-ECP.4.2(b) and (c) of the Rules, at [17]-[18]:

“17. I have considered the written evidence of Dr Razzaq and Dawn Academy. A1 started studying at Dawn Academy in September 2021 and Dr Razzaq says her treatment started in August 2021. This causes me to find the cause of her anxiety is related to the English test - but on balance, I find A1 does not meet the requirements of E-ECP.4.2(b), as whilst she has anxiety, this is caused by having to take/pass the test. It is not unusual for any student, when taking a test, to feel under pressure, anxious, apprehensive, have insomnia and forgetfulness. These are not unusual side effects of taking an examination and not a reason to not take the test. Whilst Dawn Academy speaks of A1 being

confused, forgetful, suffering from anxiety etc., they are not qualified as clinicians to make this finding. Dr Razzaq says A1 is on medication, and there is nothing to suggest this treatment will not in due course assist her in being able to take the test and pass it.

18. Turning next to E-ECP. 4.2 (c) and if there are exceptional circumstances which prevent A1 from being able to meet the English language requirement before coming to the UK - A1 has now attempted three tests and failed them all. Dr Razzaq says this has contributed to her illness and A1's inability to pass the test and join her husband has become a maintaining factor of her illness. It was submitted by the appellants representative that the test should not be "inflicted" on A1 as it worsens her condition and makes it harder to pass the test. This I find though is not an exceptional circumstance, as again, it is A1's inability to pass the test that is causing her anxiety and this in turn prevents her from joining the sponsor and HI in the UK. A1 is said to be under the care of Dr Razzaq since August 2021, but his letter does not set out the psychotherapeutic interventions A1 has undertaken or definitively state she, in due course, given the medications she is taking, cannot take and pass the test when her condition is under control."

### **Grounds of Appeal**

10. The appellant relies upon grounds of appeal drafted by Mr Richardson, Counsel.
11. Judge of the First-tier Tribunal Monaghan granted permission to appeal on grounds 1 and 2. Permission was refused in respect of ground 3 which was not renewed before this Tribunal.
12. As to grounds 1 and 2, Judge Monaghan reasoned:
  - "2. The Judge has arguably made a material error of law in finding that the A1's anxiety was of a kind experienced by all students and not the consequence of her mental illness; that the treatment she was receiving from Dr Razzaq would ultimately cure her anxiety and that Dawn College were not qualified to comment on her learning disability without first raising these matters with the sponsor or his Counsel and therefore that the Judge has arguably acted in a procedurally unfair manner.
  3. The Judge has arguably made an irrational finding that the Appellant's anxiety was pre-exam nerves in the face of the available medical evidence, including the diagnosis of a mental health condition and the treatment of A1 with three types of medication, including an anti- psychotic medication. Whilst permission to appeal is therefore additionally granted on

Ground 2, I do not accept that there was also a misunderstanding of the evidence in relation to the taking of the test. The findings made by the Judge show that she was aware that A1 had taken the test and did not reach her decision based on an erroneous belief that she had refused to take the test. I do not accept either that given that A1's anxiety was a diagnosable disorder that this finding should have been determinative of the Appeal in the Appellant's favour. E-ECP.4.2(b) requires not only that the Applicant has a disability (physical or mental condition) but that it prevents the applicant from meeting the English language requirement."

### **Discussion and Reasons**

13. At the outset, Mr Bates conceded the error of law appeal accepting on behalf of the respondent that the Judge erred in fact, and materially erred in law, by proceeding on the basis that the first appellant suffered from anxiety, when her diagnosis is of generalised anxiety disorder.
14. In addition, it was accepted that the Judge again erred in fact, and materially erred in law, when concluding at [17] that "there is nothing to suggest this treatment will not in due course assist her in being able to take the test and pass it." Mr Bates noted a letter from Dr Razzaq, dated 14 November 2022, confirming the first appellant had received various pharmacological and psychotherapeutic intervention but had shown poor to minimal response to the prescribed treatment.
15. It was proper for Mr Bates to make these concessions. It is a concern that the Judge failed to adequately identify the relevant diagnosis which was at the core of the appeal before her and failed to consider with care the one-page letter from Dr Razzaq.
16. The Judge clearly proceeded in her assessment at [17] on the basis that the first appellant suffers with anxiety: a feeling of unease, such as worry or fear, that can be mild or severe.
17. The appellant's diagnosis of generalised anxiety disorder is a long-term condition that causes a sufferer to feel anxious about a wide range of situations and issues, rather than one specific event. People with generalised anxiety disorder feel anxious most days, and often struggle to remember the last time they felt relaxed. Some sufferers of generalised anxiety disorder may establish that they suffer a disability, as established by section 6 of the Equality Act 2010, where their condition has a long-term effect on them, namely that it has lasted or is likely to last twelve months, that it has a substantial effect on daily

life if the effect of medication is ignored, and it has an adverse effect upon them, namely it makes things more difficult.

18. Anxiety and generalised anxiety disorder are two different mental health disorders.
19. The unfortunate reliance upon the first appellant having been diagnosed with anxiety, rather than correctly noting her true diagnosis of generalised anxiety disorder is an error of fact, and properly to be considered a material error of law: *R (Iran) v. Secretary of State for the Home Department* [2005] EWCA Civ 982.
20. In the circumstances, the decision of the First-tier Tribunal is properly to be set aside.
21. The respondent was also correct to concede that the Judge's failure to accurately note medical opinion that the appellant exhibits poor to minimal response in respect of pharmacological and psychotherapeutic intervention is a material error of law.

### **Resumed Hearing**

22. Both representatives requested that the matter be remitted to the First-tier Tribunal consequent to the Judge having failed to adequately identify the appellant's diagnosis.
23. I observe the guidance in *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC).
24. Being mindful that to date the appellants have not had an adequate assessment of their appeal, I consider it appropriate and just to remit this matter to the First-tier Tribunal.
25. Proper consideration is to be given to whether the first appellant has a "disability" for the purpose of paragraph E-ECP.4.2.(b).
26. An issue of law arises in this matter, namely the nature and substance of the requirement that the applicant has a disability (physical or mental condition) which "prevents" an applicant from meeting the relevant English language requirement. "Prevent" in its normal usage can mean "to hinder" or to "keep from happening". I note Mr Bates' observation that the respondent may wish to rely upon a lack of previous educational study in respect of the English language as suggesting the existence of more than one reason as to why the first appellant has to date been unsuccessful in passing the required English language test and so suffering from generalised anxiety disorder alone is not preventing her from meeting the English language

requirement. Alternatively, is it sufficient to have a disability that “prevents”, regardless as to the existence of other factors that may also prevent success? To date there is no reported decision addressing the meaning of “prevents” in this provision of the Rules. I considered whether the matter should remain in the Upper Tribunal to address interpretation, noting the Judge entirely failed to address this requirement of the Rules in her decision. However, as addressed above, in all the circumstances I consider it just to remit this matter back to the First-tier Tribunal sitting in Manchester.

27. Mr Schwenk acknowledged that the First-tier Tribunal could properly expect an addendum skeleton argument addressing the application of the test, it not having been raised in the undated appellant’s skeleton argument filed with the First-tier Tribunal. I observe that the skeleton argument is a paradigm example of an unhelpful document relying heavily on generic reference to well-known judicial authority. Tribunals are not aided by the filing of a generic skeleton argument, which is meant to be a document presenting careful and focused submissions relevant to core issues and facts.

### **Notice of Decision**

28. The decision of the First-tier Tribunal sent to the parties on 6 November 2023 is subject to material error of law and is set aside.
29. No findings of fact are preserved.
30. The appeal is remitted to the First-tier Tribunal sitting in Manchester to be heard by any Judge other than Judge of the First-tier Tribunal N Malik.

*D O’Callaghan*  
**Judge of the Upper Tribunal**  
Immigration and Asylum Chamber

**6 February 2024**