Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/13862/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 January 2018	**On 8 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MRS LUCKY BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the Appellant: Mr T Chowdhury
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh, born on 8 August 1977. She applied for entry clearance to the United Kingdom as the spouse of Mr MD Soyfur Rahman, born on 8 June 1972, who is a British citizen. The application was submitted online on 23 March 2016. On 12 May 2016 the respondent refused the appellant's application. The Entry Clearance Officer did not accept that the sponsor and appellant are in a genuine and subsisting relationship. The Entry Clearance Officer also considered that the appellant was not exempt from the English language requirement and that she had not passed the required test. The application was also refused under Article 8 of the European Convention on Human Rights.

2. The appellant appealed against the Entry Clearance Officer's decision to the First-tier Tribunal.

The appeal to the First-tier Tribunal

3. In a decision promulgated on 1 August 2017 First-tier Tribunal Judge Wright dismissed the appellant's appeal. The judge, as a starting point, when determining the appeal on human rights grounds considered the appellant's ability to meet the Immigration Rules. The judge found that the appellant was not exempt from the English language requirement and therefore does not meet the requirements of the Immigration Rules. The judge found that refusal of entry clearance would not constitute a disproportionate interference with the appellant's Article 8 rights or those of her sponsor.

4. The appellant applied for permission to appeal against the First-tier Tribunal's decision. On 31 October 2017 First-tier Tribunal Judge Doyle granted permission to appeal.

The hearing before the Upper Tribunal

5. The grounds of appeal argue that the First-tier Tribunal Judge did not consider appropriately the requirements for the respondent to demonstrate that the refusal meets a legitimate aim and that immigration controls can only be used for the prevention of crime. Reliance was placed on paragraph 34 of **R (on the applications of Ali and Bibi v Secretary of State for the Home Department [2015] UKSC 68**. Mr Chowdhury submitted that the appellant has no criminal record and is not dependent on the state so that the maintenance of immigration control cannot be relied upon and the appeal cannot be refused on the basis that that is a legitimate aim.

6. He submitted that the judge had applied the wrong standard of proof. At paragraph 21 the judge set out that it was for the appellant to prove on the balance of probabilities that her circumstances qualify her for admission to the UK.

7. He submitted that the judge had imposed a threshold test under Article 8. Reliance was placed on the case of **Nagre, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 720 (Admin)**. It submitted that because the appellant will never be able to join her spouse in the UK as a result of the refusal of entry clearance that this amounts to exceptional circumstances resulting in unjustifiably harsh consequences for the appellant. He relied on the case of **Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC).**

8. The judge erred by failing to consider that the sponsor stated 'the test' this meant a mock test. The judge did not confirm whether the Mentors Education letter is wrong or her statement was wrong as the letter provided from Mentors Education referred to a mock test.

9. In oral submissions Mr Chowdhury referred to the English language exemption and submitted that the judge had sufficient evidence to make findings on the English language exemption. It was for a judge to determine whether or not there are exceptional circumstances resulting in the appellant not being required to meet the English language requirement.

10. Mr Chowdhury accepted that there was no appeal right against either the respondent's decision under the Immigration Rules or indeed the First-tier Tribunal's findings in relation to that matter and therefore did not press the English language exemption issue further.

11. He submitted that at paragraph 34 of the First-tier Tribunal's decision the judge set out a number of factors. The judge erred in finding that some of these factors, for example 34(iii), i.e. with regard to Section 117B(iii) of the 2002 Act that in the interest of the economic well-being of the UK that persons are financially independent can only be a neutral factor. He submitted that all these factors as set out by the judge as being neutral should be considered to be in favour of the appellant. He relied on the case of **Shahzad** and submitted that this demonstrates that these should be positive factors.

12. Mr Walker submitted that there may have been an error of law with regard to setting out the wrong standard of proof but that was not material when considering paragraph 33 of the First-tier Tribunal's decision when undertaking consideration of Article 8. The judge found on the evidence there was nothing to give rise to a strong claim. The judge refers to the case of **Kaur** at paragraphs 35 and 38. The judge had not made any material errors of law. The appellant had never actually taken the English language test and there was no other evidence from the appellant that she was incapable of passing the test. The conclusion reached by the judge on this issue was open to the judge.

13. I reserved my decision.

Discussion

14. Recording the burden and standard of proof the judge set out at paragraph 21 "It is for the appellant to prove, on a balance of probabilities, that her circumstances qualify her for admission to the UK". The judge was considering both the Immigration Rules and Article 8. The judge's setting out of the burden and standard of proof must be considered in light of the fact that the judge did consider both matters. I do not consider that any error amounts to a material error of law when the decision is read as a whole.

15. The judge set out at paragraphs 26 to 30 thus:

> "26. As my starting-point for deciding whether the ECO's decision is unlawful under s.6 of the Human Rights Act 1998 ("the HRA 1998"), I take "the state of the evidence about the appellant's ability to meet the requirements of the immigration rules" (see **Kaur (visit appeals;**

Article 8) [2015] UKUT 00487 (IAC) (Storey SIJ) albeit, for the avoidance of doubt, the present appeal is not a "visit appeal").

27. The ECO put in issue the Relationship requirements of (1) E-ECP.2.6 of Appendix FM ("The relationship between the applicant [appellant] and their partner [sponsor] must be genuine and subsisting"); and (2) E-ECP.2.10 of Appendix FM ("The applicant [appellant] and partner [sponsor] must intend to live together permanently in the UK").

28. The ECO also put in issue the English language requirements of E-ECP.4.1 of Appendix FM ("The applicant must provide specified evidence that they – (a) are a national of a majority English speaking country … ; (b) have passed an English language test in speaking and listening at a minimum level A1 of the CEFR for languages with a provider approved by the SSHD; (c) have an academic qualification … Bachelor's or Master's degree or PhD …. ; or (d) are exempt from the English language requirement under paragraph E-ECP.4.2").

29. Despite misgivings about some of the evidence (for example the appellant is described as a "Maiden" in the Nikah Nama at pp29-30 of A's bundle, as opposed to a "widow" following the death of her first husband – the sponsor's older brother [in 2012] but the actual validity of the marriage not being put in issue by the ECO … nor challenged in cross-examination …. In light of (1) the evidence of the periods of post-wedding cohabitation by the appellant and sponsor in Bangladesh … (2) the evidence of continued financial support for the appellant by the sponsor; and (3) the evidence of continued telephone contact between the appellant and the sponsor … I find I am satisfied … that there the relationship requirements of … Appendix FM are met.

30. However, I find that I am not satisfied that the English language requirement … is met, because I do not find that the appellant is exempt from the requirement (as claimed) under E-ECP.4.2.(c) of Appendix FM … for the following reasons:

    (i) According to [5] of the appellant's witness statement (dated 19/4/2017) "I have tried several times to pass the required English language test. I sat for the examination numerous times but could not pass" and also according to [3] of the sponsor's witness statement (dated 7/7/2017) "she [appellant] tried numerous times to pass the exam. Unfortunately she could not manage to pass the examination", whereas according to the letter from 'Mentors' education … the appellant was "unable to … pass in mock test that we arranged to assess her ability of [sic] English. We then recommended her not to sit for IELTS Life Skill main exam conducted by 'British Council'" and (also) whereas the appellant "has never sat English test" according to the sponsor in cross-examination (see Appeal Hearing above);

    (ii) No evidence is adduced (expert of otherwise) in support of the claim that it is "impossible for anyone to pass English Language Requirement whoever has not get [sic] any primary education" … or in support of the claim that it is "impossible for me to pass English Language Requirement as I have not received any primary education" … and even taking the letter from the 'Mentors' education' … at its highest the most that can be said is simply

that during what can only be described as a very short "learning period" … the appellant was "unable to deal with her course and pass in mock test that we arranged to assess her ability of [sic] English";

(iii) there is no evidence that the English language test (examination) was unavailable prior to the date of the application, i.e. could not be sat in Bangladesh or could not be physically accessed by the appellant … "

16. The issue raised in the grounds of appeal with regard to the mistaken translation regarding "maiden" or "widow" is irrelevant as the judge found that the marriage was a subsisting marriage and this was essentially ignored by the judge.

17. With regard to the English language requirement it is clear that the judge considered all the evidence. There was a difference between the evidence in the appellant's and sponsor's witness statements and the Mentors education letter which referred to taking a mock test. However, although the judge took this difference into consideration as part of the reason for finding that the English language requirement was not met it is clear from paragraphs 30(ii) that the judge considered that no evidence had been adduced to support the claim that it was impossible to pass the English language requirement. The judge considered the Mentors education letter. The letter does not indicate that the appellant is incapable of passing the English language test or that it is impossible for her to do so. The appellant had attended the course for a very short period as set out by the judge. The judge was entitled to reach the conclusion that the appellant could not meet the English language requirement and that the exemption did not apply. In any event as accepted by Mr Chowdhury there is no right of appeal against the decision on the Immigration Rules or the findings of the judge in this regard.

18. The judge did consider Article 8 outside of the Immigration Rules. Therefore the judge has not incorrectly applied a threshold test prior to considering Article 8 outside the Rules. At paragraph 32 the judge clearly commences examination of the claim under Article 8 indicating that following her finding that there was a subsisting marriage and that the couple enjoyed family life and that interference in it is established the judge made a specific finding that Article 8(1) of the ECHR is engaged.

19. The judge indicated in paragraph 32 that she had applied the five stage **Razgar** test. At paragraph 33 the judge considered:

"33. However, I do not consider on the (fact-sensitive) circumstances of this case there are compelling circumstances here not sufficiently recognised under the Rules that can be said to render refusal of entry clearance for the appellant disproportionate under Article 8 (having applied the five stage **Razgar** test ([2004] UKHL 27) concluding with the proportionality balancing exercise, answering the first 4 questions in the affirmative with the public interest in maintaining effective immigration control

being as strong as usual and having had regard, as I must, to the relevant public interest considerations in s.117B of the 2002 Act … and also seeking to strike a fair balance, as I must, pursuant to s.6 of the HRA 1998)."

20. At paragraph 34 the judge set out factors that must be considered under Section 117B noting that the maintenance of effective immigration control is in the public interest, that the ability to speak English and financial independence could only be neutral factors. The judge then considered that Article 8 of the ECHR does not confer an automatic right of entry to the UK to join family members. The judge also considered that it would be in the best interests of the appellant's dependent child from her first marriage for the appellant to be with him and remain with him in Bangladesh (he was not included in the application to come to the UK. The intention was for him to remain in Bangladesh). The judge considered that the appellant's application for entry clearance does not meet all the requirements of the Rules, that the appellant can continue to be visited in Bangladesh as at present by the sponsor, that the appellant can continue contact by telephone and that there is no reason that the sponsor's financial support should not be continued. At paragraph 35 the judge found:

> "35. The upshot is that I find that the appellant has not shown "that there are individual interests at stake covered by Article 8 'of a particularly pressing nature' so as to give rise to a 'strong claim' that compelling circumstances may exist to justify the grant of LTE [Leave to enter] outside the rules'" (see headnote 3 below of **Kaur (visit appeals; Article 8) [2015] UKUT 00487 (IAC)** (SIJ Storey)) and, therefore, I find that refusal of entry clearance for the appellant would not constitute a disproportionate interference with, or a lack of respect for … her Article 8 rights or those of her sponsor."

21. It is clear that the judge considered fully and appropriately all the factors in this case. There is nothing to indicate that this case has any specific features that renders it unjustifiably harsh to refuse entry clearance.

22. It is argued that the Judge did not consider appropriately the requirements for the respondent to demonstrate that the refusal meets a legitimate aim and that immigration controls can only be used for the prevention of crime. Reliance was placed on paragraph 34 of **Ali and Bibi**. The appellant has no criminal record and is not dependent on the state so that the maintenance of immigration control cannot be relied upon and the appeal cannot be refused on the basis that that is a legitimate aim. **Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)** was also relied on. In **Ali and Bibi** the court considered inter alia the requirement in the rules that an applicant meets a certain level of proficiency in English and whether that rule was lawful. The appeal in that case was a challenge to the validity of the rule itself. The argument was that the Rule is an unjustifiable interference with the right to respect for private and family life. The court held that the rule was lawful. The concern identified was in the need to cater for cases where the it is genuinely impractical to meet the requirement - see paragraph 55:

> 55. This does not mean that the Rule itself has to be struck down. There will be some cases in which the interference is not too great. The appropriate solution would be to recast the Guidance, to cater for those cases where it is simply impracticable for a person to learn English, or to take the test, in the country of origin, whether because the facilities are non-existent or inaccessible because of the distance and expense involved. The guidance should be sufficiently precise, so that anyone for whom it is genuinely impracticable to meet the requirement can predictably be granted an exemption. As was originally proposed, those granted an exemption could be required to undertake, as a condition of entry, to demonstrate the required language skills within a comparatively short period after entry to the UK.

23. There was no requirement on the judge to consider the lawfulness of the rule. The appeal was not brought on that basis before the First-tier Tribunal. The First-tier Tribunal would be bound by the decision of the Supreme Court in **Ali and Bibi** in any event. **Ali and Bibi** is not authority for the proposition that immigration control grounds can only be used for the prevention of crime. As set out above the judge considered in detail the limited evidence produced regarding the appellant's assertion that she could not pass a test in English proficiency so should be exempt from that requirement and reached a finding that was open to him.

24. With regard to the section 117 factors the judge indicated that proficiency in English (not that this applies in this case) and financial independence are neutral factors. As held in **Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803**

    1. If the appellant had not been able to speak English, that would have been a negative factor under section 117B(2) to be brought into account in considering the public interest question of whether an interference with the appellant's private life was justified under Article 8(2) (see section 117A(2) and (3)). That is for the reason stated in section 117B(2), namely that it is in the public interest that persons who seek to enter or remain in the UK are able to speak English, because they are less of a burden on taxpayers and are better able to integrate into society. Those are factors relevant to the grounds on which interference with the right to respect for private life can be justified under Article 8(2) ("in the interests of … the economic well-being of the country …", highlighted in section 117B(2) itself), which again underlines that an absence of the ability to speak English is a negative factor.
    1. However, as the FTT observed, it does not follow that because a person is able to speak English that it is in the public interest that they should be given leave to enter or remain. Section 117B(2) simply does not say that. Therefore the FTT was correct to reject the appellant's argument that section 117B(2) meant that it was in the public interest that she should be admitted. Within the scheme of Part 5A, her ability to speak English was only a neutral factor.
    1. The same reasoning applies in relation to section 117B(3). Contrary to the appellant's argument, it does not provide that if she were financially independent it is in the public interest that she be granted leave to remain. It only indicates that it is a negative factor, potentially capable of justifying her removal from the UK compatibly with Article 8, if she is not financially independent. Again, under the scheme of Part 5A, the fact that a person is financially independent is a neutral factor.

25. The judge was correct to consider that these factors were at best neutral. They do not give rise to any positive obligations.

26. There was no material error of law in the First-tier Tribunal decision such that it should be set aside.

Notice of Decision

The appeal is dismissed. The decision of the Entry Clearance Officer stands.

No anonymity direction is made.

Signed P M Ramshaw Date 6 February 2018

Deputy Upper Tribunal Judge Ramshaw