



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/06982/2020
HU/06980/2020**

THE IMMIGRATION ACTS

**Heard at Field House
On 19 November 2021**

**Decision & Reasons Promulgated
On 16 December 2021**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

**MRS ANAB NUR ADAN
MR ABDIQANI AWEIS OSMAN
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms Allen, Counsel instructed by CNA Solicitors

For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

The appellants are citizens of Somalia. The sponsor, who is a British citizen, is the first appellant's husband and the second appellant's father.

The issues in contention concern only the first appellant. For convenience, I will refer to her as "the appellant" in this decision.

On 18 February 2020 the appellant applied for entry clearance under Appendix FM of the Immigration Rules in order to join the sponsor in the UK. On 7 August 2020 the respondent refused the application. It was accepted that the appellant satisfied all but one of the conditions to be granted entry clearance as the sponsor's spouse. The condition it was not accepted that she met was the English language requirement (paragraphs E-ECP.4.1 and 4.2 of Appendix FM). She appealed to the First-tier Tribunal where the appeal came before Judge of the First-tier Tribunal Dempster ("the judge"). In a decision promulgated on 4 May 2021 the judge dismissed the appeal. The appellant is now appealing against this decision.

This appeal concerns the scope of the English language exemption in paragraph E-ECP.4.2(c). This provides:

"The applicant is exempt from the English language requirement if, at the date of application

...

(c) there are exceptional circumstances which prevent the applicant from being able to meet the requirement prior to entry to the UK."

Decision of the First-tier Tribunal

The judge identified as the central issue in contention whether the appellant was exempt from the English language requirement pursuant to paragraph E-ECP.4.2(c).

In paragraph 27 the judge set out part of the respondent's guidance titled 'English language requirement: family members under Part 8, Appendix FM and Appendix Armed Forces' ("the EL Guidance"). The extract from the EL Guidance that the judge cited is as follows:

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 their application for entry 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 also demonstrate this.

Evidence of the nature and impact of the exceptional circumstances must be clearly provided, for instance examples 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 (for example, 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.

Before the First-tier Tribunal, the appellant argued that there were no English language courses available in Somalia and therefore she faced a practical impediment to learning English that could not reasonably be overcome.

The judge did not accept this. In paragraph 29 of the decision the judge acknowledged that there was evidence indicating a “paucity of educational facilities in Somalia”. However, the judge found that:

there was no evidence as to any steps taken by the appellant (or the sponsor on her behalf) to identify any classes in Somalia (or elsewhere) that she could take;

there was no evidence to suggest that the appellant had taken steps to identify any options for private tuition; and

there was no evidence as to the practicalities or cost of securing private tuition.

The judge found in paragraph 29 that the first appellant has “never made any effort to learn English and has never attempted to either identify or attend any English language course”.

The judge went on in paragraph 29 to state that the reason the appellant had not made the effort to locate an educational opportunity was that, as she was uneducated, she believed that it would take considerable effort to learn English.

The judge stated:

“There was no evidence that the first appellant would not be able to learn English nor was there any evidence that she would experience particular difficulties over and above those of others in the same situation”.

With respect to taking the test, the judge acknowledged that there were no facilities to do so in Somalia but found that the appellant could travel to Ethiopia, as she had done when she made her entry clearance application.

Having found that the Immigration Rules were not satisfied (due to the failure to meet the language requirement) the judge turned to consider Article 8 outside the Rules. The judge undertook a balance sheet approach. In paragraphs 38 – 42 the judge set out factors weighing in the appellant’s favour; and in paragraphs 43 – 46 she set out factors weighing against the appellant. In paragraph 47 the judge set out her conclusion that refusing entry to the appellant was not disproportionate under Article 8 ECHR.

Grounds of Appeal and Submissions

The EL Guidance contains several examples of exceptional circumstances, one of which is that the applicant:

“is a long-term resident of a country in which the applicant faces very severe practical or logistical difficulties, which cannot reasonably be overcome, in accessing the learning resources required to acquire English language speaking and listening skills at CEFR level A1”.

It is noted in the grounds that this example of an exceptional circumstance is omitted from the extract cited by the judge in paragraph 27 of the decision and it is argued that the judge failed to consider whether this example was applicable to the appellant.

The grounds also argue that the judge failed to take into consideration the dire humanitarian situation in Somalia and her own finding that there is a paucity of educational opportunities in Somalia.

A further argument made in the grounds is that the judge imposed an additional requirement/test because he found that the appellant did not have “particular difficulties over and above those of others in the same situation”.

The grounds also argue that the judge erred by leaving out of her consideration of proportionality under article 8 her finding as to the paucity of education facilities and the difficult circumstances in Somalia.

Analysis

The EL Guidance sets out, under the subheading “consideration of exceptional circumstances”, how the respondent will consider applications for an exemption from the English language requirement on the basis of exceptional circumstances. Five examples of exceptional circumstances are given. The fifth example states:

“[the applicant] is a long-term resident of a country in which the applicant faces very severe practical or logistical difficulties, which cannot reasonably be overcome, in accessing the learning resources required to acquire English language speaking and listening skills at CEFR level A1”.

I will refer to this example as “the fifth example”.

Before the First-tier Tribunal, the appellant relied on the fifth example, contending that it applied to her.

In paragraph 27 of the decision the judge set out the section of the EL Guidance under the subheading “consideration of exceptional circumstances” but included only the first of the five examples of exceptional circumstances. The fifth example was one of the four examples that were not quoted in the decision, even though it was the example relied upon by the appellant.

Ms Allen argued, before me, that the judge failed to consider the fifth example. Mr Tufan's response was that it is clear from paragraph 29 of the decision that the judge did consider it. I agree with Mr Tufan. In paragraph 29 the judge found that the appellant had failed to establish that she was unable to locate a suitable class or to undertake private tuition because she had not provided any evidence of making any attempts to locate suitable learning opportunities. Moreover, the judge found that the evidence indicated that the reason she did not attempt to locate an educational opportunity was because she thought it would be too difficult to learn English, not because she believed there were nothing available. These findings clearly demonstrate that the judge considered the fifth example.

Moreover, the approach taken by the judge – which was to consider the evidence of efforts made by the appellant to locate educational opportunities – was consistent with the EL Guidance, which states:

Evidence of the nature and impact of the exceptional circumstances must be clearly provided, for instance examples 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 (for example, an appropriately qualified medical practitioner) or capable of being verified by the decision-maker

The fact that the judge did not quote the fifth example in the decision is irrelevant because what matters is whether in substance it was considered, which plainly it was.

Ms Allen also argued that it necessarily followed from the judge finding that there was a paucity of educational facilities, and very difficult circumstances, in Somalia that the exemption in ECP.4.2(c) was satisfied. I do not agree. The assessment of whether ECP.4.2(c) applies is fact specific. It will normally involve consideration of the circumstances in the appellant's country and consideration of her individual circumstances. In this case, the judge considered the situation in Somalia and found that there was a paucity of educational facilities. She also considered the appellant's personal circumstances and found that she had not made any effort to locate a suitable educational opportunity. The judge was entitled, having balanced these considerations, to find that ECP.4.2(c) was not satisfied. It was rationally open to the judge to reach this conclusion even though she accepted that there was a paucity of educational facilities and difficult circumstances in Somalia.

In paragraph 29 the judge stated that the appellant would not face "particular difficulties over and above those of others in the same situation". Ms Allen argued that this was an additional requirement going beyond what is stipulated in ECP.4.2(c). Ms Allen is correct that there is no requirement for an appellant to establish that she has particular difficulties "over and above" others who are similarly situated. In some situations most (or even all) people in a similar position will satisfy ECP.4.2(c) because of their circumstances. For example, if a country prohibited learning English then it may be that everyone in it would meet the exemption. However, reading the decision as a whole, it is clear that the judge did not – in substance – introduce, or impose, a requirement that the

appellant show her situation was “over and above” others similarly situated. The judge simply looked at the objective evidence (indicating a paucity of educational facilities) and the evidence of the appellant (which failed to establish that she had made any attempts to locate suitable learning opportunities) and concluded that the exception not apply. This was the correct approach and I am satisfied that the reference to “over and above”, although incorrect, did not affect the assessment.

I do not accept that the judge erred by omitting from the article 8 ECHR assessment consideration of the difficulties the appellant might face in taking an English language test or learning English as it is clear from paragraph 47 of the decision that the exemption issue was taken into consideration in the article 8 balancing exercise.

In evaluating the proportionality of refusing entry to the appellant, the judge undertook a balance sheet approach where she set out the factors weighing for and against her and (in paragraphs 47 and 48) gave a clear analysis explaining how her conclusion was reached. The grounds do not identify any error in the approach taken, and the judge reached a conclusion that was rationally open to her based on the evidence.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of a material error of law and stands.

Signed

D. Sheridan
Upper Tribunal Judge Sheridan

Dated: 9 December 2021