Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2021-001450
On appeal from HU/08516/2020

THE IMMIGRATION ACTS

Heard at Birmingham CJC
On the 4th October 2022

Decision & Reasons Promulgated
On the 02 November 2022

Before

UPPER TRIBUNAL JUDGE MANDALIA
and
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[F A]
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr N Nadeem, Citadel Immigration Lawyers Ltd
For the Respondent: Mr C Williams, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in the appeal before us is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is [FA]. However, for ease of reference, in the course of this decision we adopt

the parties' status as it was before the FtT. We refer to [FA] as the appellant, and the Secretary of State as the respondent.

2. The appellant is a national of Yemen. On 14th October 2020, she made an application for entry clearance to the UK under Appendix FM of the Immigration Rules on the basis of her family life with her partner, [MS], a British citizen. They married in Yemen on 1st April 1996. In the application form completed by the appellant (page 12 of 17), the appellant claimed she is exempt from the English language requirement because she has a disability that prevents her from meeting the requirement.

3. The application was refused by the respondent for reasons set out in a decision dated 3rd November 2020. The respondent accepted the application does not fall for refusal on grounds of suitability. However, the respondent was not satisfied that the appellant meets all of the eligibility requirements of Section E-ECP of Appendix FM. In particular, the respondent was not satisfied that the eligibility relationship requirement is met. The respondent considered the documents relied upon by the appellant to demonstrate she is married but was not satisfied that the relationship between the appellant and her sponsor is genuine and subsisting or that they intend to live together permanently in the UK. The respondent therefore refused the application under paragraph EC-P.1.1(d) of Appendix FM of the Immigration Rules. The respondent also concluded that the appellant had not provided evidence that she has a disability preventing her from meeting the eligibility English Language requirement, or that there are exceptional circumstances preventing her from meeting that requirement. Having decided the requirements for entry clearance as a partner set out in Appendix FM are not met, the respondent went on to conclude that there are no exceptional circumstances which would render refusal of the application a breach of Article 8 of the ECHR because it would result in unjustifiably harsh consequences for the appellant, her partner, a relevant child or another family member.

4. The appellant's appeal against that decision was heard by First-tier Tribunal Judge Andrew and allowed for reasons set out in a decision promulgated on 14th September 2021. Judge Andrew noted, at paragraph [4], that the burden of proof is on the appellant to establish that the decision does amount to an interference with her right to a family and/or private life in the United Kingdom. She noted the respondent was not represented at the hearing and had not given any reasons for the absence of a Presenting Officer. At paragraphs [10] and [11] she said:

> "10. The Refusal Letter revealed two issues in the matter. The first was whether the Appellant and the Sponsor were in a genuine and subsisting relationship and the second was the fact that the Appellant had not met the English language requirements of the Rules.
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> 11. I deal firstly with the issue of the Appellant and the Sponsor's relationship noting that the Respondent had chosen not to send a representative to the hearing and following from this it appears that the Respondent had no wish to cross examine either the Sponsor or the Sponsor's daughter who had both provided witness statements and that accordingly the Respondent must have accepted their evidence as credible, having had sight of the same."

5. For reasons set out at paragraphs [12] to [16], Judge Andrew was satisfied that the appellant's marriage to her sponsor is a genuine and subsisting marriage. She addressed the English Language Requirement at paragraphs [19] to [21] of the decision and said:

> "19. I have also taken note of the Respondent's own guidance. The Appellant must show that because of exceptional circumstances they are unable to learn English before coming to the United Kingdom or that it is not practicable or reasonable to travel to another country to take their test.
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> 20. It is the Appellant's case that there are exceptional circumstances which make her unable to learn English before coming to the United Kingdom. The Respondent's guidance does say that a lack of limited literacy is not an exceptional circumstance. However, the evidence in this case is that the Appellant is illiterate in Arabic, not that she has limited literacy. The reasons given for this are set out in the medical evidence. In the letter from the hospital at page 42 of the Appellant's Bundle it is said that the Appellant cannot read and write and that she is 'forgetful, has a lack of focus, memorization and frequent sleep'. It goes on to say that she is unable to deal with new information which would make it difficult for her to learn the English language. The letter refers to her having been prescribed piracetam which is a drug which it was hoped would assist her in her difficulties but that it has not, in fact, done so.

> 21. Accordingly I am satisfied that this is one of the rare cases in which the Appellant has been able to show that there are exceptional circumstances which prevent her from learning English before coming to the United Kingdom to enable her to take the appropriate English language test and that she should be exempt from the same."

6. Having concluded that the requirements of the rules are met, the appeal was allowed on human rights grounds.

7. The respondent claims Judge Andrew erred in her analysis of the evidence and in paragraph [11] of her decision proceeds on the basis that the respondent had chosen not to send a representative to the hearing to cross examine either the sponsor or the sponsor's daughter who had both provided witness statements, and that accordingly, the respondent must have accepted their evidence as credible. Second, there is further error in the judge's consideration of whether there are exceptional circumstances which would exclude the appellant from the requirement to demonstrate her English Language ability. The respondent claims the fact that the appellant is illiterate, specifically in Arabic, is irrelevant to any assessment. The respondent's published guidance speaks of illiteracy in general, and not with regard to a specific language. The respondent claims it is clear that the appellant's inability to read and write is an indication of the fact she has a "lack of literacy", and to find otherwise, is to err in law. Furthermore, the medical evidence provided does not indicate any medical diagnosis of a physical or mental condition which would prevent the appellant from learning English.

8. Permission to appeal was granted on both grounds by First-tier Tribunal Judge Haria on 4th November 2021.

9. Before us, Mr Williams refers to the decision of the Tribunal in MNM (Surendran guidelines for Adjudicators) Kenya * [2000] UKUT 00005. As far as relevant here, the guidelines state:

> "1. Where the Home Office is not represented, we do not consider that a special adjudicator is entitled to treat a decision appealed against as having

> been withdrawn. The withdrawal of a decision to refuse leave to enter and asylum requires a positive act on the part of the Home Office in the form of a statement in writing that the decision has been withdrawn. In the instant case, and in similar cases, this is not the position. The Home Office, on the contrary, requests that the special adjudicator deals with the appeal on the basis of the contents of the letter of refusal and any other written submissions which the Home Office makes when indicating that it would not be represented.
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> 2. Nor do we consider that the appeal should be allowed simpliciter. The function of the adjudicator is to review the reasons given by the Home Office for refusing asylum within the context of the evidence before him and the submissions made on behalf of the appellant, and then come to his own conclusions as to whether or not the appeal should be allowed or dismissed. In doing so he must, of course, observe the correct burden and standard of proof.
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> …
> 4. Where matters of credibility are raised in the letter of refusal, the special adjudicator should request the representative to address these matters, particularly in his examination of the appellant or, if the appellant is not giving evidence, in his submissions. Whether or not these matters are addressed by the representative, and whether or not the special adjudicator has himself expressed any particular concern, he is entitled to form his own view as to credibility on the basis of the material before him."

10. Mr Williams submits Judge Andrew erred in proceeding upon the basis that the absence of the respondent was such that the respondent must have accepted the evidence of the sponsor and daughter as credible. He submits that this impacted on her assessment of the evidence overall. The respondent had not accepted the appellant and sponsor are in a genuine and subsisting relationship. The respondent had not taken any positive act which was capable of suggesting her decision was withdrawn and it was incumbent on the judge to proceed with the appeal on the basis of the contents of the respondent's decision and the reasons given for refusing the application. The concerns highlighted by the respondent should have been addressed during the course of the hearing. Mr Williams submits Judge Andrew failed to adopt the correct approach to the evidence.

11. Second, Mr Williams submits that on the evidence before the Tribunal, it was not open to Judge Andrew to conclude that the appellant has a disability that prevents her from meeting the English language requirement. The medical evidence before the Tribunal was not

sufficient, and no physical or mental disability is diagnosed. At its highest, there was evidence the appellant is illiterate and suffers from forgetfulness and lack of focus. She is said to have been given *"... a treatment called Paracitam tab, a pill in the evening ..."*, but despite that treatment her health has not improved. She is also said to suffer from severe depression and loneliness.

12. In reply, Mr Nadeem submits Judge Andrew was right to note the respondent had not attended. He accepts the failure of the respondent to send a representative is not to say that the respondent, on whom the relevant evidence had been served, accepted that evidence as credible. However, Mr Nadeem submits any such error is immaterial, because Judge Andrew went on in paragraphs [12] to [16] of her decision to consider the evidence before the Tribunal for herself, and gave reasons for her conclusion that the marriage is a genuine and subsisting marriage. She had regard to the evidence before the Tribunal regarding the visits made to the appellant in Yemen by the sponsor. She found it credible that the last of those visits was between 5 January 2018 and 8 January 2018. She accepted the appellant is illiterate and said that whilst she would normally expect to see written messages, a credible explanation has been provided as to why there are no such messages. Mr Nadeem submits the Tribunal should be slow to interfere with the decision of First-tier Tribunal Judge where the judge reached a decision that was open to her following a consideration of the evidence.

13. As to the second ground of appeal, Mr Nadeem submits there was medical evidence before the First-tier Tribunal confirming the appellant is illiterate and that she suffers from depression and loneliness. The evidence was that she is unable to deal with new information and it would be difficult for her to learn the English language. When pressed, Mr Nadeem accepts that at paragraph [20] of her decision, Judge Andrew does not make a finding that the appellant has a disability which prevents her from meeting the English language requirement. He submits the focus of the judge appears to have been upon whether

there are exceptional circumstances which prevent the applicant from being able to meet the requirement.

Discussion

14. It is convenient for us to begin by considering the second ground of appeal (relating to the English language requirement) first. The English language requirement set out in Section E-ECP.4.2 of Appendix FM of the Immigration Rules is as follows:

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

15. The appellant is not over the age of 65. The question to be considered when considering whether the appellant is exempt from the English language requirement relying upon E-ECP.4.2.(b), is whether the appellant has a disability (physical or mental condition) which prevents her from meeting the English language requirement. An individual might have a diagnosed disability that impacts upon their ability to learn and pass the required English language tests in speaking and listening. As Mr Nadeem quite properly in our judgment accepts, at paragraph [20] of her decision, Judge Andrew does not make a finding that the appellant has a disability which prevents her from meeting the English language requirement. In fact, Judge Andrews starts paragraph [20] with the sentence *"It is the Appellant's case that there are exceptional circumstances which make her unable to learn English before coming to the United Kingdom.".* Her focus was upon whether the appellant is exempt from the English language requirement relying upon E-ECP.4.2.(c). However, the reasons given by Judge Andrew refer back to the medical evidence that was before the Tribunal, including the evidence

that indicates the appellant is unable to deal with new information and that would make it difficult for her to learn the English language.

16. On a careful reading of Section E-ECP.4.2(c) of Appendix FM, it is clear that there must be exceptional circumstances which prevent the applicant from being able to meet the requirement prior to entry to the UK. These are circumstances other than, aside from, or in addition to, any physical or mental disability which would fall to be considered under E-ECP.4.2(b), else this provision would not have been stated as its own consideration in the alternative. The use of the words *"which prevent the applicant"* in this context are important and make it clear that the exceptional circumstances must be circumstances which prevent the applicant from being able to meet the requirement prior to entry to the UK. It is clear from the respondent's published guidance that the intention behind E-ECP.4.2 is to ensure that where there are exceptional circumstances that prevent the applicant passing the relevant English language tests prior to entry to the UK, those applicants should not suffer any prejudice. The exceptional circumstances will therefore usually be factors outside the control of the applicant that prevent the applicant from being able to meet the English language requirement prior to entry to the UK. That may be relevant in cases where there is an absence of local test centres. However, the appellant does not claim that the relevant facilities to take the tests were not available. As the respondent said in her decision, the appellant made her visa application from Cairo, where there are several options for learning English. Mr Nadeem did not draw our attention to anything in the evidence that addresses that suggestion made by the respondent.

17. The words "prior to entry to the UK" within section E-ECP.4.2(c) are equally important and cannot be glossed over. As far as Judge Andrew was persuaded by the evidence that the appellant is unable to deal with new information which would make it difficult for her to learn the English language, as being relevant to this sub provision, she fell into error. Evidence of an inability to learn the English language because of a

physical or mental condition that prevents the applicant from meeting the English language requirement, is relevant when considering whether the individual is exempt, relying on section E-ECP.4.2.(b), but does not assist when considering whether the individual is exempt for the purposes of section E-ECP.4.2(c). Section E-ECP.4.2(c) is concerned with circumstances that (apart from anything falling within E-ECP.4.2(b) more generally) prevent the applicant from being able to meet the requirement prior to entry to the UK, not simply circumstances that prevent the applicant from meeting the requirement. Section E-ECP.4.2(c) of Appendix FM does not in our judgement permit a wider consideration of whether there are exceptional circumstances such that the applicant should not be required to meet the requirement prior to entry to the UK. That would be to defeat the intention of the relevant rules, misread the rule and to reformulate the test set out.

18. We are satisfied that Judge Andrew erred in her analysis as to whether the appellant is exempt from the English language requirement, as she conflated E-ECP.4.2(b) and E-ECP.4.2(c). That is material to the outcome of the appeal because Judge Andrew proceeds to allow the appeal on the basis that the appellant meets the requirements of the immigration rules. Plainly, if the English language requirement is not met, the appellant is unable to meet all of the requirements of Section E-ECP: Eligibility for entry clearance as a partner set out in Appendix FM. The decision of Judge Andrew must therefore be set aside.

19. In the circumstances we can deal briefly with the first ground of appeal. Whilst we have a considerable amount of sympathy with the submissions made by Mr Nadeem regarding the judge's analysis of the evidence regarding the appellant's relationship with her sponsor as set out, in particular, at paragraphs [12] to [16] of the decision, in the end, we cannot be satisfied that the judge would have reached the same findings and conclusions if she had not proceeded upon the basis that the failure of the respondent to attend to cross examine either the

sponsor or his daughter, is such that the respondent must have accepted their evidence as credible.

20. It follows that we allow the appeal and set aside the decision of First-tier Tribunal Judge Andrew with no findings preserved.

21. Both parties submit the appropriate course is for the appeal to be remitted to the First-tier Tribunal for hearing afresh. As to disposal, we have had regard to the background that we have set out. In all the circumstances, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012, we are satisfied that the nature and extent of any judicial fact-finding necessary will be extensive and the appropriate course is to remit the appeal to the First-tier Tribunal for hearing afresh. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

DECISION

22. The decision of First tier Tribunal Judge Andrew is vitiated by material errors of law and is set aside.

23. The appeal is remitted to the First-tier Tribunal for hearing afresh with no findings preserved.

V. Mandalia Date 4th October 2022

Upper Tribunal Judge Mandalia