Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/03687/2012
OA/03685/2012

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 23 May 2013	**On 4 July 2013**

Before

UPPER TRIBUNAL JUDGE STOREY

Between

MRS SEMHAR SIUM
MISS DELINA TEDROS

Appellants

and

ENTRY CLEARANCE OFFICER, CAIRO

Respondent

Representation:

For the Appellants: Mr G Hodgetts, Counsel instructed by Migrant Legal Project
For the Respondent: Mr K Hibbs, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants, mother and daughter, are citizens of Eritrea who had travelled to Khartoum in Sudan and made an application for entry clearance to join husband/father Mr Tedros Habtesion. Their applications were refused on 19 January 2012. The respondent did not accept that the first appellant met

the English language requirement of paragraph 281(i)(a)(ii) or the maintenance and accommodation requirements at paragraph 281(iv). The appellants appealed to the First-tier Tribunal (FtT) who in a determination sent on 3 October 2012 dismissed their appeal. The appellants were successful in obtaining permission to appeal to the Upper Tribunal bringing the matter before me.

The English Language Requirement

2. The relevant provisions of paragraph 281(i)(a)(ii), which took effect from 29 November 2010 (see Cm 7944), requires an applicant:

> "to provide an original English language test certificate in speaking and listening from an English language test provider approved by the Secretary of State for those purposes, which clearly shows the applicant's name and qualification obtained (which must meet or exceed level A1 of the Common European Framework of Reference) unless:
> (a) …
> (b) …
> (c) The Secretary of State considers that the applicant has a physical or mental condition which would prevent him from meeting the requirement; or…

3. At the date of decision the first appellant had not provided an English language test certificate, although she did state she was currently learning English. In the Entry Clearance Manager's Review letter of July 2012 the respondent acknowledged that there were no available test centres in Eritrea at the relevant time but that there were in Sudan where the appellants had resided for one year. This observation only makes sense as a reference to the then current UKBA IDIs which set out at 5.7 an "Exceptional compassionate circumstances exemption", which listed Eritrea among the countries where no test centre was available. In addition, it was conceded on behalf of the respondent at the hearing before the FfT judge that although there were test centres in Sudan they did not provide for A1 certification, only a general training certificate.

4. The judge's reasons for concluding that paragraph 281(i)(a)(ii) was not met were expressed in paragraph 15 as follows:

> "15. This appeal is bound to fail under the immigration rules even if no other reason than the fact that a vital piece of information, namely evidence of English ability, was not provided until after the date of decision. I would have been inclined to allow the exception to the extent of accepting an appropriate level of IELTS because I accept that A1 certification is not available in Sudan. However, I would not, and do not allow that exception to include the late production of any such certificate after the date of decision."

The reference to "late production" was to the fact that the first appellant had obtained an IELTS certificate in March 2012, over two months after the refusal decision.

5. The grounds for permission to appeal raised several points. It is as well to dispose of one of them at the outset. They sought to raise again the fact that the appellant had subsequently obtained an IELTS certificate in March 2012. This ground cannot succeed. By virtue of section 85(5) the appellants cannot rely on such post decision evidence. It was not a circumstance appertaining at the date of decision.

6. The main contention advanced in the written grounds otherwise was that, having accepted that it was not possible to obtain an A1 certificate in Eritrea or Sudan, the FtT judge had erred in not finding that the exceptional circumstances requirement set out in paragraph 281(i)(a)(ii) (c) was met, especially given the way in which it was elaborated in the IDIs. Mr Hodgetts submitted that the first appellant had been able to demonstrate that this requirement was met because it was specified in the IDI that applicants "must be able to demonstrate that as a result of their circumstances they are unable to access facilities for learning before coming to the UK". He submitted that if there were no A1 testing facilities in either Eritrea or Sudan "that must show, ipso facto, that there are exceptional compassionate circumstances within the meaning of paragraph 281(i)(a)(ii)(c)".

7. In a request for permission to amend the grounds, which I accepted at the hearing, the appellant's representatives submitted that in addition the refusal of the ECO was not in accordance with the law (as it has subsequently been declared to be in R (Alvi) v SSHD [2012] UKSC 33) because "at the date of the decision the requirement to satisfy the English language test provision was contained in an extraneous policy document that did not form a valid and lawful part of the Immigration Rules, ..."

Assessment

8. In relation to the first limb of the appellants' submissions, I do not consider it is made out. Both the rule and the IDI presuppose that an applicant has some ability to speak and read English. To the extent that by their reference to exceptional compassionate circumstances in the rule and in the IDI accord a discretion, it is one which (in the words of the IDI):

> "should be exercised only in cases where there are exceptional circumstances specifically relating to the ability of the applicant to meet the language requirement...Consideration will be on a case by case basis. The applicant must demonstrate that as a result of the situation they are unable to access facilities for learning English before coming to the UK...".

9. The same IDI also specifies that an applicant must produce:

> "Evidence of an inability to attend, prior/previous attendance or attempts to access learning must be clearly provided".

10. The appellants were unable to provide any evidence of such attempts and there has been no suggestion that they tried.

11. I also do not accept the second (new) limb Mr Hodgetts' submissions. In light of the decision of the Supreme Court in Alvi, it is clear that at the relevant time the identification of the English language test providers approved by the Secretary of State was not contained in the Rules but in an extraneous document. The fact that the Immigration Rules were subsequently amended by HC8423 with effect from 20 July 2012 to incorporate this further identification in paragraph 281(i)(a)(ii), might be thought to be a strong indication of a recognition that Alvi principles were considered by the relevant parliamentary body to require their inclusion; but in any event it seems to me that what was set out in the IDIs (which covered who were the English language test providers and where they were to be found) was detailed information which was material to whether or not any applicant could qualify. However, whilst in these respects certain basic information about English language test providers was lacking, the rule as it stood did nevertheless make clear that any certificate had to show that an applicant met or exceeded level A1 of the Common European Framework of Reference. This the applicant was unable to do. Hence in respect of the relevant requirement in this case, the rule was Alvi-compliant because it did contain what was referred to by their lordships in Alvi as:

"…information the application of which will determine whether or not the applicant will qualify" (see paragraphs 128 (Lord Wilson), 57 (Lord Hope), 94 (Lord Dyson).

12. Accordingly, the First tier judge did not err in concluding that the first appellant failed to show she had sufficient knowledge of the English language and had failed to show she had a qualification meeting or exceeding level a1 of the Common European Framework of Reference.

Article 8 and the language test requirement

13. Mr Hodgetts sought to argue that the First-tier judge had also erred in failing to recognise that any kind of English language test is contrary to Article 8 of the ECHR. I disagree: this argument was rejected (as Mr Hodgetts acknowledged) in R (ota Bibi and Ali) [2013] EWCA Civ 322.

The Accommodation Requirement

14. Even if I had decided the Fist tier Tribunal erred in its treatment of the English language requirements, it remains, however, that it could not be said to have materially erred in law - or cannot be said to have made an error of law necessitating that its decision be set aside - unless the appellants were able to show they met all the relevant requirements of paragraph 281, including paragraph 281(iv) and (v) dealing with accommodation and maintenance respectively.

15. It is submitted in this regard that judge was wrong to refuse to consider the sponsor's evidence that on 7 February 2012 the sponsor took an assured shorthold tenancy on a flat in Durham Avenue, Plymouth where it was intended he would live with the appellants. It is submitted that the maintenance and accommodation Rules have to be read prospectively and hence that the judge

was wrong to consider that there was no satisfactory evidence of accommodation.

16. Mr Hodgetts is correct to state that the accommodation and maintenance rules have to be read prospectively, but that entails considering what was foreseeable as at the date of decision. At the date of decision on 19 January 2012, there was no evidential basis for concluding that the Durham Avenue accommodation would be available.

17. It is submitted in the alternative that in their application the appellants had made clear from their answers given to Q 145-150 that the address where they proposed to live was an address in Alma Rd, Portsmouth where the sponsor lived at that time. The respondent had refused to acknowledge this fact because the appellants had stated several questions earlier on in the form that the location at which they would live is “not applicable” (see answer to Q141). Mr Hodgetts submitted that the address in Alma Rd was of adequate size even though only described as having one bedroom.

18. I am prepared to accept that the respondent was wrong to place reliance on the “not applicable” answer given to Q141 as it is clear from the subsequent answers that the proposed address at which the appellants would live was in Alma Road and a description was given of it. I am also prepared to assume for the purposes of this appeal that Mr Hodgetts is right in stating that for a child under 12 one bedroom for parents and such a child is adequate. However, it remains, as the respondent had noted in the refusal decision that they had also not supplied satisfactory evidence that they would have accommodation in the UK where they could live that will be occupied solely by them and their sponsor. The sponsor had the opportunity at the hearing to furnish evidence as to what the position was in relation to this address but chose instead to rely on the new proposed accommodation in Durham Avenue.

The Maintenance Requirement

19. The grounds as amplified by Mr Hodgetts submit that the FtT also erred in law in failing to make any assessment of whether the couple could maintain themselves adequately. This error had two dimensions, it was submitted, one relating to ability to satisfy the rule itself; the other relating to its impact on the judge’s conduct of the Article 8 proportionality assessment, as a favourable finding would have lessened the weight to be placed on the state’s interests in the Article 8 balancing exercise.

20. As regards paragraph 281((v), I do not consider, in the light of my above finding on the accommodation requirement, that it is necessary to make a specific finding on this matter.

Article 8

21. In relation to Article 8 the judge had concluded:

> "In considering Article 8…I note that the sponsor is an Eritrean national who was granted indefinite leave to remain in the UK under the legacy policy although he was a failed asylum seeker. Under the circumstances, on the face of it, there is no reason why he cannot return to Eritrea although it is appreciated that there are presently a number of difficulties in that country and it is not currently an ideal place to be. Furthermore, although he is a Sudanese citizen no reason has been given as to why he would not be able to visit that county and as such maintain close contact with his family there."

22. Dealing first with Mr Hodgett's point about maintenance, I note that the judge made no finding to the effect that the appellants failed to meet the maintenance requirements but, given his finding that the respondent was correct to find the accommodation requirement not satisfied, the refusal of entry clearance clearly served a legitimate aim of economic well-being, if not also maintenance of effective immigration control as an aspect of prevention of disorder and crime. The Strasbourg jurisprudence has made very clear that in conducting the Article 8 balancing exercise the state is entitled to attach adverse weight to the inability of applicants to meet socio-economic requirements: see e.g. Konstatinov v Netherlands, App. 16351/03.

23. Insofar as the grounds attack the judge's reliance on the option of the sponsor visiting Sudan, I consider he was entitled to take this view. There was no evidence before him to show that the appellants could not either return to Eritrea (they had said they only went to Sudan because that was where they had to make their application) or continue living in Sudan. The judge was entitled to attach significant weight to the fact that the sponsor was not someone who had come to the UK out of a well-founded fear of persecution and hence his decision to leave his family could not as a result be said to be one of necessity. As noted by Toulson LJ in Musa & Ors v Entry Clearance Officer [2012] EWCA Civ 10 para 23:

> "The trauma of breaking up a family and thereby rupturing family ties may be significantly greater than the effect of not facilitating the reunion of a family whose members have become accustomed to living apart following a decision by part of the family to live elsewhere".

24. For the above reasons, I do not consider that the judge's determination was vitiated by any material error of law. Even if I had found the judge's error to amount to a material error of law, it is not one which I would have considered to necessitate the setting aside of this decision.

25. Accordingly the decision of the First tier Tribunal judge to dismiss the appellants' appeals must stand.

Signed Date

Upper Tribunal Judge Storey

Approval for Promulgation

Name of Upper Tribunal Judge issuing approval:	Dr H H Storey
Appellants' Names:	Mrs Semhar Sium and Miss Delina Tedros
Case Numbers:	OA/03687/2012 and OA/03685/2012

Oral determination (please indicate) ☐

I approve the attached Determination for promulgation

Name:

Date:

Amendments that require further action by Promulgation section:

Change of address:

Rep: ☐ Appellant: ☐

Other Information:
