Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/15401/2017
HU/00055/2018
HU/00058/2018
HU/00059/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 November 2018	**On 7 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

NARGIS [A] (FIRST APPELLANT)
MOHAMMAD [A] (SECOND APPELLANT)
WAAZDA [T] (THIRD APPELLANT)
[A F] (FOURTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr R Singer of Counsel instructed by Paul John & Co Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. These are linked appeals against the decisions of First-tier Tribunal Judge Lucas promulgated on 3 August 2018 in which the Appellants' appeals against refusals of entry clearance were dismissed.

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2. The Appellants are citizens of India. The First Appellant is the mother of the other three Appellants. The First Appellant was born on 10 June 1971, her oldest child - her son - was born on 1 August 1999, and her two daughters were born on 10 December 2000 and 6 March 2009 respectively. The First Appellant is the wife of the UK-based British citizen sponsor [MS] (date of birth 25 March 1970). The Sponsor, has been present in the United Kingdom from January 2004, is also the father of the other three Appellants.

3. The Appellants applied for entry clearance to join the sponsor in the United Kingdom for the purposes of settlement. The applications for entry clearance were each refused for reasons set out in respective decisions dated 4 November 2017. The Respondent considered that the First Appellant failed to meet the financial requirement of the Rules and also failed to meet the English language requirements. The children's applications were refused 'in- line' with their mother's refusal.

4. The Appellants appealed to the IAC.

5. Before the First-tier Tribunal it was conceded by the Presenting Officer on behalf of the Respondent that the financial requirements were met: see paragraph 4 of the First-tier Tribunal Judge's 'Decision and Reasons'. Accordingly the only outstanding matter between the parties in respect of the Immigration Rules was the issue of the English language requirement. It is clear that the proceedings before the First-tier Tribunal focused on that particular issue: see for example, again, paragraph 4 of the Decision, and also the submissions of the parties set out at paragraphs 18-20).

6. The First-tier Tribunal Judge dismissed the appeals for the reasons set out in the Decision and Reasons promulgated on 3 August 2018.

7. The Appellants sought permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge Povey on 12 August 2018.

8. The grant of permission to appeal identifies that it is arguable that the Judge "*failed to consider the appeal under Article 8*", and/or applied inappropriately an exceptionality test in the context of the possible grant of leave outside the Immigration Rules.

9. In addition to these two particular matters that are referenced in the grant of permission to appeal, the grounds of challenge to the decision of

the First-tier Tribunal drafted in support of the application for permission to appeal also include in part further grounds pleading a failure to consider an unreported authority which was properly cited before him (Ground 4, paragraphs 22-27), and failure to consider and apply the principles of the case of **Ali and Bibi [2015] UKSC 68** (Ground 5 paragraphs 28-31).

10. As noted above the 'live' issue between the parties under the Immigration Rules before the First-tier Tribunal was in respect of the English language requirement. Before me it is common ground that this was not an appeal under the Immigration Rules but was essentially a human rights appeal. Necessarily though, it is trite that the Immigration Rules may form a framework for consideration of human rights appeals – in particular as potentially relevant in considering public interest – and thereby proportionality.

11. In the early part of the Skeleton Argument reference was made to an unreported case - **Hameed v ECO** (ref. HU/01283/2017) - being a decision of First-tier Tribunal Judge Fitzgibbon QC promulgated on 23 October 2017 following a hearing on 18 October 2017 at Taylor House. It was requested that the Appellants be permitted to rely on the unreported decision (paragraph 2). The Skeleton Argument recites a number of paragraphs from the Practice Direction in respect of citing unreported authorities (paragraph 4), and then at paragraph 5 states:

> "*It is respectfully submitted that the **Hameed** case is highly relevant to the issue whether the inability of the first Appellant to meet the English language requirement due to living in a remote area with few opportunities to learn English and practice it and having to travel a long distance to the test centre and having a low level of education in general where a combination of circumstances that be described as sufficiently exceptional to amount to an unjustified interference with Article 8 ECHR rights.*"

12. The next paragraphs of the Skeleton Argument address the financial issues (paragraphs 7-12) - which in the event were conceded by the Respondent. Paragraph 13 sets out Article 8 of the ECHR; paragraph 14 submits that the application should have been allowed under Article 8, and asserts that the refusal of entry clearance amounts to an unjustifiably harsh interference such as to be disproportionate; paragraph 15 asserts that the Respondent failed to consider Article 8 in the decision letters. Paragraph 16, returning to the English language requirement, pleads: *"The children should not be blamed for their mother's level of linguistic ability"*. It is also submitted that it is in the children's best interests that they should be granted entry clearance to live in the UK

with both their parents and that that should be a primary consideration in the balancing exercise under Article 8 (paragraph 17).

13. The oral submissions made on behalf of the Appellants are summarised at paragraph 18 of the First-tier Tribunal Judge's decision in the following terms:

> *"Submitting to the Tribunal (as there was no evidence called), Mr Singer relied upon his detailed Skeleton Argument - most of which was directed to the issues of finances and therefore no longer relevant. He relied heavily upon the decision before the Tribunal - Fitzgibbon QC LJ -* ***Hameed and Hameed*** *(heard at Taylor House on 18 October 2017) for the assertion that exceptional circumstances – such as low level of education, long distance to travel - could succeed in mitigating the effect of the Rules with regard to English Language (the determination in turn relied on the decision in* ***Bibi****). He stated that it was necessary for the Tribunal to strike a fair balance in all of the circumstances of this case. He pointed out that this Appellant had a limited education and lived in a remote part of India. If she was granted entry clearance she would have access to more appropriate language skills in the UK. He added that there were also three children in the case".*

14. I pause to note that the reference to there being "*no evidence called*" is not strictly accurate: the Judge records in the decision that the sponsor attended the hearing and adopted his witness statement as evidence-in-chief, and was assisted in so doing by a Punjabi interpreter (paragraph 15). To that extent evidence was called before the First-tier Tribunal – albeit that there was no cross-examination (paragraph 16) and accordingly the oral evidence before the First-tier Tribunal went no further than the contents of the witness statement. The appeal hearing proceeded by way of submissions thereafter.

15. It seems to me that nothing of substance turns on the technically inaccurate reference to there being no evidence called, but I mention it for completeness because it was a matter to which Mr Singer drew my attention as being an inaccuracy in the Decision.

16. The First-tier Tribunal Judge dealt with the Appellants' submissions, and indeed the Appellants' case, in the following terms at paragraphs 22-31 under the heading 'Findings':

> *"22. The burden of proof is upon the Appellant and the standard of proof is of the balance of probabilities.*

23. It is a requirement of the Rules that potential residents of the UK from other countries should have English language skills. There is a clear public interest in such a Rule since it is an aid to integrate within this country.

24. The Appellant has attempted to pass the English language requirement of the Rules and has failed on three separate occasions. It is said that her own circumstances and the fact that she has failed the exam on three separate occasions amounts to exceptional circumstances such as to mitigate, but not strike down this Rule.

25. The Tribunal has noted the decision of this Tribunal upon which Mr Singer now relies. It is not bound by it and it does not amount to guiding or even persuasive authority.

26. The fact is that the English language ability of the Appellant is very low and has on three occasions been described as below A1 standard. It is fair to conclude therefore that she is largely unable to communicate in English. It was precisely this situation which the Rule intended to address.

27. It is of note that the sponsor who has been in the UK for many years continued to rely upon a Punjabi interpreter at this Hearing.

28. The sponsor states that he is in work and earning a good salary. There is no indication at all from the papers that either he or the Appellant has sought any meaningful tuition in respect of her language studies or that she has ever attempted to relocate to a large city to achieve the necessary standard of English. Simply sitting and failing the exam on three separate occasions does not amount, in the view of this Tribunal, to an exceptional circumstance sufficient to set aside this Rule.

29. It is acknowledged that the status of the child Appellants are dependent upon the success or otherwise of the main Appellant in this case. It is indeed unfortunate that the eldest of the children may not be able to reapply again as a dependant of his mother. However this Tribunal does not consider that any of the matters put forward by Mr Singer amount to an exceptional circumstance.

30. The Tribunal repeats that without more, simply failing the exam on three occasions does not amount to an exceptional circumstance. There is no evidence of any additional effort or work by the Appellant to improve or seek access to resources to enable her to pass the exam. Simply sitting an exam on three

occasions which, it appears, she was clearly destined to fail, makes little sense in having the Rule at all.

31. The appeal is therefore dismissed."

17. I pause to note that the references therein to 'exceptional circumstances' echo the submission advanced in the Skeleton Argument and repeated in the oral submissions, which pleaded the existence of exceptional circumstances for relaxing the English language requirement: "*… a combination of circumstances that he described as sufficiently exceptional…*" (Skeleton at paragraph 5); "*… circumstances which are sufficiently compelling (and therefore exceptional)…*" (Skeleton at paragraph 14); "*… the assertion that exceptional circumstances… could succeed in mitigating the effect of the Rules with regard to English language…*" (Decision at paragraph 18). (It is also an echo of the wording of paragraph E-ECP.4.2(c) of Appendix FM of the Rules, which provides for an exception to the English language requirements.)

18. It is to be acknowledged that there is no express reference to Article 8 in the foregoing passages which form the totality of the Judge's findings in the appeal, and there is no evaluation of the Appellants' cases with reference to the five **Razgar** questions. However I am not persuaded that that is in and of itself fatal to these particular linked decisions.

19. Once the financial issue had been conceded the whole focus of the Appellants' submissions in the case was on the English language test and the guidance that was available as to circumstances in which the rigours of the test might be relaxed, by way of the Supreme Court decision in Ali and Bibi, and - as suggested by the Appellants - by way of the decision of another First-tier Tribunal Judge. It was the Appellants' case: that in principle - as identified by the Supreme Court in **Ali and Bibi** - there may be some cases in which the language obstacle does not strike a fair balance in terms of proportionality when interfering with family life; and, on the particular facts, the First Appellant's circumstances were such that reliance on the language requirement did indeed fail to strike a fair balance.

20. In this context it is instructive to bear in mind the nature of the challenge and the discussion in **Ali and Bibi**. It was contended therein that the Rule imposing the English language requirement was in itself incompatible with human rights (Articles 8 and 14). The argument failed. Nonetheless in the course of discussion, and with particular focus on the Respondent's Guidance as it existed at that time, it was recognised that the imposition of the requirement might result in unjustifiably harsh consequences in individual cases depending on their facts. Particular concerns were

expressed in respect of access to tuition and test centres. I note in particular the following key passages:

Per Lady Hale (with whom Lord Wilson agreed):

> *"53. The problem lies not so much in the Rule itself, but in the present Guidance, which offers little hope, either through the "exceptional circumstances" exception to the English language requirement (see paras 17, 18 above), or through the even fainter possibility of entry clearance outside the Rules (see para 20 above). Only a tiny number achieve leave to enter through these routes. This is not surprising given the way in which the Guidance is drafted. The impracticability of acquiring the necessary tuition and practice or of accessing a test centre is not enough. Financial impediments are not enough. Furthermore, all applications for an exception to be made will be considered on a case by case basis. This means that the considerable expense of making an application has to be risked, even though, on the current Guidance, the chances of success are remote.*
>
> *54. It is not enough to say (see para 7.2 of the Guidance at para 18 above) that partners are expected to be self-sufficient without recourse to public funds when they come to this country and can therefore be expected to find the resources to meet this requirement. It is one thing to expect that people coming here will not be dependent upon public funds for their support. It is quite another thing to make it a condition of coming here that the applicant or sponsor expend what for him or her may be unaffordable sums in achieving and demonstrating a very basic level of English. Given the comparatively modest benefits of the pre-entry requirement, when set against the very substantial practical problems which some will face in meeting it, the only conclusion is that there are likely to be a significant number of cases in which the present practice does not strike a fair balance as required by article 8.*
>
> *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."*

Per Lord Hodge (with whom Lord Hughes agreed):

> "*73. To my mind the principal problem which the evidence adduced by the appellants suggests is that within certain states, with which many UK citizens have a close connection, there are areas, including rural areas, from which it may not be reasonably practicable for the incoming spouse or partner to obtain the needed tuition without incurring inordinate cost, for example by having to travel long distances repeatedly or to reside for a prolonged period in an urban centre in order to complete the relevant language course. Dr Geoffrey Jordan suggested in Dr Helena Wray's second report that preparation for the A1 test could involve 90 hours of tuition (para 40). In principle, it is not unreasonable to expect some level of expenditure by the spouse/partner who aspires to live in this country or by the presently resident sponsoring party; the potential financial benefits of life in the UK are significant. But in a particular case the potential cost may be shown to be inordinate, undermining the fair balance which article 8 requires. Dr Jordan also stated that some testing centres offered the A1 speaking and listening test but required English reading skills in order to take it and others offered the test only when it was combined with tests involving reading skills. If that is still the case and it creates a significantly higher hurdle than the A1 test which the UK Government requires, that also might affect the fair balance in an individual case. It is impossible at the moment to predict what level of provision of testing centres will be made, or what identification of sources of tuition. Travel to a major city is likely to be an inevitable part of obtaining entry clearance or of eventual travel to the UK in any event. But the central issue is the accessibility of both tuition providers and approved testing centres which offer the stipulated test without additional language requirements. This will no doubt call for examination on the facts of specific cases.*"

Per Lord Neuberger:

> "*101. However, I have concerns about the Guidance. It does appear virtually certain that there will be a significant number of cases where application of the Guidance will lead to infringement of article 8 rights. By way of example, it may be impossible, in any practical sense, for a potential applicant to obtain access to a tuition and/or to a test centre. In particular, it appears that, in some countries, a person in a remote rural home either would have to travel repeatedly to and from a tuition centre many hundreds of miles away, or would have to find the money to rent a place to live near the tuition centre. Depending on the circumstances of the potential applicant, this may well render reliance on the Rule disproportionate. And, as Lady Hale points out, reliance on the absolute exclusion in the Guidance of "[l]ack of or limited literacy or education" from the category of "exceptional circumstances", and the broad statement that "it is reasonable to expect that [applicants] (or their sponsor …) will*

generally be able to afford reasonable costs incurred in making their application" could easily lead to inappropriate outcomes in individual cases.

102. Accordingly, I share Lady Hale's concerns expressed in para 53, and it is also right to say that I also agree with what Lord Hodge says in para 73."

21. Lady Hale identifies likely disproportionality in cases where it is 'genuinely impracticable' to learn English or access a test centre; Lord Hodge and Lord Neuberger refer to cases where it is not 'reasonably practicable' to meet the requirement of the Rule without inordinate expense – which might arise in cases of geographical remoteness from tuition facilities.

22. The decision in the unreported case of **Hameed** relied upon by the Appellants was informed by just such considerations. See in particular at paragraph 14:

"*In my judgement, the difficulties that face the appellant in acquiring necessary proficiency in English were very substantial. She lives in a remote village with few opportunities to learn and practice the language. She has to travel a long distance to attend the test centre, something that can only add to her stress and anxiety. A low level of education will make the learning of a foreign language all the more difficult. In my view, the combination of the circumstances can properly be described as exceptional. A refusal to admit [the Appellant] to the UK on these grounds will amount to an unjustified interference with her rights under Article 8…*"

23. It seems to me that it was clear and obvious that the case on proportionality advanced by and on behalf of the Appellants was exactly that the First Appellant's circumstances were such that her inability to pass the English language test was for exceptional circumstances that made it disproportionate to rely upon it as the sole reason for denying the Appellants entry to the United Kingdom.

24. Indeed there is nothing else identified either in the written submissions or the oral submissions before the First-tier Tribunal, and there is nothing identified as evident on the facts of the case, that would set this family apart from any other family seeking to join a UK based sponsor who, save in respect of the language requirement otherwise meet the requirements of the Immigration Rules. The language requirement and the plea to be exempted from it were the crux of the case under Article 8 as advanced by the Appellants.

25. It seems to me that the First-tier Tribunal Judge engaged with the argument that was put to him. In those circumstances the failure of the Judge further to articulate the case with reference to the five **Razgar** questions, and indeed the failure to make any express reference to best interests of the children is not fatal. In the latter regard it was inherent in the appeals that it was being asserted that it was in the children's best interests to be with both parents in the United Kingdom. Equally it was inherent in the case that the family had arranged their family life for the last fourteen years or so to protect the interests of their children by having the sponsor work in the United Kingdom whilst the children were looked after and brought up by their mother in Bangladesh. In my judgement any issue in respect of best interests add nothing of substance to the primary question posed by the parties to the First-tier Tribunal Judge, and does not in any way detract from the real focus of the issues before the First-tier Tribunal Judge. That real focus - and indeed the substance of the complaint advanced before this Tribunal - is the approach of the Judge to that very question.

26. I turn then to a consideration of the facts-specific issue that was the core of the Appellants' arguments before the First-tier Tribunal.

27. In my judgement there is a fundamental difficulty in the Appellants continuing to pursue this point in the way it was put before the First-tier Tribunal. The submission were premised on a clear and obvious factual misconception as to the residence of the Appellants.

28. It was at the forefront of both the written and oral submissions (as may be seen from the quotations above) that the First Appellant's ability to satisfy the English language requirement was impeded to an extent that it amounted to an exceptional circumstance in primary part "*due to living in a remote area with few opportunities to learn English and practice it and having to travel a long distance to the test centre*" (paragraph 5 of the Skeleton Argument). This submission was made in line with, and relied upon support from, the observations in **Ali and Bibi** via the ratio in **Hameed**.

29. However, whilst the First Appellant's witness statement and the sponsor's witness statement refer to the First Appellant having been born in a small village, on closer perusal of the papers the visa application form makes it plain that the First Appellant had been living for the last six years at the same address in Calcutta. Necessarily this means that she was not 'living in a remote village' as pleaded. Further, bearing in mind that Calcutta is one of the major cities in India, it seems to me without more that it was not open to the Appellants make the submission that that tuition would

not have been available to the First Appellant within her own town or city, or that she would have had to travel a long distance to a testing centre.

30. In my judgement such a circumstance renders any potentially arguable error on the part of the First-tier Tribunal ultimately immaterial. The crux of the Appellants' case was misconceived in fact to such an extent that once the error is identified the argument collapses. The Appellants' proportionality argument was placed squarely on the basis of the speeches in the Supreme Court and the decision in **Hameed**; the real facts of the instant case could not make good those arguments.

31. For completeness I note the following in respect of the Ground to the Upper Tribunal pleading that the Judge's failed to consider an unreported case which it is contended was "*properly cited before him*". Mr Singer acknowledged in the course of discussion that **Hameed** was really no more than an illustration of the application of the principles in **Bibi** to a particular case, and further acknowledged that there was nothing apparent in the Practice Direction that made it appropriate to cite an unreported case simply by way of illustration of the application of a principle where that principle itself could be supported by quotation of the authoritative decision that set out the principle. In such circumstances there is no substance in the suggestion that the Judge failed to consider an unreported authority which was "*properly*" cited before him, because it was not properly so cited.

32. Be that as it may, and bearing in mind that the decision was before the First-tier Tribunal it is appropriate and relevant that I say something further briefly about the facts in that case. I have already cited a passage above to illustrate how it was informed by the decision in **Ali and Bibi**. I note the following as regards the particular facts:

> *"… in order to take the test she had to travel to Chennai from her village near Ramanathapuram in Southern Tamil Nadu a round trip of about 1,400 kilometres. [The sponsor] said that the travelling exhausted and stressed her and must have contributed to her inability to pass the test".* (paragraph 10).

33. Bearing in mind the factual misconceptions in the submissions it can readily be seen that the attempt in the Skeleton Argument and the oral submissions to equate the Appellant's case with the case of Mrs Hameed was misconceived.

34. The First-tier Tribunal Judge was seemingly wrong-footed by the misconceived submission: at paragraph 28 he refers to an absence of any

indication as to attempts to relocate to a large city. Be that as it may the Judge noted that otherwise the evidence as to attempts to learn English was extremely limited, and on that basis concluded to the effect that the failure to pass the exam on three occasions did not in itself establish an exceptional circumstance such that the language requirement should in effect not stand in the way of the family living together in the United Kingdom.

35. In my judgment the First-tier Tribunal Judge's observations do not offend against any of the guidance to be derived from **Ali and Bibi**. There is nothing in the speeches in the Supreme Court that suggest that geographical remoteness is in itself sufficient to establish a case under Article 8. It is not suggested that meeting the English language requirement is thereby inevitably rendered genuinely impracticable; rather it gives rise to a theoretical possibility that must be tested on the evidence of the particular case applying the civil standard of proof. It seems to me the First-tier Tribunal Judge was entitled to conclude that more was required by way of evidence as to what steps had been taken to overcome the supposed remoteness of the Appellants' location.

36. The Judge also seems to have had in mind the suggestion that the First Appellant might subsequently – if permitted to enter the UK - acquire adequate command of English such that it would not act as an obstacle to integration, was speculative and perhaps unrealistically optimistic, in that he observed that the sponsor still required the assistance of an interpreter in the hearing notwithstanding fourteen years' presence in the United Kingdom (paragraph 27).

37. I find no error of law in the Judge's approach to the Appellant's case as it was put to him. The Judge's conclusion that the First Appellant had not shown any exceptional circumstances such as to warrant disregarding the English language requirement did not offend against the guidance to be derived from in **Ali and Bibi**. The Judge reached this conclusion on a misconceived factual premise: however the misconception of fact was very greatly in favour of the Appellants. Indeed, as discussed above, once the misconception of fact is identified the reality is that the substance of the submission relied upon collapses. Moreover, once that submission collapses, the Appellants' case on Article 8 proportionality also collapses – because this was the only submission of substance put at the core of the appeals. The continuing separation of the Appellants from the sponsor, and thereby minors from their father, and the concomitant effect upon children's best interests, were an intrinsic part of this consideration - and in the absence of any particular or peculiar factors did not require further exposition on the facts herein.

38. In all the circumstances I find no material error of law and the decisions of the First-tier Tribunal Judge stand.

Notice of Decision

39. The decision of the First-tier Tribunal contained no material errors of law and stands.

40. Each of these linked appeals remains dismissed.

41. No anonymity direction is sought or made.

Signed: Date: 4 March 2019

Deputy Upper Tribunal Judge I A Lewis