



18 November 2015

PRESS SUMMARY

R (on the application of Ali) (Appellant) v Secretary of State for the Home Department (Respondent), R (on the application of Bibi) (Appellant) v Secretary of State for the Home Department (Respondent) [2015] UKSC 68
On appeal from [2013] EWCA Civ 322

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Wilson, Lord Hughes, Lord Hodge

BACKGROUND TO THE APPEALS

The appellants in these cases challenged the validity of an amendment to the Immigration Rules in 2010 requiring a foreign spouse or partner of a British citizen or person settled in the United Kingdom to pass a test of competence in the English language before coming to live here (rule E-ECP 4.1 and E-LTRP 4.1 in Appendix FM) ('the Rule'). They argued that the Rule itself is an unjustifiable interference with the right to respect for private and family life protected by article 8 of the European Convention on Human Rights ('ECHR') and/or is unjustifiably discriminatory in securing the enjoyment that right contrary to article 14, or unlawful by reason of its irrationality.

The Government's objectives in introducing the pre-entry English requirement for spouses and partners were (a) to assist the spouse or partner's integration into British society at an early stage, (b) to improve employment chances for those who have access to the labour market, (c) to raise awareness of the importance of language and to prepare for the tests that the spouses or partners would later have to pass to settle indefinitely in the UK, (d) to save translation costs, (e) to benefit any children the couple might have and (f) to reduce the vulnerability of newly arrived spouses, especially women. The Rule requires spouses and partners to show the ability to speak English at a basic level by passing a test with an approved test provider unless exceptional circumstances are shown. Guidance accompanying the Rule makes it clear that exceptional circumstances will rarely arise and do not include financial reasons or lack of literacy.

The appellants are UK citizens who have been married to foreigners since 2009 and 2010 respectively. Their husbands are unable to satisfy the pre-entry language requirement, in Saiqa Bibi's case because he would have to relocate to Rawalpindi in Pakistan for several months, which is not affordable, and in Mrs Ali's case because there is no test centre in the Yemen where they have had to live.

The High Court held that the Rule itself was not unlawful. The Court of Appeal by a majority upheld the High Court's decision.

JUDGMENT

The Supreme Court unanimously dismisses the appeal in respect of the finding that the Rule itself does not infringe article 8, but it invites further submissions from the parties on whether a declaration should be made that the operation of the Guidance in its present form is incompatible with article 8 rights where compliance with the requirement is impracticable. Three justices give substantive judgments: Lady Hale (with whom Lord Wilson agrees), Lord Hodge (with whom Lord Hughes agrees) and Lord Neuberger.

REASONS FOR THE JUDGMENT

The right to respect for family life guaranteed by the ECHR includes the right of married couples to live together, but article 8 does not impose a general obligation on the part of a state to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country [25-26]. However, interference with the right must still be proportionate, striking a fair balance between the interests of the individuals and the community as a whole [29]:

- The six objectives of the Rule are intended to protect the interests of the economic well-being of the country or perhaps the protection of the rights and freedoms of others. Assisting the spouse or partner's integration into British society at an early stage is undoubtedly an important and benign aim for which even a basic level of English language skills would be of some benefit. Evidence filed by the appellants casts doubt on the value of the test in getting the learner off to a flying start compared with the opportunities to learn after arrival, but the aim is legitimate and sufficiently important to justify interference with the article 8 right [30-45]
- There is a rational connection between the Rule and the aim it seeks to achieve. It will make a contribution to the overall aim of promoting integration [46]
- The Rule is no more than necessary to achieve this contribution [47-48]
- The impact of the pre-entry language requirement has not been systematically studied by the Secretary of State but it is obvious that at an individual level access to appropriate tuition and a test centre may prove such an obstacle that it amounts to an unjustified interference with their partner's article 8 rights [50]. However, the problem lies not in the Rule itself but in the restrictive interpretation of exceptional circumstances in the Guidance which means there are likely to be a significant number of cases in which the present practice does not strike the fair balance required by article 8 [53-55].
- The discrimination claim adds nothing to the claim under article 8: the exemption for nationals of Anglophone countries makes sense and direct discrimination on grounds of nationality could be justified under article 14 [56-59].

Accordingly, the Rule itself is not disproportionate. Lady Hale suggests that the appropriate solution to avoid infringements in individual cases would be to recast the Guidance to grant exemptions in cases where compliance with the requirement is simply impracticable, and one remedy might be for the court to declare that the present application of the Guidance is incompatible with the rights of individuals in such circumstances. Since this was not a remedy sought by the appellants the Court should invite further submissions before finally deciding the outcome of the appeal [55, 60].

Lord Hodge agrees that there is no basis for striking down the Rule and that the Guidance may result in a significant number of cases in which the article 8 rights of individuals will be breached, where, for example the cost is inordinate. He is not persuaded that a declaration relating to the Guidance is appropriate but is content to reach a concluded view after further submissions [61-76].

Lord Neuberger agrees that the Guidance seems bound to result in the infringement of article 8 rights in individual cases but that the Rule itself is not disproportionate, bearing in mind the wide measure of discretion which should be accorded to the executive in a case such as this and the research that was done in anticipation [98]. He is sympathetic to the proposed declaration relating to the Guidance but agrees that it would be wrong to make it without considering further submissions [104].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.shtml>