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Marriage Visas and English Language Competence

1 Paragraph 281 of the Immigration Rules sets out the requirements which have to be met for a foreign spouse or civil partner (other than one from inside the European Economic Area) of a British citizen or person settled in the United Kingdom to be granted entry clearance enabling him or her to enter the United Kingdom. In November 2010 paragraph 281 was amended to require an applicant to produce a test certificate of knowledge of the English language to a prescribed standard **before entering the United Kingdom and as a condition of being granted leave to enter**. The previous requirement had been that persons granted leave should demonstrate their knowledge of the language within two years of entering the United Kingdom. The amended paragraph 281 contains an elaborate and detailed definition of the required test certificate and of certain exemptions. The main exemption is in favour of nationals of majority English speaking Commonwealth countries and the USA. Other applicants must have an English language test certificate at the required level from an approved provider or have a degree level qualification which was taught or researched in English. Other exemptions are in favour of applicants (1) aged 65 or over (2) those with a physical or mental condition which would prevent them from meeting the requirement and (3) those who can successfully plead "exceptional compassionate circumstances", an expression which includes nationals of countries which do not have approved test centres accepted by the United Kingdom Border Agency as being competent to carry out the required tests.

2 The amending provisions in paragraph 281 were contested by judicial review in the recent Court of Appeal case of *Bibi v. Secretary of State for the Home Department* [2013] EWCA 322. The case was brought by two British married women, each of whom wished to bring in a husband who was a foreign national who did not speak English. The Court of Appeal considered whether the amending provisions, clearly interfering with the rights to marry and to enter the United Kingdom for the purpose of joining a spouse already here, were compatible with Article 8 of the European Convention on Human Rights (ECHR) on the right to family life, for a general discussion of which see Legal Paper MW 270 . In undertaking this assessment the Court had to take into account the decision of the Supreme Court in the recent case of *Quila v. Secretary of State for the Home Department* [2012] 1AC 621, discussed in Legal Paper MW 240 and Legal Paper MW 241. In that case the Supreme Court had to consider an amendment to the Immigration Rules which den a spouse visa to an applicant under 21, as opposed to the previous age requirement of 18. The publicly stated purpose of the amendment was to deter forced marriages. The majority of the Supreme Court found that having regard to the relatively small number of forced marriages which might be prevented, this was, to quote Lord Wilson "a colossal interference with the rights of the claimants to respect for their family life, however exiguous that might be". In the case here being considered, the declared objective of the amendments imposing more strenuous English language requirements was to encourage integration of immigrants into the host society, protect public services and save costs. On this the Court of Appeal quoted with approval the following statement by Beatson J, the judge who had heard the case at first instance:

> "In the present case the categories of protection of "economic wellbeing" (in view of the evidence about the impact on job prospects), "health" (in view of the evidence about accessing health services) and possibly "public safety" of "the protection of the rights and freedoms of others" (in view of the evidence about the protection of women from domestic violence) mean that the new requirement [ie the amending provision on standard of attainment of English language proficiency] does pursue a legitimate public aim."

3 The Court then had to consider whether the effect of the amendment to the Immigration Rules, the interference with family life, was proportionate to the legitimate aim as defined in the above quotation. After considering the matter at some length, Lord Justice Maurice Kay, delivering the majority judgment, concluded at paragraph 92:

> "...the Secretary of State identified a social problem...considered an ameliorating solution; she assessed the implications of introducing it; she provided for exempt and exceptional cases; and in the event, the effect on applications and grants was not numerically significant."

The conclusion of the majority was that introduction of a pre-entry requirement of proficiency in the English language, pitched at a rudimentary level, was proportionate. One member of the Court of appeal dissented, but the majority judgment was that the amending Immigration Rule was compatible with Article 8 of the ECHR. By contrast with the decision of the Supreme court in *Quila* the Court of Appeal in the case of *Bibi* did not find any ground for upsetting the decision of the Home Secretary to amend the Immigration Rules in a way which interfered with the right to marry.

A FURTHER COMMENT

4 Somewhat unusually neither of the applicants for judicial review had actually applied for entry clearance because they had been advised that they would not be able to meet the amended requirements. Instead they started judicial review proceedings on the ground that the amendments to Paragraph 281 were incompatible with Articles 8 (right to family life), 12 (right to marry) and 14 (prohibition of discrimination) of the ECHR. In the normal way judicial review is a way of contesting a decision taken by a particular authority on the ground of failure to comply with the relevant law. In this case there were no decisions to be thus contested and as a general principle of common law judges may not adjudicate on legal problems in the abstract, unrelated to particular facts or events. However, both the judge at first instance and the justices of the Court of Appeal decided to go ahead. These decisions, taken together with the fact that the judgment of the court was not unanimous, may give ground for appeal to the Supreme Court.

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