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Blackledge, Adrian

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Language, Marriage Migration, and the Law

Adrian Blackledge

Many European states seek to limit migration from outside the European Union. However, national laws provide for the admission of family members even when opportunities for labour migration have closed (Wray, Agoston, and Hutton, 2014). Marriage migration permits the entry of migrants who would not otherwise be admitted (Wray 2011a), and this can pose a fundamental challenge to governments' attempts to manage migration (Charsley 2014). A further concern of governments is the question of how best to ensure the integration of migrants into society. This paper considers how recent British governments have responded to the entry of migrants as spouses of British citizens. In particular, the paper focuses on the introduction of pre-entry English language tests for applicants for marriage visas. The analysis examines the judgment of the High Court, the Court of Appeal, and the Supreme Court in a single test case. The courts considered whether the introduction of the pre-entry language tests disproportionately interfered with Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private and family life. The discussion situates the discourse of the judiciary and the government in the context of familiar, typical discourses about migration, and argues that 'common sense' beliefs about language and languages powerfully underpin the judgment of the courts.

1. Language and migration

In migration and post-migration contexts a paradigm shift has recently occurred in the way sociolinguists investigate and understand communication. Blommaert and Rampton (2016: 24) point out that there is now a substantial body of work on *ideologies of language* that "denaturalises the idea that there are distinct languages", and refutes the notion that a language is a bounded, pure entity. Rather, named languages "are ideological constructions historically tied to the emergence of the nation state". Notwithstanding this, the traditional idea of 'a language' "operates as a major ingredient in the apparatus of modern governmentality" (25). Language as an ideological artefact retains considerable power in public discourse and "in everyday common sense" (Blommaert and Rampton 2016:24). This is because familiar argument (or the social order) is repeatedly reproduced in "the self-evidences of common sense" (Bourdieu 2000:181) which give the illusion of reality.

Contexts in which everyday common sense operates as an ingredient of modern governmentality include the legislature and the courts. Bourdieu points out that legal authority is the objectification of the legitimate vision of the world (Bourdieu 2000: 186). Law symbolically "consecrates" existing relations of power (Bourdieu 1993:122). Bourdieu argued that an exemplary manifestation of state power is the judgment of the court, "a legitimate exercise of the power to say what is and to make exist what it states, in a performative utterance that is universally recognised" (Bourdieu 2000:186). The words of the judge are legitimate not because the judge is learned, or because (s)he has greater knowledge than others. The authority of the judge is determined by "the ermine and the robe" (Bourdieu 1991:76), by the rituals of the institution of the court. In this way the state wields "a genuinely creative, quasi-divine power" (Bourdieu 1998:52). This paper examines the relationship between the legislature and the courts, in the context of a case related to pre-entry English language tests for the spouses of British citizens.

2. Marriage migration

Marriage migration “is a prism through which many other concerns and anxieties are filtered” (Wray 2011a: 9). Spouses are the largest single category of migrant settlement in the UK, accounting for 39 per cent in 2008, and 40 per cent in 2009 (Charsley 2012a, b). Marriage migration poses a particular threat to governments’ attempts to limit the entry of non-EU migrants because it permits a potentially endless chain of migration (Wray 2011a). It brings to the fore the diversity of contemporary international mobility, the centrality of relationships for understanding migration, and tensions between human rights and immigration control (Charsley 2014).

In April 2007 the UK government indicated its intention to introduce a pre-entry English requirement for those applying for visas to join their spouses in the UK (Blackledge 2008). That is, for the first time, a language requirement for marriage visas must be met by passing a test taken outside of the UK. A Home Office consultation document, *Marriage Visas: Pre-entry English Requirement for Spouses* (2007) set out three objectives of the pre-entry English requirement: “To assist the spouse’s integration into British society at an early stage; to improve employment chances for those who have access to the labour market; and to raise awareness of the importance of language and to prepare the spouse for the tests they will need to pass for settlement” (6). The pre-entry test would be set at Level A1 CEFR. That is, candidates were required to demonstrate that they could recognise familiar words and basic phrases, interact in a simple way, ask and answer simple questions, and use simple sentences.

A week before the new Rule came into force, Home Secretary Theresa May addressed the House of Commons:

We aim to reduce net migration from the hundreds of thousands back down to the tens of thousands ... Last year, the family route accounted for nearly 20 per cent of non-EU immigration. Clearly, British nationals must be able to marry the person of their choice, but those who come to the UK must be able to participate in society. From next week, we will require all those applying for marriage visas to demonstrate a minimum standard of English.

(HC, 23 November 2010)

The Home Secretary’s rationale for the introduction of the pre-entry tests established a clear link between the introduction of the tests and an intention to reduce migration. Before the new Rule (‘Appendix FM to the Immigration Rules’, and henceforth ‘the Rule’) was implemented the government conducted an Impact Assessment (IA) and an Equality Impact Assessment (EIA). IA weighed up the costs and benefits of the forthcoming policy change, while EIA focused on equality issues. Taken together, IA and EIA argued that the pre-entry English language requirement would: reduce public sector translation costs; improve social cohesion and integration; remove cultural barriers; create opportunities for migrants; help women participate in British life; improve school achievement; enhance communication between teachers and parents; and extend awareness of rights. They also found that the Rule may have an impact on Article 8 – right to respect for private and family life – of the European Convention on Human Rights (ECHR), if families were separated because a spouse was unable to meet the English language requirement. However, “any indirect discrimination which resulted from the rules change would be justified on the basis that English language skills are necessary to assist migrants’ integration into British life” (Home Office 2010: 15). That is, in ECHR terms, interference with human rights would be proportionate. On 29 November 2010 the Rule was introduced.

3. Language tests, common sense, and justice

Shohamy (2009) argues that the stipulation of ‘language’ and ‘language tests’ as criteria for obtaining entry or citizenship may represent biased, discriminatory and unattainable requirements that can lead to invalid decisions about the rights of people in societies. Shohamy reminds us that tests are considered to be the domain of experts and are therefore rarely challenged and criticised. Common-sense myths about tests include that they are capable of improving knowledge, changing behaviour, raising standards, and expanding equality and efficiency. As we have seen, substantial claims were made by the Home Office about the power of the pre-entry English language tests. Shohamy (2009:51) concludes that “tests are introduced for various political agendas, for manipulating educational systems, for imposing specific knowledge, and for gate-keeping ‘unwanted’ groups that authorities want to keep out”. Eades (2009:30) adds that “language tests in immigration contexts typically perform a gate-keeping role in decisions about whether an applicant should be granted residence or citizenship in a new country”. McNamara and Ryan distinguished between ‘fairness’ and ‘justice’ in the development and administration of tests, and argued that such a distinction is helpful in clarifying what is at stake in discussions of language testing in contested social and policy contexts. While fairness assumes that a testing procedure exists, and questions the meaningfulness of the results it yields in relation to its construct, “justice questions the use of the test in the first place” (McNamara and Ryan 2011:164). That is, notwithstanding the fairness or otherwise of a test, questions may be asked about the purpose to which it is put. This paper examines the courts’ judgment of the justice of the pre-entry English language tests for applicants for marriage visas.

4. Language, marriage migration, and the law

Article 8 of the European Convention on Human Rights (Council of Europe 1950:10) provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of the rights and freedoms of others.

In 2011 three sets of claimants argued in the High Court that the Rule interfered with their rights under Article 8. This, they submitted, was because significant numbers of applicants for spouse visas would find it difficult or impossible to satisfy the requirements of the Rule. The claimants were:

1. *Mr and Mrs Chapti*. Mrs Chapti married her husband in India. Mrs Chapti was then the holder of a British Overseas Citizen passport. Mr Chapti was a citizen of India. They lived together in Gujarat and had seven children. In 2006 Mrs Chapti left Gujarat for the UK. In 2007 she became a British citizen by naturalisation. In November that year, Mr Chapti applied for entry clearance to settle in the United Kingdom as “the spouse of a person present and settled in the United Kingdom”. His application was refused in January 2008.

2. *Mrs Ali*. Mrs Ali was a British citizen aged 26, who lived in the United Kingdom. She married Ryadh Saleh Saif Ali, aged 19, a national and resident of the Republic of Yemen. Mr Ali did not speak English, had had no formal schooling, and, it was claimed, would find it very hard to learn English. There was no UK government-approved centre in Yemen which provided tuition in English to the level required, and, since the test could only be taken online, Mr Ali would also need to take lessons in computer literacy.
3. *Mrs Bibi*. Mrs Bibi was a British citizen aged 20. She married Mohammed Jehangir, a citizen of Pakistan; they had one child. Mrs Bibi wanted Mr Jehangir to live in the UK as it would have been impractical for her to go and live in Pakistan. Mr Jehangir was educated in Urdu, but spoke no English and had no computer skills. There were no local places which provided English tuition at the level required. The nearest places for him to study were in Mirpur and Islamabad, respectively 115 and 141 kilometres from his home.

Justice Beatson heard evidence from the claimants, together with reports and statements of expert witness Helena Wray and her colleagues Katharine Charsley, Anne-Marie Clift, and Geoffrey Jordan. The evidence on behalf of the government consisted of three statements from Helen Sayeed, of the Home Office Migration Policy team.

Following the judgment in the High Court, the case was referred to the Court of Appeal, which made its judgment in 2013. The case was subsequently heard in the Supreme Court in February 2015, with judgment in November 2015. The following discussion will consider the judgments of the High Court (Justice Beatson), the Court of Appeal (Lord Justice Maurice Kay, Lord Justice Toulson, and Sir David Keene), and the Supreme Court (Lord Neuberger, Lady Hale, Lord Wilson, Lord Hughes, and Lord Hodge). Quotations and summaries in the High Court judgment will be cited as [HC], in the Court of Appeal as [AC], and the Supreme Court as [SC]. As Mr and Mrs Chapti did not pursue the matter beyond the High Court, the case was retitled *Ali & Bibi v SSHD*.

In the High Court Beatson J adopted the approach of Lord Wilson in *R (Quila) v Secretary of State for the Home Department* [2010], formulating a set of questions the court had to consider in order to evaluate the proportionality of the new Rule. The discussion will consider Beatson J's responses in the High Court to each question, together with excerpts from the judgments in the Court of Appeal and the Supreme Court. In this section the relevant sections of the courts' judgments are excerpted, and in Section 5 they are discussed.

The first question

The first of the "Wilson" questions examined the impact of having little or no English on a person's ability to take part in British life.

In answering this Beatson J made two points. The first was that it "is a question of common sense" [HC 91] that there are benefits to those living in the UK in having an understanding of English. The second part focuses on the notion of "participation". Beatson J rejected the argument that those who do not understand English can participate in society, saying that "while they may be able to participate to some extent, it is participation of a limited and dependent nature" [HC 92]. Related to 'participation', and deployed almost synonymously in the courts' judgment, is the notion of 'integration'. In the Court of Appeal Kay LJ spoke in

favour of the pre-entry test as “a benign measure of social policy with the purpose of facilitating the integration of non-English-speaking spouses” [AC 30]. In the Supreme Court Lord Hodge took a similar view, arguing that “the pre-entry test is the first stage of the process of integration” [SC 65]. In a lengthier consideration of the benefits to integration of the pre-entry test, Lady Hale also argued that “it must be beneficial for a newly arrived partner to be able to go into a shop and buy groceries and other necessities, to say “hello” to the neighbours, to navigate public transport, to inter-act at a simple level with bureaucrats and health care professionals” [SC 41].

The second question

The second ‘Wilson’ question concerned the significance of the numbers of spouses and partners who were either unable to pass the Knowledge of Life and Language (KOLL) test, or who opted for the alternative English for Speakers of Other Languages (ESOL) route, with its lower requirements¹.

Beatson J took into account evidence from the Home Office that after two years in the UK almost a third of spouses took the ESOL route to satisfy the language requirement for settlement, while the remainder took the KOLL route. He concluded that the Secretary of State was justified in considering there was “a problem in spouses’ acquisition of the English language skills required in the KOLL test and thus in regarding spouses on limited leave as a key target group” [HC 94]. In the Court of Appeal Kay LJ concluded that the Secretary of State had identified and ameliorated a “social problem” - that some candidates for settlement who were spouses took the ESOL route to meet the English language requirement.

In the Supreme Court Lady Hale pointed out that it was unsurprising that applicants should take the ESOL course “and, having taken it, choose this route to qualify”. Lord Neuberger disagreed with her, arguing that even spousal migrants who learned English after arriving were in a weaker position than they would be under the Rule, because “the effect of the Rule is that spousal migrants learn English before arriving here and are therefore able to ‘hit the ground running’” [SC 91].

The third question

The third question asked “What are the relative advantages and disadvantages of learning English as a second language in this country and abroad before arrival?”.

Acknowledging that there may be advantages to learning English in the UK rather than elsewhere, Beatson J found that “the Home Secretary was entitled to conclude that such advantages did not outweigh the advantages of individuals having some, albeit a limited, knowledge of the language before arrival” [95]. In the shortest of his responses to the nine questions posed, Beatson J dismissed the argument that learning English may be more straightforward where English is widely spoken, and where English classes are readily available.

In the Court of Appeal Kay LJ referred to “the manifest benefit of a pre-entry requirement”, relying on IA, which had stated that the pre-entry test would “assist a spouse’s integration into British society at an early stage” [AC 25]. However, Sir David Keene judged that “the

English language is much more quickly and fully mastered once a person is within the community where that language is in everyday use” [AC 58]. He went on to say that it was difficult to see “what additional benefits to the public interest the new test brings, and in that situation it does not seem to me to justify the interference with Article 8 rights” [AC 59].

In the Supreme Court Lady Hale also concluded that the pre-entry test was of almost no value as a language learning resource, and that the post-entry settlement test, to be taken after five years, should be sufficient motivation for migrants to learn English. She concluded that “The best and quickest way to learn the language is by practice and immersion while here rather than in a foreign classroom” [SC 43].

The fourth question

The fourth question asked whether passing the pre-entry test would confer any job or earnings advantage to the spouse, or benefit the children of the family.

Beatson J treated this question in two parts, relating first to earnings, and then to children. He argued that benefits of having some command of the English language included “improved access to ordinary activities such as shopping and communicating, and to health and other public services” [HC 97]. Beatson J argued that migrant spouses should have sufficient knowledge of English to engage in “ordinary activities”. In responding to the second part of the question Beatson J referred to EIA [51], which argued that “ensuring that migrant spouses and partners have English language skills before they come to the UK can only have a positive impact on the English language skills of their children” (Home Office 2010b: 10). He judged that the pre-entry English test would help “remove current barriers for the second generation who suffer academically when English is not able to be spoken in the home” (Home Office 2010b: 10).

Beatson J also summarised evidence presented by the Home Office that a lower percentage of schoolchildren learning English as an Additional Language achieved the expected level in English and Mathematics than children whose first language was English. The Home Office evidence he relied on was the *Early Years Foundation Stage Profile 2008-9*, a measure which assessed children’s physical, intellectual, emotional and social development. The assessments were conducted when children were aged between 2 and 3 years, and at the age of 5.

In the Supreme Court Lady Hale noted that in some cases an effect of the pre-entry testing regime would not only be the separation of husbands from wives, but also children from their parents: “the choice is not between having a parent here with or without basic English language skills but between having a parent here and not having a parent here at all; separation is likely to be far more damaging to the child than living with a parent who has yet to acquire any English” [SC 38]. In the 310 paragraphs of text in the judgments of the nine judges hearing this case, this was a rare reference to the consequences of the pre-entry language testing regime for those who were unable to take, or pass, the test.

The fifth question

The fifth question asked “to what extent will the pre-entry English language requirement protect public services, in particular by reducing the need for translation services by government, public and health authorities?”

Beatson J referred to Mrs Sayeed's evidence for the Home Office, in which she cited "research undertaken by the BBC in 2006, identifying expenditure across government of at least £100 million on translation in 2005, by the NHS of an estimated £55 million, and by local councils of at least £25 million". The 'research' cited by the Home Office, and by Beatson J, was a two-minute item presented on BBC Ten O'Clock News on 12th December 2006. Although the television journalist, Mrs Sayeed, and Beatson J all referred to the item as 'research', the validity of its findings is open to question. Notwithstanding this, Beatson J concluded that in a period of financial stringency, translation costs were "significant", and should be reduced.

In the Supreme Court Lady Hale was sceptical about the link between translation costs and the pre-entry language requirement. She pointed out that the government had supplied no evidence of the costs, nor had they offered evidence that the language requirement would contribute to bringing down the costs: "no-one has shown what, if any, extra burden is occasioned by allowing partners to come here without any pre-entry language requirement or how much help that requirement is in reducing the need for translation when communication really matters" [SC 37].

The sixth question

The sixth question asked "What can be said about the impact of the new requirement on numbers of applications and success rates?"

Beatson J corrected the figures provided by the Home Office, noting that applications fell in the first half of 2011 by some 21% (not the 6% stated by Mrs Sayeed) and refusals rose by just under 24% (not the 7% stated by Mrs Sayeed). Although this appears to be evidence of a change since the introduction of the pre-entry English language requirement in November 2010, Beatson J found, "it is not possible to conclude that the decrease in applications and rise in refusals was caused by the English language requirement alone, or that it will be anything other than temporary" [HC 102]. Beatson J was content that the evidence may reflect a "transitional phase" [HC 100].

The seventh question

The seventh question concerned the provision of English language tuition and testing overseas.

The claimants had argued that there were inadequate and inaccessible teaching and testing facilities in the countries from which there are significant numbers of applicants. In her expert witness evidence to the High Court, Clift (2011:17) reported that "it is, in practice, impossible for many applicants to take a test of only speaking and listening in their country of origin". Lady Hale pointed out that since the case initially came to court there had been an amendment to the tests. From 6 April 2015, the approved A1 test for partners overseas was the International English Language Testing System ("IELTS") Skills for Life test, offered by the IELTS consortium. The test involved a face to face conversation lasting 16 to 18 minutes with the examiner and another candidate, and could be taken at around 100 test centres around the world [SC 21].

Beatson J dismissed the argument that for some candidates the logistics of attending English classes and taking a test at a designated centre were impracticable. He argued that candidates did not have to take the test in their country of residence. Beatson J also judged that the complaint about the proximity of test centres to the claimants' residence was "at bottom a financial challenge", and that "the cost of learning English to the required standard was one to be borne by the spouse and the spouse's sponsor" [HC 109]. The judge found that the financial argument overruled the argument that adequate and accessible tuition and tests were often unavailable.

Lady Hale pointed out that many candidates would find it hard to arrange access to appropriate tuition. Citing expert witness Jordan (2011), she said "people living in remote rural areas may experience serious difficulties in gaining access to suitable tuition, which may only be obtainable at unreasonable cost". Lady Hale said the interference with the Article 8 rights of the British partners of the people who faced such obstacles was substantial: "They are faced with indefinite separation, either from their chosen partner in life, or from their own country, their family, friends and employment here" [SC 52].

The eighth question

The eighth question asked how long, on average, it would take to learn English to the standard required for the test, and whether the interference created by the new rule would be limited in its impact and duration.

Beatson J considered evidence that it may take between 40 and 100 hours to learn English to Level A1. He noted that an applicant who was illiterate or semi-literate would be likely to need more time to achieve the required standard. Beatson J concluded that for some applicants the language requirement may be "incompatible with the Article 8 rights of that person or his or her spouse". However, he found that "this is not a ground for impugning the Rule itself" [HC 111].

In the Supreme Court Lord Hodge judged that there were areas in which it may not be reasonably practicable to obtain the needed tuition, "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". He said the central issue was "the accessibility of both tuition providers and approved testing centres which offer the stipulated test" [Lord Hodge SC 73]. Lady Hale judged that for citizens separated from their spouses, "the interference may be permanent" [SC 52].

The ninth question

The ninth and final question asked what information was available to applicants about exemption from the language requirement, and examined the implications of those exemptions for the impact of the new requirement.

Beatson J found that the existence of exemptions for candidates with disabilities, and for those in exceptional compassionate circumstances, "positively supports the proportionality of the new rule" [114]. In the Court of Appeal Kay LJ argued that where candidates were unable

to pass or take the test, a significant number “will benefit from the exceptions, particularly the one based on ‘exceptional compassionate circumstances’” [AC 32]. However, in the Supreme Court Lady Hale expressed her concern about Home Office Guidance in relation to the consideration of exceptional circumstances. She pointed out that the Guidance to entry clearance officers dissuaded them from exercising discretion, and quoted the relevant paragraph in the Home Office document:

Discretion should be exercised only in cases where there are the most exceptional, compelling and compassionate circumstances specifically relating to the ability of the applicant to meet the language requirement; circumstances should be assessed on a case-by-case basis. The expectation is that use of the exceptional compassionate circumstances exemption will be rare. Financial reasons will not be acceptable.

Lady Hale concluded that the Guidance offered little hope, either through the ‘exceptional circumstances’ exemption, or through the faint possibility of entry clearance outside the Rules. She pointed out that “Only a tiny number achieve leave to enter through these routes. This is not surprising given the way in which the Guidance is drafted” [SC 53]. Lady Hale described the chances of success in applying for exemption as “remote”. Lady Hale did not see the invocation of exceptional circumstances as a route to entry for those who were unable to take or pass the test.

In the light of the material before him Beatson J concluded that “the rule providing for a pre-entry English language requirement is not a disproportionate interference with family life, and is justified” [HC 115]. Kay LJ also dismissed the appeals, as the Rule did not contravene any requirement of the ECHR or of domestic law. Although Lady Hale considered that the Rule would disproportionately interfere with the Article 8 rights of applicants, she said it could be operated in a manner which was compatible with the convention rights, and she did not strike down the Rule. Lord Neuberger agreed, saying “I would dismiss these appeals”.

The final section of this paper will consider the discourse of the court judgments in relation to typical, ‘common-sense’ arguments about language and migration.

5. *A question of common sense*

Van Dijk (2000:98) suggests that in analysing discourse relating to immigration, it is fruitful to consider argumentation strategies, or *topoi*, “the common-sense reasoning typical for specific issues” and “the most typical elements of the argumentative and persuasive nature of debates on immigration, integration and the multicultural society”. Reisigl and Wodak (2000) point out that *topoi* belong to obligatory, either explicit or inferable, premises. They are the content-related warrants or ‘conclusion rules’ that connect the argument with the conclusion or claim (Reisigl and Wodak 2001:75). Such arguments can be identified because they have frequently, and typically, occurred elsewhere in other discourses about immigration. The analysis of common-sense content-related strategies used in arguments about immigration can be done by categorising *topoi*. The list below, adapted from Reisigl and Wodak (2000), and Blackledge (2005), derives from the judgments in the *Chapti / Bibi & Ali* case in the High Court, the Court of Appeal, and the Supreme Court, and does not presume to be exhaustive or comprehensive:

1. *topos* of advantage
2. *topos* of participation

3. topos of responsibility
4. topos of definition
5. topos of burden
6. topos of finance
7. topos of threat
8. topos of Authority
9. topos of law

In what follows the discourse of the judgment of the courts is analysed in relation to the common-sense reasoning typical of debates about immigration.

Topos of advantage. Typical of authoritative discourse about immigration is the argument that if an action is said to advantage the minority group, it should be done. Beatson J judged that having some command of the English language was advantageous to migrants because it helped them to engage in “ordinary activities” [HC 97]. He said the general point that it is easier to function in Britain if one is able to speak the language before entry at least to a limited degree is “a question of common sense” [HC 91]. Lady Hale asserted that “it must be beneficial” for newly arrived migrants to be able, for example, to go into a shop.

However, Shohamy (2009:48) questions the extent to which there is a need for migrants to be proficient in the language on entry to their new home country: “The question here is to what extent knowledge of a new language is always essential for all newcomers in order to function ‘properly’ in the new society they move to”. Shohamy suggests that passing a language test may not provide the key to participation in society. Recent research has investigated the role of shops as sites at which new migrants can engage in convivial interaction with other people in their neighbourhood (Blackledge et. al. 2015; Zhu Hua et al 2015). This ethnographic research demonstrated that new migrants are able to get along with established residents by finding points of communicative overlap (Rymes 2014), and translanguaging (Garcia and Li Wei 2014) – that is, making the best use of available semiotic resources, not all of which are ‘linguistic’. Furthermore, the evidence from these studies indicates that shops (and other neighbourhood sites in the public realm) are often contexts for informal language learning. Lady Hale’s statement is perhaps half-right: navigating the city is beneficial to the migrant, but it is not contingent on pre-existing English language proficiency. The judgment of the courts relies on the common-sense belief that in order to navigate urban space it is necessary to share linguistic proficiency with the majority group.

Beatson J further proposed that pre-entry English tests are beneficial to migrants, making a connection between the English language requirement and the educational attainment of young English language learners. We have seen that the High Court judgment relied on Home Office reference to a resource which was not designed to evaluate the relationship between English language testing of parents and its effect on their children’s attainment. The report quoted by EIA (2010b), and relied on by Beatson J, states that “Achievement is higher for those pupils whose first language is English when compared to pupils who have English as an additional language”. However, this was not a research report, and referred only to children of 5 years and younger. Research in the field of second language acquisition demonstrates that it takes at least 5 to 7 years for second language learners to master academic skills (*inter alia*, Collier and Thomas 1989, Cummins 1993, Tokuhama-Espinosa 2008). Yet the judge relied on assessments conducted when children were 5 years of age and younger, and concluded that learning English as an additional language was a negative factor in educational achievement. Jordan’s evidence to the court (2011: 17) summarised research

which clearly finds that the most effective way to learn English as a second language is through immersion in an English speaking environment, where learners acquire English as a result of the negotiation of meaning while engaging in real communication with English speakers. Gass and Mackey (2013:1) point out that “The highly complex phenomenon of second language learning can only be understood when all parts of the picture can be seen at the same time”. Beatson J concluded that “having English as an Additional Language was a factor in educational achievement” [HC 98]. His conclusion relied on a common-sense belief that young English language learners in the UK will be disadvantaged educationally if one parent has limited English proficiency. The common-sense argument here was that illiberal policy (subjecting spouses of citizens to tests which were potentially exclusionary) should be pursued because it was good for the applicants, and for their children.

Topos of participation. Beatson J rejected the argument that those who do not understand English can participate in society, saying that they were capable only of limited and dependent participation. In the Court of Appeal Kay LJ referred to “the manifest benefit of a pre-entry requirement” [CA 25], relying on IA, which had stated that the test would support integration. Lord Hodge took a similar view, arguing that “the pre-entry test is the first stage of the process of integration” [SC 65]. In announcing the pre-entry language requirement in 2010 Home Secretary Theresa May had said: “those who come to the UK must be able to participate in society”. The notion of ‘participation’ has an established provenance in public discourse about English language tests for applicants for naturalisation, settlement, and entry to the UK. Previous iterations of the argument had proposed that migrants should participate “fully” (Cantle Report, 2002), and “properly” (Lord Rooker, 2001), and that the use of languages other than English, or limited proficiency in English, were factors in preventing such participation (Blackledge 2005).

In her expert witness evidence to the court Charsley (2011: 44) concluded that “a pre-entry test has no identified benefits in terms of integration and may prove to be counter-productive”. However, Lady Hale stated that integration was a two way process, “it must be beneficial for others to see that the people living in our midst and intending to stay here are able and willing to join in and play a part in everyday social interactions, rather than keeping themselves separate and apart” [SC 41]. The typical argument here proposed that if immigrants were willing to join in and participate, it would be better for them, and better for society. Following her detailed ethnographic research in London, UK, Wessendorf (2010) concluded that participation in migration settings is not contingent on proficiency in the majority language of society. Rather, in order to navigate public space characterized by a variety of languages and backgrounds, people learn a code of practice and certain social skills. That is, openness to difference and diversity, what Lofland (1998) terms ‘civility towards diversity’, is crucial for participation in the city. Hall (2012) found that migrants deploy diverse repertoires to participate in the city, in ‘spaces of participation’. This argument, based on empirical research conducted at a local level and over time, counters the common-sense belief that participation in society is contingent on basic proficiency in English.

The *topos of responsibility* holds that because a group or person is responsible for the way things are, that group or person should act to put things right. Lady Hale’s argument that migrants should be “willing to join in” is an example of this. In the Court of Appeal Kay LJ concluded that the Secretary of State had identified and ameliorated the “social problem” of some candidates for settlement taking the ESOL route (rather than the more demanding computer-based KOLL test) to meet the English language requirement for citizenship or

Indefinite Leave to Remain. In a *topos of definition*, which argues that when something is allocated a name or definition it carries the qualities contained in that name, migrants themselves become the social problem. The implicit argument here seems to be that migrant spouses applying for settlement in the UK had been cheating the system by taking an English language course and demonstrating progress, rather than taking a computer-based test.

As Lady Hale pointed out, there may have been a number of reasons why candidates for settlement opted for the ESOL path rather than the KOLL path. Some may have entered an ESOL programme shortly after entry to the UK, at a time when they wanted to improve their English language proficiency. Others may have found the prospect of learning the 145-page *Life in the UK: A Journey to Citizenship* handbook to be a daunting prospect. Other candidates may have lacked confidence in their IT skills. The fact that 32% of candidates opted to take an English language course does not appear to constitute good evidence that there was a problem in their acquisition of English language skills. In the High Court and the Court of Appeal migrants were held responsible for a (hardly defined) social problem. The assumption of the High Court and the Court of Appeal appeared to be that requiring applicants for marriage visas to take an English test would increase their proficiency in English. No evidence was submitted to the courts to support this assumption. The common-sense arguments proposed that where there are said to be social problems associated with migration, the migrants were responsible, and through the repetition of the phrase ‘social problem’ they became associated with the problem.

The *topos of burden* and the *topos of finance* are related, with the latter perhaps a sub-category of the former. The *topos of burden* is a causal *topos*, a *topos of consequence*. In the context of debates about migration, this argumentation strategy points to the harm done to others by the presence or actions of the minority group. The *topos of finance* is characterised by the conclusion rule that if a specific action costs too much, steps should be taken to prevent that action. One of the stated aims of the introduction of the pre-entry English tests was to save public sector translation costs. Although evidence was presented on behalf of the government that translation costs were excessive, the research base was unreliable. Beatson J quoted Mrs. Sayeed for the Home Office, who supplied figures for translation costs in several local authorities. For example, she stated that Birmingham City Council spent £74,800 on translation in 2009-10. It is difficult to assess whether such a figure is excessive or not in the largest authority in the UK, which numbers around one million residents. Beatson J also relied on Home Office evidence which was elicited for a BBC news item, and carried no guarantee of validity. In the Supreme Court Lady Hale could find no causal link between the pre-entry tests and the cost of translation services in the public sector. Notwithstanding this, the judgment of the High Court was that translation costs were significant, and should be reduced. The common-sense argument appeared to be that the pre-entry tests should be implemented because failure to do so would increase the financial burden on the state, and on the tax-payer.

The *topos of threat* argues that if there are specific dangers or threats, something should be done to prevent this. Beatson J referred to the government’s post-hearing submission that “what one has to focus on is the overall system of immigration control, the aim of which is for the economic wellbeing of the country” [HC 84]. As we have seen, the Secretary of State announced the pre-entry tests in a statement in which she said “We aim to reduce net migration from the hundreds of thousands back down to the tens of thousands” (2010). Although the threats often associated with immigration were not made explicit in the courts, the Secretary of State’s announcement of the change to the immigration Rule began as

follows: “When immigration gets out of control, it places great pressure on our society, economy and public services” (HoC 2010). Although Lady Hale argued in the Supreme Court that “the government has never suggested that the aim of the Rule is to limit immigration by spouses and other partners of people settled here”, it is difficult to read the Secretary of State’s announcement otherwise. The common-sense argument deployed by the government here proposes that ‘out-of-control’ immigration constitutes a threat to society, and concludes that pre-entry tests must be introduced to limit the numbers of migrants entering the country.

The *topos of authority* is based on the argument that if an authoritative figure or body says that something is right or wrong, then it *is* right or wrong. Beatson J looked to the ruling of the Chief Justice in Germany, who held that a pre-entry language test for migrants was compatible with Article 8 ECHR [HC 86]. Kay LJ found that another state party to ECHR had a pre-entry language test requirement, and that it had not been held to be unlawful [AC 34]. Both judges considered the Rule to be legitimate because a similar rule had been upheld by courts elsewhere.

Similarly, the *topos of law* proposes that if there is existing legislation, or a Rule, on the statute books, the argument is already won. That is, the law is the law, and should not be struck down by the courts. Lord Hodge [SC 63] made this argument explicit: “I consider that this court’s role does not extend to overruling the predictive judgment of the executive branch of government on an issue of social policy”. That is, the law is made by the government, and the courts have no business changing it. Kay LJ in the Court of Appeal further supported the government, arguing that it should not be required to defend its Rules by supplying empirical evidence. Toulson LJ agreed, insisting that government would be “unduly trammelled” [AC 52] if judges required an “unrealistic” level of proof of the benefits intended by new processes. Home Office Guidance to entry clearance officers, published in November 2015, states:

The lawfulness of the pre-entry English language requirement in the Rules was upheld by the Supreme Court in its 18 November judgment in *Ali & Bibi v SSHD* [2015] UKSC 68.

(Home Office 2015:4)

In a circular dance, the courts relied on the evidence of the Home Office to uphold the Rule, and the Home Office relied on the courts to legitimise the Rule. As we have seen, the Supreme Court did not see its role as overruling the government. The common-sense argument appears to be that the law is the law because it is the law.

The *topos of law* was also in play, as the Supreme Court accepted that for some candidates and their British spouses there would be disproportionate interference with Article 8 ECHR, but they were nonetheless unwilling to strike down the Rule. Lady Hale noted that until July 2014 applicants for marriage visas who were resident in a country with no approved A1 English test were exempt from the language requirement. However, this exemption was removed by the government, so candidates are expected to travel to another country to take the test. Only where they can demonstrate that it is not practicable or reasonable for them to travel will they be exempt, and then only at the discretion of a senior caseworker or an entry clearance manager. In the Supreme Court Lady Hale concluded that there were likely to be a significant number of cases in which the testing and entry regime would not strike a fair balance as required by Article 8 [SC 54]. Lord Neuberger also judged that it may be impossible for a potential applicant to obtain access to a tuition and/or test centre, as 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 live near the tuition centre, and concluded that “this may well render reliance on the Rule disproportionate” [SC 101]. Despite the fact that the Supreme Court judged that there would be disproportionate interference with the (Article 8 ECHR) right of British citizens to respect for private and family life, they upheld the Rule. Lady Hale said this was because the Rule “was capable of being operated” in a way that did not disproportionately interfere with human rights. However, the common-sense argument underpinning the judgment appears to be that the Rule should not be struck down because it was not the court’s role to do so. Again, the law was the law.

The Supreme Court judges expressed concern that the rules and guidance, taken together, did not provide sufficiently for those cases in which it would be difficult or even impossible to pass the test or to do so would very expensive (Wray 2015). Unusually, Lady Hale invited further submissions with a view to ruling later on the guidance. It was always improbable that the Rule would be rejected in its entirety (Wray 2013), not least for the reasons stated in relation to the *topos of law*. Lady Hale pointed out that the appellants had “set themselves a difficult task” [SC 2]. Notwithstanding the difficulty of the task in which the appellants engaged, the discourse of the judgments of the courts offers a valuable insight into the interlinked domains of language tests, migration, and the law.

6. Language tests, common sense, and social life

The judgment of the courts recontextualised the discourse of government, deploying argumentation strategies which had been heard before in debates about migration, and which appeared to be ‘common sense’. Bourdieu (2000: 188) pointed out that acts of legitimation are carried out on the basis that the world is as it is because it is as it is, and is legitimised by those “whose interests are bound up with common sense”. Following his research into integration of migrants in Europe, Van Avermaet (2009:32) asked whether a language test was the best means to measure someone’s degree of integration, or willingness to integrate, or whether it “is mainly an instrument for exclusion”.

Bourdieu (2000: 181) points out that when the social order is threatened by crisis or critique it falls back on the shared self-evidences which constitute common sense. In the case here the shared self-evidences, the common sense arguments, are familiar, and are reiterated in the judgment of the courts. We have seen that the arguments are founded on beliefs, hardly supported with evidence, that the wives and husbands of British citizens should be required to take an English language test before they are permitted to engage in family life because: it enables them to go shopping when they arrive; it will help their children do well in school; some of them have been avoiding the test by taking a language course; the government will no longer have to spend money on translation services; immigration will be reduced; other countries do it; and it is already a legally enforceable Rule. In the judgment of the courts little was said about the consequences of failing the test, or of finding the process inaccessible or intimidating. The Supreme Court acknowledged that the effects may be permanent, as not only would British citizens and their husbands or wives be separated from each other, but they would also in some cases be separated from their children. The court said that if existing Guidance could be reworded, exemptions may be possible on compassionate grounds. However, the current possibility of such exemptions was described by the Supreme Court as “remote”. Notwithstanding the court’s acceptance that interference with Article 8 ECHR

would be disproportionate, common-sense arguments about language and law were deployed to uphold the Rule.

The world has become a complex place in its superdiversity (Vertovec 2014), and we may need more than common sense to ensure that complexity does not carry with it injustice. In superdiverse environments demonstration of basic proficiency in ‘a language’ neither guarantees advantage, nor is it in keeping with the complexity of the world (Arnaut, Blommaert, Rampton, and Spotti 2016). Blommaert and Rampton (2016:27) point out that “people apprehend meaning in gestures, postures, faces, bodies, movements, physical arrangements, and the material environment”, and these constitute contexts which shape the production and comprehension of utterances. When people navigate the complex social world they deploy semiotic resources of all kinds which enable them to buy chicken, borrow a library book, play volleyball, have their hair cut, send WeChat messages, catch a bus, take English classes, and so on. This may not always be straightforward, and there is some creativity and a little patience to be invested if desired outcomes are to be achieved. But each of these interactions, like thousands of others, is an opportunity for communication, and for learning. If we recognise these interactions as creative communicative spaces, and as sites for informal learning, “the ideological homogenisation and/or erasure achieved in national language naming becomes obvious, and a host of sub- and/or transitional styles and registers come into view” (Blommaert and Rampton 2016: 25). Instead of focusing on proficiency in ‘a language’, such an approach recognises a differentiated account of the organisation of communicative practice, as relationships “are enacted in ways that both official and common sense accounts often miss” (Blommaert and Rampton 2016: 25). The pre-entry language testing regime offers an official and common sense account which misses the lived communicative practices of new migrants.

Shohamy (2009:55) points out that language tests “are not only random and arbitrary but, given the difficulties of meeting them, serve as unrealistic mechanisms for control, categorization, gatekeeping and classification of human beings, and for the denial of basic human and personal rights”. Whether the intention of the government is to reduce immigration by closing the marriage route, or the government believes that the testing regime will provide better opportunities for migrants to integrate, is unclear. In the meantime, however, British citizens and their wives and husbands are forced to live apart. Common sense dictates that a language test for wives and husbands of British citizens in their home countries is good for them, and good for British society. However, in this case common sense argument appears to misunderstand the complexity of language and migration.

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ⁱ In 2004 the UK government set out language requirements for those seeking naturalisation as British citizens. Candidates whose English skills were below English for Speakers of Other Languages (ESOL) Entry 3 level were required to take an ESOL course and demonstrate progress. Those whose English skills were at or above that level were required to take the Knowledge of Life in the UK (KOLL) test. The computer-based KOLL test required candidates to answer questions based on a 145-page handbook, 'Life in the UK: The Journey to Citizenship', which set out knowledge about living in the UK.