



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/03956/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 5th June 2014**

**Determination Promulgated
On 9th June 2014**

Before

UPPER TRIBUNAL JUDGE COKER

Between

ENTRY CLEARANCE OFFICER

Appellant

And

SAMINA PERVAIS

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr J Wells, counsel, instructed by M & K solicitors,

DETERMINATION AND REASONS

1. The appellant (hereafter the ECO) appeals a decision of the First-tier Tribunal which allowed an appeal by the respondent (hereafter the claimant) against a decision of an Entry Clearance Officer on the grounds that the claimant met the requirements of the Immigration Rules for entry clearance as the spouse of a person present and settled in the UK. The application had been refused on the grounds that she did not meet the requirements of the Immigration Rules in force at the date of the decision namely, that the College of Excellence who provided the English Language certificate (Test certificate 1) were not on the

approved list of providers. There was no allegation that the claimant did not meet the other requirements of the Rules.

Background

2. The claimant had originally submitted Test Certificate 1 with an earlier application for entry clearance, which had been refused, and her appeal dismissed for reasons other than the English Certificate. In the instant appeal the claimant asserted that she had not been aware that Test Certificate 1 was not recognised and that she was unaware that the College had been removed from the list of approved providers.
3. Test Certificate 1 is dated 28th April 2011 and has endorsed upon it "Approved by the UK Border Agency". The grounds of appeal to the First-tier Tribunal (18th January 2013) state that the claimant is undertaking a further language test with an approved provider and the certificate would be provided in due course. A TOEIC/ETS listening skills certificate from an approved provider was then submitted dated 1st December 2013, valid until 1st December 2015. The Certificate shows listening skills score at 95 out of 495. A TOEIC/ETS speaking skill certificate dated 1st December 2013 valid until 1st November 2015 was produced showing a score of 60 out of 200.
4. The First-tier Tribunal judge found that the latter certificates, although submitted after the date of decision satisfied the requirements of the Immigration Rules and that the submission that it post dated the date of decision and was therefore not admissible was not effective: the certificates confirmed her language ability as at the date of decision and were thus admissible.
5. Permission to appeal was granted on the grounds that it was arguable that the judge had materially misdirected himself in finding that the subsequent submission of the certificate was relevant to proficiency because the relevant requirement under the Immigration Rules is to submit a valid certificate. The grounds seeking permission to appeal also state that the date of the certificate filed subsequent to the decision had not been referred to; the date was relevant because the new test was not available at the relevant date which was a requirement under the Rules.

Discussion

6. The claimant had submitted her application for entry clearance on 25th June 2012. The application was refused on 13th December 2012. There were significant amendments to the Immigration Rules to take effect on 9th July 2012 save for transitional provisions. In so far as relevant to this appeal the Rules applicable at the date of decision are:

A277 from 9 July 2012 Appendix FM will apply to all applications to which Part 8 of these rules applied on or before 8 July 2012 except where the provisions of Part 8 are preserved and continue to apply, as set out in paragraph A280.

....

A280 The following provisions of Part 8 apply in the manner and circumstances specified:

(a)

(b)

(c) The following provisions of Part 8 continue to apply to applications made on or after 9 July 2012, and are not subject to any additional requirement listed in (b) above;

(i) By persons who have made an application before 9 July 2012 under Part 8 which was not decided as at 9 July 2012; and

(ii)

281-289

.....

281. The requirements to be met by a person seeking leave to enter the United Kingdom with a view to settlement as the spouse or civil partner of a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement are that:

(i)

(ii) the applicant provides an original English language test certificate in speaking and listening from an English language test provider approved by the Secretary of State for these purposes, which clearly show the applicant's name and the qualification obtained (which must meet or exceed level A1 of the Common European Framework of Reference) unless:

....

7. The Immigration Directorate Instruction (IDI) as at 8th July 2012 and thus the instructions relevant to this application state (Chapter 8, Annex A3, paragraph 2.5)

How to treat applicants who already have a certificate

If an applicant supplies a certificate from a test provider who has ceased to be an approved UK Border Agency test provider we will not accept that certificate as they are not currently on the approved list of test providers for partners.

Once the new requirement is in place if there are any changes to the list of test providers for partners then transitional arrangements will be put in place advising how to treat certificates from providers who are no longer on the list of approved providers.

8. The IDI as at the date of decision is the same as regards the English language qualification as set out above. It does not appear that any "transitional arrangements" were introduced at the date of the rules changes in so far as the language qualification is concerned. The IDI as from April 2013 is as above save that it states in the second paragraph

“If there are any changes to the list of test providers then transitional arrangements will be put in place advising on how to treat certificates from providers who are no longer on the list of approved providers”

9. So far as I am aware there are no transitional provisions or arrangements in place and the actual Rule has not been amended.
10. The College of Excellence was not, at the date of decision, on the list of approved providers. Mr Wells submitted firstly that the judge had correctly accepted the Certificate and secondly that the subsequent certificates were correctly admitted as verification of her language abilities. He submitted that there was a basic fairness point in refusing to admit a certificate because a College had ceased, since the exam was taken, to be on the list of providers where there was no indication that the reason for ceasing to be on the list was because of some fraudulent or similar behaviour by the college that affected the actual testing of language; that she had acquired the required language level and this was confirmed by the submission of the subsequent certificates; that if the first certificate was not accepted the claimant should have been given an opportunity to submit a current certificate prior to a decision to refuse being made - see Thakur [2011] UKUT 00151 (IAC) and Patel [2011] UKUT 00211 (IAC).
11. Mr Avery submitted that it was inconceivable that the Rules as drafted could be read to enable a certificate obtained at some unidentified time in the past from an organisation that was at one time on the approved list, as complying with the requirements of the Rules. He submitted that the Rules clearly required submission of a certificate from an approved provider at the time of the decision. In so far as the certificates subsequently filed were concerned he submitted that these were irrelevant because of the failure to meet the Rules; the subsequent submission of a certificate, which was from an approved provider, did not render valid a previous invalid certificate. He further submitted that even if Mr Wells were correct and the claimant should have been given more time to submit a further certificate (a proposition he did not accept) in this case the new certificates were not obtained until some 10 months after the appeal was lodged in any event and therefore she would not have been able to comply with any short period of time given.
12. I provided Mr Wells and Mr Avery with copy extracts from the Common European Framework of Reference for Languages to enable an assessment of the later certificates against the required Level A1 because the certificates did not state what level had been acquired. Mr Wells submitted that the later certificates showed that the claimant had retained her level of language ability as tested by the College of Excellence whereas Mr Avery submitted she had not.
13. The Common European Framework of Reference for Languages describes Level A1 in the following terms:

Can understand and use everyday familiar everyday expressions and very basic phrases aimed at the satisfaction of needs of a concrete type. Can

introduce him/herself and others and can ask and answer questions about personal details such as where he/she lives, people he/she knows and things he/she has. Can interact in a simple way provided the other person talks slowly and clearly and is prepared to help. (Page 24)

14. According to UKVI, for a TOEIC/ETS certificate to qualify as level A1 the minimum grade required is listening – 60 and speaking 50.
15. Thakur was an in country variation appeal where it was held that a decision by the Secretary of State to refuse further leave to remain as a Tier 4 (General) student migrant was not in accordance with the common law duty to act fairly in the decision making process when an applicant had not had an opportunity of enrolling at another college following the withdrawal of the sponsor's license. At the time of that appeal there was policy guidance, which, in general terms, required the Secretary of State to grant periods of 60 days where a sponsor college licence was revoked, thus enabling students to find alternative colleges within which to complete their studies. I was not directed to any similar policy guidance in the scenario the subject of this appeal; in fact what guidance does exist states that where the provider ceases to be an approved provider, the certificate is not to be accepted. Whatever transitional provisions were envisaged do not appear to have been introduced.
16. Patel, also a Tier 4 student case, considered in rather more detail the issue of the duty of fairness in that class of case. The panel stated that the requirements of fairness always depended upon the context and the specific facts of the case [13] and accepted the proposition that wherever a public function is required to be performed there is an inference that the function is required to be performed fairly, in the absence of an express indication to the contrary [14]. In [24] the panel states

It is obviously unfair for the Secretary of State to revoke the college's status after the application has been made when it was not an approved sponsor and not to inform the applicant of such revocation and not afford him an opportunity to vary the application.

It goes on to say

33 We were informed that UKBA is concerned as to the potential costs of imposing a duty of having to inform the applicant that the college was no longer sponsored. We are unpersuaded that this diminishes the duty to act fairly or the way in which the duty is discharged in the present case.

34 We are equally unpersuaded that merely putting a list of unapproved sponsors on the website will serve as a substitute for notification of a change of circumstances since the application has been made. Of course such a course may increase transparency and fairness in respect of applicants who can learn the status of their college before they apply and may therefore be a useful move. But it is unrealistic to expect an applicant who has applied to monitor the Home Office website every day just in case there has been a change

in the sponsorship status of the college and relying on the college to notify those to whom it has issued sponsorship letters of a change of status may be equally ineffective.

17. The first question to be asked is whether the original test certificate ie the one issued by the College of Excellence satisfied the requirements of the Rules. It is plain that as at the date it was issued it was issued by an approved provider. However at the date of decision the provider was no longer approved. There is no allegation by the ECO that at the date of submission of the application the provider was no longer approved, although I do not see, given the wording of the Rule, that that would make any difference in any event. The Rules do not state that the certificate must have been obtained within a certain number of months of submission of the application. However, the IDI states that if the certificate produced is from a provider who is no longer approved then it is not acceptable.

18. Alvi [2012] UKSC 33 sets out the obligation of the Secretary of State under s3(2) Immigration Act 1971 to lay statements of the Rules before Parliament. At [63]

Various expressions have been used to identify the test which should be used to determine whether or not material in the extraneous document is a rule which requires to be laid before Parliament. It is not easy to find a word or phrase which can be used to achieve the right result in each case. I agree with Lord Dyson (see para 88, below) that it is not helpful to say that there is a spectrum. A more precise expression is needed. The word "substantive" was identified by Foskett J in *English UK* and by Singh J in *Ahmed*. But even this word needs some explanation. I would prefer to concentrate on the word "rule" which, after all, is the word that section 3(2) uses to identify the Secretary of State's duty and to apply the test described in para 57, above. The Act itself recognises that instructions to immigration officers are not to be treated as rules, and what is simply guidance to sponsors and applicants can be treated in the same way. It ought to be possible to identify from an examination of the material in question, taken in its whole context, whether or not it is of the character of a rule or is just information, advice or guidance as to how the requirements of a rule may be met in particular cases.

19. In Ferrer [2012] UKUT 00304 (IAC) and Philipson [2012] UKUT 00039 (IAC) the IAC held that where the provisions are ambiguous or obscure it is unlikely that Parliament would have sanctioned rules which (a) treat a limited class of persons unfairly and (b) disclose no policy reason for that unfairness; italic point 5 of Ferrer asks the question "does it [the particular provision] amount to a condition of succeeding under those rules?" it goes on to say there may still be difficulties "in determining whether a particular requirement amounts to such a condition or is merely a "procedural" requirement".

20. Clearly on a plain reading of the Rule, there is no requirement for the provider to be approved at any time other than at the date of the obtaining of the certificate. The qualification in the IDI falls fairly and squarely as a requirement to be complied with by an applicant and would require numerous checks to be

undertaken by an applicant right up until the time that the decision is taken (which would be on a date unknown to the applicant) if s/he were to be certain to comply with it. Furthermore there does not appear to have been any provision made for applicants in this situation despite reference to such in the IDI. This is not a scenario where the decision process breaches the common law duty of fairness in failing to provide a remedy which was referred to in Guidance; rather it is a simple failure on the part of the ECO to comply with the Rules.

Conclusion

21. Although the First-tier Tribunal judge allowed the appeal on the grounds that the certificates submitted subsequently were confirmatory, such an approach was neither correct nor necessary – although in passing I would say that according to the scores obtained by the claimant she does meet the basic level A1.
22. It cannot be said that the decision of the ECO was “unfair” in the sense of Thakur and Patel: this is not a scenario where there was guidance as to how a Rule should be implemented but a specific requirement in the IDI as to the implementation of the Rule in a specific situation.
23. There is no suggestion from the ECO or Mr Avery that the College of Excellence was involved in the production of false or misleading English qualifications or that this claimant obtained her certificate through some sort of underhand means. Again, in passing, the current certificates produced show that she has reached the required level A1. Had the College of Excellence been producing certificates that were not reliable, it was open to the Secretary of State/ECO to assert this.
24. Therefore although the judge erred in rejecting the Test Certificate 1, the outcome of this appeal was correct, namely the claimant meets the requirements of the Immigration Rules.

Decision:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

The ECO appeal is dismissed; the determination of the First-tier Tribunal to stand.

Date 9th June 2014

Judge of the Upper Tribunal Coker