



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

Appeal Number: IA/16219/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 22 October 2013**

**Determination
Promulgated
On 25 October 2013**
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Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

**MR VIGNESH KUMAR PERVMAL
(Anonymity Direction Not Made)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Sowerby of counsel instructed by Sahida & Co
Legal Services

For the Respondent: Mr G Saunders a Senior Home Office Presenting
Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Sri Lanka who was born on 23 March 1987. He has been given permission to appeal the determination of First-Tier Tribunal Judge Atkinson (the FTTJ) who dismissed his appeal against the respondent's decision of 23 April 2013 to refuse to vary his leave to remain in the UK as a Tier 4 (General) Student Migrant

2. The appellant arrived in the UK on 11 July 2011 having been granted a Tier 4 (General) Student visa valid for a period expiring on 29 August 2012. On 29 August 2012 he applied for a variation of leave in the same capacity which was refused on 23 April 2013. The respondent accepted that the appellant was entitled to the required 10 points for Maintenance (Funds) but concluded that he was not entitled to the required 30 points for Attributes - Confirmation of Acceptance for Studies (CAS) because he had not shown that he met the minimum standard of English requirements.
3. The appellant appealed and asked for the appeal to be determined on the papers which is what the FTTJ did on 12 August 2013. He concluded that the three certificates produced by the appellant from the Educational Testing Service (ETS) did not meet the requirements of Appendix B paragraph 10 and Appendix O of the Immigration Rules. These required the passing of the proficiency tests to be set out in a single document. He dismissed the appeal.
4. The appellant sought permission to appeal arguing that the FTTJ erred in law. Firstly, by failing to conclude that on the evidence before him the appellant had shown that he did comply with the requirements of the Immigration Rules and secondly, by applying the law in force at 17 July 2013 rather than at the date of the application.
5. The judge who granted permission to appeal was of the view that the FTTJ erred in law by failing to allow the appeal against the decision to remove the appellant under s47 of the 2006 Act. He stated that this was one of the grounds of appeal, although I cannot find it in the grounds before me. I interpret the grant of permission to appeal as permission to argue all grounds and neither representative suggested otherwise.
6. Mr Saunders conceded that the FTTJ erred in law and should have allowed the appeal against the decision to remove the appellant by way of directions under s47 of the Immigration, Asylum and Nationality Act 2006 and that I should substitute my decision to do so.
7. The provisions which set out what the appellant had to establish in order to show that he satisfied the English language requirements of the Immigration Rules are extremely complicated. However, it is not necessary to go through all the possible requirements because it is common ground, accepted by both representatives, that the appellant did not qualify for any of the exemptions and was required to produce valid original English-language test certificate(s) from an English language test provider approved by the respondent. The question of whether this can be done in one or more than one certificate is in issue in this appeal.

8. What the appellant produced was three TOEIC official score report certificates. The first, dated 17 July 2012 shows that he passed the writing test but failed the speaking test. The second, dated 31 July 2012, shows that he passed the listening and reading test. The third, dated 1 August 2012, shows that he passed the speaking test.
9. The wording of the relevant section of the refusal letter of 23 April 2013 is;

"Therefore, as you do not meet any of the exemptions, you must provide the original English-language test certificate, which is still valid, from an English language test provider approved by the Secretary of State as specified in Appendix O of the Immigration Rules. However, you failed to do so.

You have submitted 3 TOEIC certificates from the Educational Testing Service (ETS) in support of your application. You have to show the required minimum scores for the reading and listening components on one certificate of the same date as well as the speaking and writing components on one certificate of the same date, to show that you have achieved or exceeded CEFR level B1 in all four components.

Therefore, we cannot accept the TOEIC certificate dated 1 August 2012 you have provided in support of your application which shows only the Speaking score and not the Writing.

As you have failed to provide an appropriate certificate to show you have achieved or exceeded level B1 of the CEFR in all four components (reading, listening, speaking and writing), and therefore have not met this requirement, you have not achieved the maximum standard of English required and no points have been awarded for your CAS."

10. Paragraph 118(b)(iii)(4) of Appendix A to the Immigration Rules sets out the requirement that;

(4) the applicant provides the specified documents from an English language test provider approved by the Secretary of State for these purposes as listed in Appendix O, which clearly show:

i. the applicant's name,

ii. that the applicant has achieved or exceeded level B1 of the Council of Europe's Common European Framework for Language learning in all four components (reading, writing, speaking and listening), unless exempted from sitting a component on the basis of the applicant's disability,

iii. the date of the award, and

iv. that the test is within its validity date (where applicable)."

11. It is common ground accepted by both representatives that the certificates produced by the appellant from TOEIC came from an English language test provider approved by the Secretary of State for the purposes of Appendix A as listed in Appendix O. In relation to TOEIC all that Appendix O contains under the column headed "Documents required with application" are the words "Score report".

The documents submitted by the appellant are so titled. I find that Appendix A and Appendix O provide little assistance and no clear guidance as to whether one certificate or more than one certificate is permissible. The former refers to "specified documents" in the plural and the latter to "Score report" in the singular.

12. Mr Sowerby has produced a number of documents printed out from the TOEIC website which, I find, give a clear indication that there are two sets of tests; one a speaking and writing test and the other a listening and reading test. This is supported by the refusal letter although this is not without its inconsistencies. Although there are references to an "original English-language test certificate" and "an appropriate certificate" both in the singular I find that the words "You have to show the required minimum scores for the reading and listening components on one certificate of the same date as well as the speaking and writing components on one certificate of the same date" combined with the information from the TOEIC website establish that two TOEIC tests are the normal course and accepted by the respondent under the Immigration Rules, one for the listening and reading components and the other for the speaking and writing components.
13. An indication that the position was considered unclear and needed to be clarified can be gleaned from the amendment to Appendix O which came into effect on 1 October 2013. The new rule reads; "Where two or more components (reading, writing, speaking and listening) of an English-language test are examined and awarded together, for example a combined exam and certificate for reading and writing skills, the specified evidence submitted by the applicant must show that he achieved the required scores in all the relevant components during a single sitting of that examination, unless exempted from sitting a component on the basis of his disability...."
14. I find that the FTTJ erred in law in concluding that the English language proficiency requirements had to be shown in a single certificate or document.
15. I set aside his decision which both representatives agreed and I find can be remade without receiving or hearing further evidence. The representatives also agreed that the submissions they had made were all that they wished to say in relation to remaking the decision.
16. I find that over a short period between 17 July and 1 August 2012 the appellant has established that he passed tests which, if two or more tests were permissible, demonstrated the necessary proficiency in English. He failed the speaking test on 17 July but passed it on 1 August. The other components were passed at the first attempt. Mr Saunders accepted that on the basis of what is said in the letter of 23 April 2013 the appellant would have succeeded if,

when he re-sat and passed the speaking test he had at the same time re-sat the writing test and passed them together even if the test with the other two components had been sat and passed together on a different date.

17. Nothing in the material to which my attention has been directed shows and I find that the Immigration Rules in force at the date of the appellant's application and the decision did not contain a clear requirement that the English-language qualification must be set out in one certificate, that the tests could not be broken down into one or more components with those components being tested on different dates or that a component failed on one occasion could not be retaken and passed on another occasion. I find that the appellant has established that tests passed by him and the certificates produced meet the requirements of the Immigration Rules.
18. In the circumstances it is not necessary for me to determine whether there was unfairness to the appellant or whether the respondent failed to follow any policy in relation to giving the appellant the opportunity to provide missing or inadequate documentation.
19. Having set aside the FTTJ's decision I remake it. I allow the appeal against the decision to remove the appellant by way of directions under s47 of the Immigration, Asylum and Nationality Act 2006. I also allow the appeal under the Immigration Rules.

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Signed
2013
Upper Tribunal Judge Moulden

Date 23 October