Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34963/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17th October 2014	**On 23rd October 2014**

Before

FIRST-TIER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

(ANONYMITY NOT DIRECTED)

Appellant

and

MISS SABINA BEGUM

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Tiffin who, in a determination promulgated on the 14th August 2014, allowed the respondent's appeal against refusal of her application for further leave to remain as a Tier 4 (General) Student Migrant. In granting permission to appeal to the Upper Tribunal, Judge Shimmin considered that the First-tier Tribunal had arguably erred in law by -

(a) failing to take account of the requirement in the Immigration Rules that the appellant was required to pass all four components of the English language test, and

(b) relying on the decision in Khatel and others (s85A; effect of continuing application) [2013] UKUT 44 IAC.

2. There was no appearance by or on behalf of the respondent at the hearing of this appeal. I was nevertheless satisfied that she had been served with reasonable notice of the time, date, and place of the hearing, and that it was therefore just to determine this appeal in her absence. After hearing helpful submissions from Mr Bramble, I reserved my decision.

3. The fundamental problem, faced by both the decision-maker and the First-tier Tribunal, was that whilst the Confirmation of Acceptance for Studies (CAS) certificate indicated that the respondent had passed all four components in her English language test, the certificate issued by the test-provider indicated that she had in fact narrowly failed the 'writing' component. The test-provider did however indicate that the respondent's results were sufficient for her to achieve an overall 'pass' at the required B2 level of the Common European Framework Reference (CEFR). Moreover, there was evidence before the Tribunal that, following the submission of her application but before the Secretary of State had made a decision, the respondent had re-sat and passed three of the four components. This included the 'writing' component of the test, which she had previously narrowly failed.

4. At paragraph 19 of her determination, the judge reconciled these various conflicts in the following way –

> Clearly the Appellant's language course provider was satisfied that the Appellant had achieved the required level B2 of CEFR based on the requirements of the CEFR itself. I need to consider all of evidence provided by the Appellant to assess the disparate evidence. It is for me to decide whether or not the evidence is sufficient to show that it is more likely than not that the Appellant has attained CEFR Level B2. The Appellant has produced a further City And Guilds certificate dated 07 August 2013 showing that she has passed level B" (*sic*) in reading writing and listening which combined with the previous certificates satisfied me that on a balance of probabilities the Appellant has the required ability and has demonstrated the required level of ability in English language in accordance with the Immigration Rules.

5. The above approach was fundamentally flawed for three related reasons.

6. Firstly, in an appeal from refusal of an application made under the points-based system, the Tribunal is not generally concerned with making findings of fact, whether to the standard of a balance of probabilities or otherwise. Exceptions to this general rule include where there is a genuine dispute about whether (or when) an applicant submitted a particular document to the respondent, or where the Immigration Rules themselves call for the making of a factual finding and/or an exercise of judgement. Otherwise, the

issue in the appeal will be confined to whether the appellant submitted the specified documents that are required by paragraph 245 and the relevant appendices to the Immigration Rules so as to attract the required number of points. It was thus an error of law for the Tribunal to assess the respondent's ability in the English language by reference to all the evidence. That was not the issue in the appeal. The sole issue was whether the respondent had submitted specified documents that were in the required form.

7. Secondly, the Immigration Rules make it plain that in order to attract the requisite points, the applicant must submit a single certificate that clearly shows (amongst other things) that he has achieved a 'pass' in all four components of the English language test [see paragraph 10 of Appendix B]. It was not therefore open to the Tribunal to 'add together' the results of tests that the respondent had sat on separate occasions in order to conclude that she had met the requirement for a 'pass' in all four components.

8. Thirdly, the Immigration Rules also make it plain that in order to be awarded the requisite 'points', the English language certificate must show that s/he had passed all four components by the date upon which the application was made [see the fourth section of Table 10 of Appendix A]. An application is "made" on either the day when it is posted or is otherwise submitted to the respondent [see paragraph 34G of the Immigration Rules, and Khatel v SSHD [2013] EWCA Civ 754 (*reversing* the decision of the Upper Tribunal that was cited by Judge Tiffin)]. It was thus not open to the Tribunal to consider the evidence that the respondent had re-sat three of the four components of her English language test after she had submitted her application to the respondent.

9. It follows from the above that I must set aside the First-tier Tribunal's decision and remake that decision in accordance with the Immigration Rules. This can result only in the dismissal of the respondent's appeal from the Secretary of State's decision to refuse her application.

Decision

10. The Secretary of State's appeal is allowed.

11. The decision of the First-tier Tribunal to allow the respondent's appeal from the decision to refuse her application for further leave to remain in the United Kingdom is set aside, and is substituted by a decision to dismiss that appeal.

Anonymity not directed.

Signed Date

Deputy Judge of the Upper Tribunal 23rd October 2014