Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07561/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th December 2018	**On 08th January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS SUSHMA MORE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Harvey (Counsel)
For the Respondent: Mr J Whitwell (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge McCarthy, promulgated on 23rd May 2018, following a hearing at Birmingham on 18th May 2018. In the determination, the judge refused the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of India, and was born on 29th October 1982. She appealed against the decision of the Respondent dated 23rd May 2017, refusing her application for entry clearance to join her husband, who is present and settled in the UK. The Appellant satisfied the requirements of suitability, relationship, and financial requirements. What she needed to satisfy was whether she met the English language requirements.

The Judge's Findings

3. The judge observed that the Appellant was required to state her unique reference number in her application form so that it could be verified on the IELTS SET consortium online system, to verify whether the Appellant had acquired certification of the English language test at the requisite level (paragraph 7). The evidence before the judge was that the Appellant had obtained the IELTS academic qualification because she was a trained nurse and was applying for nursing jobs in the UK prior to entry. She had worked previously in South Africa. To work as a nurse in the UK, the Appellant had to provide an IELTS academic qualification (paragraph 11). The Appellant obtained a further IELTS qualification which contained a unique reference number. This was to support a fresh application that she submitted on 8th March 2018. However, the requisite verification was not forthcoming notwithstanding the existence of the unique reference number.

4. Instead, what the judge was faced with was a printed certificate. This, held the judge,

> "Does not satisfy the provisions of Appendix O, which specifies that results are verified through the online system. I have no means to access that system. Upon enquiry, Mr Smith [the Presenting Officer] said he had no means to do so. The only people who do are those involved in entry clearance directly" (paragraph 12).

5. Therefore, for "technical reasons" the appeal stood to be refused (paragraph 13), as the evidence before the judge did not disclose the fact that there had been verification through online certification of the Appellant having sat the requisite English language test. The judge, on more than one occasion, referred to the Appellant and the Sponsor as being "blameless" (paragraph 10 and paragraph 13).

Grounds of Application

6. The grounds of application state that the Appellant and her husband had stated a number of times to the authorities, and before the First-tier Tribunal, that the unique reference number can be verified online by recognised organisations (such as the Entry Clearance Officer, universities and employers). They cannot be accessed by the Appellant herself. The

necessary verification could not be produced before the Tribunal but this was through no fault of the Appellant or her Sponsor.

7. On 29th October 2018, permission to appeal was granted by the Upper Tribunal on the basis that it was arguable that the judge erred in law in not considering that the IELTS B1 academic certificate relied on by the Appellant was verifiable online.

Submissions

8. At the hearing before me on 17th December 2018, Ms Harvey, appearing as Counsel on behalf of the Appellant, handed up her well-compiled skeleton argument. She submitted that the First-tier Tribunal erred in law by holding that an IELTS certificate had to be able to be verified online by the Appellant, or by him, and by the Presenting Officer. It could be verified by the Entry Clearance Officer in order to meet the requirements of paragraph E-ECP.4.1. That was not in dispute. As a consequence of suggesting that the Appellant and others could also verify it, the judge erred in holding that the Appellant did not meet the requirements of the Immigration Rules. In further consequence of this, the judge's approach to proportionality was in error. It was not necessary in a democratic society, and nor was it proportionate, to deny entry to the Appellant. Furthermore, the judge erred in his approach to proportionality in holding that the interference with the Appellant and her Sponsor's right to family life was necessary in all the circumstances of the case.

9. Ms Harvey made good her submissions by stating that the sole reason for refusal of the Appellant's application by the Respondent was expressed by the Entry Clearance Manager in his review of 23rd November 2018 (see the Appellant's bundle at page 25), where he referred to the Appellant as having submitted the "wrong" IELTS certificate, because he had submitted the IELTS *academic* certificate and not the IELTS for UKVI. The Entry Clearance Manager asserted that this did not have the "required" unique reference number. However, the Appellant had submitted an IELTS academic certificate at level B1, and this exceeded the required A1 level, which was taken with an approved provider, and was less than two years old, because she needed to obtain this for her nursing career in the UK. The judge, however, held that the Appellant (at paragraph 7) was required to state her unique reference number on her application form so that it could be verified online on the IELTS SET consortium system. He had held (at paragraph 12) that he himself had not been able to access the system and nor could Mr Smith, the Presenting Officer, so that "the only people who do are those involved in entry clearance directly" (paragraph 12). On this basis, the judge held that the Appellant had failed to satisfy the English language requirements because of "technical reasons" (paragraph 13).

10. However, submitted Ms Harvey, if one looks at Appendix O to the Immigration Rules, this refers to tests taken outside the UK, and includes the IELTS life skills test, as well as the IELTS SELT consortium provider, and

underneath the section "documents required with application", it is stated that "for tests taken on or after 6th April 2015 no document required (scores will be verified using IELTS SELT consortium online system using a unique reference number which should be stated on the application form)". This was set out by Ms Harvey at paragraph 8 of her skeleton argument.

11. Thereafter, Ms Harvey submitted that Appendix FM-SE sets out the evidential requirements for applications made under Appendix FM, and this provides that the evidence required of passing an English language test in speaking and listening with the provider approved by the Secretary of State, where the applicant relies on that pass to meet an English language requirement, is confirmation on the online verification system operated by an approved English language test provider, as specified in Appendix O.

12. Ms Harvey went on to say that the phrase "as specified in Appendix O" refers simply to those identified as approved English language providers. Nothing more is specified by the note against the rubric "documents required". She explained that rather than specifying documents, the statement "for tests taken on or after 6th April 2015: no document required (scores will be verified using the IELTS SELT consortium online system using a unique reference number which should be stated on the application form)" is recorded that no documents are required. Nowhere is it suggested that they could not be submitted. The unique reference number obviates the need to submit a document, but nowhere in the Rules is it suggested that it bars such submission.

13. Accordingly, the effect of this was that the judge had fallen victim to the very complexity and confusion of the Immigration Rules that he had sympathetically referred to on behalf of the Appellant (at paragraph 10). The Appellant herself had made no error in assuming that an IELTS academic certificate could satisfy the requirements of paragraph E-ECP.4.1. The judge had no basis in law for his conclusion (at paragraph 13) that the Appellant had failed to satisfy the English language requirement. In accordance with Appendix FM-SE, she submitted a certificate which could be verified online, from an approved provider, at the requisite level, obtained within the past two years. The Appellant submitted with the Grounds of Appeal to the Upper Tribunal, a copy of the online verification certificate, obtained by the potential employer whom she asked to provide her with a copy of the verification it had undertaken (see the Appellant's bundle before the Upper Tribunal at page 81B). She applied for this to be admitted in evidence. If an error of law was to be found, Ms Harvey submitted that could then be taken into account.

14. For his part, Mr Whitwell submitted that the starting point was the failure of the Entry Clearance Officer to actually verify the online test. This is clear from the application detail, submitted before this Tribunal by Mr Whitwell, in relation to the Appellant's application. What this showed (at page 3 of 9) was that on 21st March 2017 there had been an attempt by

the Entry Clearance Officer to attempt an online verification. The entry on the left-hand column states that, "unable to verify IELTS online verification – no details found". Then again on 22nd March 2017, another effort was made to seek verification and there is an entry in the left-hand column of "unable to verify IELTS online verification – no details found".

15. Mr Whitwell went on to say that the CRS notes of the Entry Clearance Officer for 23rd November 2017 makes it clear, before the refusal letter was issued that:

> "Refusal only on basis of Appellant taking wrong IELTS test even though it was done at an approved IELTS for UKVI test centre in India. Grounds state Appellant's IELTS certificate was not considered which is a misinterpretation of the refusal notice as it was considered by not valid as certificate doesn't have unique reference number."

16. Mr Whitwell then referred to the refusal letter of the Entry Clearance Officer dated 9th June 2017. This makes it clear that the Appellant has:

> "Not passed an English language test (A1 level of Common European Framework) with the provider approved by UKBA and/or do not hold an academic qualification recognised by NARIC UK to be the equivalent to the standard of a bachelors or masters degree or PhD in the UK … You have not provided a UKVI IELTS certificate."

17. The ECM's report which followed this, on 23rd November 2017, states also that the Appellant had submitted the wrong test. This is because the IELTS for UKVI test centre certificate does not have the required unique reference number which should be printed below the candidate's ID number. The Appellant had taken the wrong test. The requisite test required for settlement application is "IELTS for UKVI" and not IELTS academic test. Alternatively, the Appellant could provide a NARIC letter, as advised on the refusal notice, in order for her degree certificate to be accepted as meeting the English language requirement.

18. Ms Harvey submitted that the statement in the notes of 21st March 2017 and 22nd March 2017 stating "unable to verify IELTS online verification" was misleading because they implied that the Entry Clearance Officer was unable to verify, rather than implying that the Appellant had not submitted the unique reference number, which would have meant that the fault lay not on the side of the Appellant. The Entry Clearance Officer erred in stating that the IELTS test was not verifiable. The mechanism of a unique reference number was not something that allowed for verification in this case. The Appellant had not sat the wrong test at all. The Entry Clearance Manager was wrong. Both tests could be verified online and it is not the case, as the ECM suggests, that the IELTS academic test cannot be verified online.

Error of Law

19. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law, such that it stands to be set aside. My reasons are as follows. First, this is a case where the Appellant was unable herself to verify online the IELTS test, which in any event was only verifiable by virtue of a unique reference number. It could be verified by the authorities, by employers, and by educational institutions. After all, it was verified by the British Council, because the Appellant had to work in the UK as a nurse. The evidence shows that there was an attempt made by the Entry Clearance Officer to verify the tests taken by the Appellant both on 21st March 2017 and on 22nd March 2017. However, the Entry Clearance Officer's department was unable to do so on the basis that it was "unable to verify IELTS online verification". This does not explain why verification was not possible. It does not state that verification was not possible because there had been an absence of a submission of a unique reference number.

20. Second, what was plain, however, was that not only was it the case that the judge himself was in no position to seek online verification, or that the Presenting Officer at the hearing before the judge was unable to do so, but the Appellant herself was singularly unable to do so. Therefore, at the hearing before Judge McCarthy, the Appellant produced a printed copy of the test, which bore the unique reference number. This would have allowed the Appellant to put evidence before the Tribunal, so as to enable the burden of proof to be discharged, insofar that the disclosure of the unique reference number, would mean that those who were able to undertake the online verification process, were able to do so. The relevance of Appendix O to the Immigration Rules, is such that alongside the rubric "documents required with application", it is simply stated "no document required (scores will be verified using IELTS SELT consortium online system using a unique reference number which should be stated on the application form). It does not mean to say that such a document cannot actually be produced itself. If the document contains the unique reference number, such that it is stated on the application form, then this can only assist in the necessary verification being carried out. Otherwise, it is perverse to require verification of something which is impossible to verify for the Appellant herself. In short, the Appellant was entitled to assume that her IELTS academic certificate could satisfy the requirements of paragraph E-ECP.4.1.

Remaking the Decision

21. I have remade the decision on the basis of the evidence before the judge, the submissions that I have heard today, and the findings made by the judge previously. I am allowing this appeal on the basis that the Appellant, in accordance with Appendix FM-SE, submitted a certificate that could be verified online, from an approved provider, at the requisite level, obtained within the past two years.

22. The Appellant submitted with the Grounds of Appeal to the Upper Tribunal a copy of the online verification of her certificate, and this being obtained

from a potential employer, whom she asked to provide her with a copy of the verification that had been undertaken (see the bundle before the Upper Tribunal at page 81B). There has been no suggestion that anything is wrong with the certificate provided by the Appellant.

23. Finally, the appeal is also allowed on the basis of the decision of the Secretary of State being disproportionate. This was a case where, as the judge properly found, both the Appellant and the Sponsor were "blameless" (see paragraph 10), and had met all of the requirements of the Rules. The Appellant met all the requirements of the Rules and to refuse to admit her serves no legitimate objective and is not necessary in a democratic society. This was a case where the Appellant only failed "on technical reasons" (paragraph 13).

24. At the time of the decision, the Appellant was in the advanced stages of her pregnancy. The strain of application and separation from her husband, at a very difficult time, meant that it was particularly important that she and her husband were together. The Appellant's husband owns his own home in the UK and works in the UK. Travelling to India to be with his wife would interfere with his private life in the UK.

25. The Appellant herself is now with a child. In all the circumstances, accordingly, this appeal is allowed.

Notice of Decision

26. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

27. No anonymity direction is made.

28. This appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 4th January 2019