



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

Appeal Number: IA/46471/2014

**THE IMMIGRATION ACTS**

**Heard at Manchester  
On 18 November 2015**

**Decision & Reasons  
Promulgated  
On 11 December 2015**

**Before**

**UPPER TRIBUNAL JUDGE CLIVE LANE**

**Between**

**ZB  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Moksud, Agent Solicitor for Lincolns, Solicitors  
For the Respondent: Ms Johnstone, a Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant, ZB, born in November 1990 and is a citizen of Pakistan. She had applied for leave to remain in the United Kingdom as the spouse of MMR, who has indefinite leave to remain in this country. Her application was refused by the respondent on 6 June 2014 and the appellant appealed to the First-tier Tribunal (Judge Nichol) which, in a decision and reasons

dated 15 February 2014, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. I find that the Judge of the First-tier Tribunal did err in law such that his decision falls to be set aside. I have reached that decision for the following reasons. First, I am not satisfied that the judge properly applied the law as to the burden of proof in the appeal before the Tribunal. In this appeal, the respondent has asserted that the appellant had taken an ETS TOEIC English language test in speaking and writing that the results of her test have been deemed invalid by the respondent. The judge found [12] that none of the evidence provided to him in the First-tier Tribunal appeal for this appellant contained any evidence which was particular to her. Rather, the statements provided to the judge were “generic” and sought to “explain problems that had arisen in connection with the English language test conducted by or on behalf of ETS and the action that has been taken as a result.” At [37], the judge wrote:

I consider that the starting point to decide whether, without considering the respondent’s evidence, I am satisfied the claimant did take the correct tests in question. It is only then that I need to consider whether the respondent’s evidence outweighs that of the appellant.

3. That paragraph is problematic. It is difficult to see how, if the burden of proving that the appellant had not taken the tests and that her test results were not genuine rested on the respondent, that burden might be discharged “without considering the respondent’s evidence.” The judge proceeded to consider the oral evidence which he had been given by the appellant and her husband which led him to find that he was “not satisfied on the balance of probabilities that the appellant did take the test personally.” [38]. Only at that point in the analysis did the judge consider the respondent’s evidence finding that this evidence “strengthens this finding.” In effect, the judge proceeded on the basis that the central issue of the appeal (whether the appellant or a proxy had taken the test) was for the appellant, not the respondent, to prove. The judge noted that, “[the generic evidence] outlines well-established procedure for checking results and requires evidence to rebut it. In this case I do not accept the appellant took the test and the respondent’s evidence serves to reinforce that conclusion.”
4. I appreciate the difficulty in which the judge found himself and that he may have considered that the “generic” evidence from the respondent somehow required special treatment. Whatever the difficulties he encountered, I am satisfied the judge erred in law in proceeding to determine the appeal in the manner which he describes at [37].
5. Secondly, I note that MMR (the appellant’s spouse) has indefinite leave to remain in the United Kingdom and that their child (LR) was born to the couple in July 2014 in the United Kingdom. Correctly, the judge assumed [44] that the child is a British citizen in consequence. At [44] and also when discussing the application of Article 8 ECHR outside the Immigration Rules, the judge concluded that there “would not seem to be any reason why [LR] could not move with her mother to Pakistan or remain in the

United Kingdom with her father. She is still very young and would therefore be more adaptable to a new way of life". The judge went on to note that the "appellant and her husband could return to Pakistan together and continue their family and private life [there]." In that scenario, it is not clear where LR would live. It is also unclear how a very young child might reasonably live in the United Kingdom separated from her mother. Issues such as those arising in *Sanade (British children - Zambrano - Dereci)* [2012] UKUT 00048 (IAC) (concerning the reasonableness of requiring a British citizen child to live outside the European Union) had not been addressed by the judge. Viewed as a whole, I consider that the Article 8 ECHR analysis has been inadequate.

6. In the circumstances, I set aside the decision of the First-tier Tribunal. None of the findings of fact shall stand. Because there is an extensive fact-finding analysis required in order to remake the decision, it is appropriate for the appeal to be remitted to the First-tier Tribunal (not Judge Nichol) for that Tribunal to remake the decision.

### **Notice of Decision**

The decision of the First-tier Tribunal which is dated 15 February 2015 is set aside. None of the findings of fact shall stand. The appeal is remitted to the First-tier Tribunal (not Judge Nichol) for that Tribunal to remake the decision.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 20 November 2015

Upper Tribunal Judge Clive Lane