Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/07018/2015**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 14 November 2017 **On 28 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

MRS AMINA SAID AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Balroop, Counsel
For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Djibouti. She was born on 27 October 1993. She appealed against the respondent's refusal to grant her entry clearance as the partner of a British national.

2. In a decision promulgated on 28 February 2017, Judge S. Aziz (the judge) dismissed the appellant's appeal against the respondent's refusal because he found that she did not satisfy the requirements of the Immigration Rules and that as regards Article 8, the respondent's decision was proportionate.

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3. The grounds claim the judge erred materially. The only issue in question was whether the appellant met the requirements of the English test. At [31] the judge accepted the appellant obtained an overall band score of 4.0. At [32] the judge accepted that 3.5 was equivalent to B1. The grounds claim that was important as the test only required the appellant to obtain A1 in all four levels. Before B1, there is a 2 and then A1 comes after that so A1 is two levels below B1.

4. The grounds claim that the judge essentially refused the case as there was no evidence that level 3 listening was equivalent to A1. It was submitted that the judge erred as he accepted B1 was 3.5 to 4.5 and for the judge to come to the conclusion that 0.5 band level meant a drop in two grades could not be logical. It had to be that a 0.5 drop, that is, to level 3, was the next grade below, that is, A2.

5. The grounds submit that a printout from Language Levels at Oxford School of English and Educouncil.org from the public domain confirmed that B1 was 3.5–5, A2 is level 3 and A1 is below that. Since A2 is level 3 and only A1 is needed, that would show the judge erred in his logic.

6. With regards Article 8, the grounds claim the judge erred because he appreciated there was a British child (see [17]). The judge failed to consider **<u>MA and SM</u> (Zambrano: EU children outside EU) Iran [2013] UKUT 00380 (IAC)**. See headnote:

> *"(1) In EU law terms there is no reason why the decision in **<u>Zambrano</u>** could not in principle be relied upon by the parent, or other primary carer, of a minor EU national living outside the EU as long as it is the intention of the parent, or primary carer, to accompany the EU national child to his/her country of nationality, in the instant appeals that being the United Kingdom. To conclude otherwise would deny access, without justification, to a whole class of EU citizens to rights they are entitled to by virtue of their citizenship.*
>
> *(2) The above conclusion is fortified by the terms of The Immigration (European Economic Area) (Amendment) (No.2) Regulations 2012 (SI 2012/2560), brought into force on 8 November 2012. Paragraphs 2 and 3 of the Schedule to the Regulations give effect to the CJEU's decision in **<u>Zambrano</u>** by amending Regulations 11 and 15A of the Immigration (European Economic Area) Regulations 2006 in order to confer rights of entry and residence on the primary carer of a British citizen who is joining the British citizen in, or accompanying the British citizen to [Regulations 11(5)(e) and 15A(4A)], the United Kingdom and where the denial of such a right of residence would prevent the British citizen from being able to reside in the United Kingdom or in an EEA State."*

7. The grounds claim that reference should have been made to **Mostafa [2015] UKUT 112 (IAC)**.

8. Judge Shimmin in a decision dated 20 September 2017 found it was arguable that the judge materially erred in consideration of the evidence in relation to the level at which the appellant had passed the English test. Further, it was arguable that there was an error of law in consideration of Article 8 in terms of there being a British child as per **Mostafa**.

9. The Rule 24 response was filed on 11 October 2017. The respondent did not oppose the appellant's application for permission to appeal and invited the Tribunal to determine the appeal with a fresh oral continuance hearing to consider the appellant's application for entry clearance to the UK as a partner under Appendix FM of the Immigration Rules and outside the Rules under Article 8.

Submissions on Error of Law

10. Mr Balroop relied upon the grounds.

11. Mr Tufan accepted that the Rule 24 response indicated that the respondent did not oppose the application for permission to appeal.

Conclusion on Error of Law

12. I find the judge materially erred in his analysis both with regard to his approach to the requirements of the English test and with regard to his approach to Article 8. As regards Article 8, the judge failed to take into account **MA and SM** as well as **Mostafa** in terms of the child and also the appellant's ability to satisfy the Rules. Such ability to satisfy the Rules, whilst not the question to be determined, is capable of being a weighty factor in the proportionality analysis. See also **Chavez-Vilchez [2017] EUECJ C–133/15**. It is important to determine in each case at issue in the proceedings which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third country national parent.

13. The judge made a material error of law. The appeal must be re-heard.

Notice of Decision

14. The decision of the First-tier Tribunal contains errors of law, is set aside and shall be remitted to the First-tier Tribunal for a de novo re-hearing.

    Anonymity direction not made.

Signed   Date 14 November 2017

Deputy Upper Tribunal Judge Peart