Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/00447/2016

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 9th March 2018	**On 23rd March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

FR
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss E Norman of Counsel instructed by Harbans Singh & Co Solicitors
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appealed against a decision of Judge Perry of the First-tier Tribunal (the FtT) promulgated on 29th December 2016. The Appellant is a female citizen of Pakistan and she has a dependent son, MR, born [ ] 2000.

2. The Appellant and her son and her daughter who was born in February 1995 arrived in the UK as visitors on 16th June 2012. The Appellant made

an asylum and human rights claim on 8th January 2013. She claimed to be the member of a particular social group, on the basis that she would be a lone vulnerable female if returned to Pakistan. She claimed to be at risk from her husband who had been violent and abusive to her, and had fired gunshots at her. After her arrival in the UK her husband had contacted her brothers, who are British citizens, and made threats to kill her.

3. The asylum and human rights claim was refused on 16th March 2016 and the Appellant appealed to the FtT. Her appeal was heard on 15th December 2016 and dismissed on all grounds. The FtT did not find that the Appellant was a credible witness and found that she would not be at risk if returned to Pakistan. The FtT found that the Appellant would not have family in Pakistan to provide support, but she could receive financial support from her family in the UK and she would not be returning alone, as her son who was 16 years of age at the date of the FtT hearing, would accompany her. Having found that the Appellant would not be at risk if returned to Pakistan, the FtT dismissed the appeal.

4. The Appellant applied for permission to appeal to the Upper Tribunal which was granted by Designated Judge Shaerf. Although the grounds seeking permission to appeal had not expressly referred to the Appellant's son, Judge Shaerf found it a 'Robinson obvious' point that the FtT had failed to consider the best interests of the Appellant's son which was an arguable error of law.

Error of Law

5. On 21st July 2017 I heard submissions from both parties in relation to error of law. On behalf of the Appellant it was argued that the failure by the FtT to consider the best interests of the Appellant's 16 year old son amounted to a material error of law and therefore the decision of the FtT should be set aside on that basis. On behalf of the Respondent it was accepted that the FtT should have considered the best interests of the Appellant's son, but it was contended that the error was not material, as it was open to the FtT to conclude, in the circumstances of this case, that the Appellant and her son could return to Pakistan.

6. Full details of the application for permission to appeal, the grant of permission, and the submissions made by both parties are contained in my error of law decision promulgated on 2nd August 2017. I set aside the decision of the FtT, and set out below paragraphs 11–18 which contain my conclusions and reasons for so doing;

> "11. It was common ground between the parties that the FtT had not considered the best interests of the Appellant's son who is a minor. He was 16 years of age at the date of the FtT hearing. He was a dependant in the Appellant's appeal. The Respondent considered his best interests at some length at paragraphs 78–87 of the refusal decision dated 16th March 2016. There was

evidence relevant to the son submitted to the Respondent and contained within the Respondent's bundle, and pages 146–161 of the Appellant's bundle related only to evidence about the son.

12. I find that failure to consider the best interests of the Appellant's son is a material error of law. I find that where it is proposed to remove a child from the UK, and it is clear that there is opposition to such action, it is necessary for the FtT to consider the best interests of the child.

13. Permission to appeal was not granted on any other point, and therefore the findings of the FtT in relation to credibility and risk on return are preserved.

14. It is necessary to have a further hearing. This is not an appropriate case to remit to the FtT.

15. Article 8 was raised as a ground of appeal, and there was specific reference to Article 8 in letters from the Appellant's solicitors dated 3rd and 4th October 2016, and reference to Article 8 in the Appellant's skeleton argument. The FtT recorded at paragraph 1 that Article 8 was relied upon in the appeal, but recorded at paragraph 7 that Article 8 was not pursued. No findings were made by the FtT in relation to Article 8.

16. Both representatives indicated that Article 8 was in fact pursued before the FtT, not in relation to the Appellant's adult daughter, but in relation to her 16 year old son. Both representatives contended that their colleagues who had appeared before the FtT had in fact made submissions to the FtT on Article 8.

17. I find it appropriate therefore to consider Article 8 at the next Upper Tribunal hearing. That hearing will consider Article 8 and the best interests of the Appellant's son. For the avoidance of doubt there will be no consideration of asylum, humanitarian protection, or Articles 2 and 3 of the 1950 Convention.

18. Mr Sidhu was somewhat unsure as to the number of witnesses that might be called in relation to Article 8. He indicated that there would be three witnesses although the Appellant would not be called and therefore there was no need for an interpreter."

7. The hearing was adjourned to enable evidence to be called so that the best interests of the Appellant's son and Article 8 could be considered.

Re-making the Decision – Upper Tribunal Hearing 9th March 2018

Preliminary Issues

8. The Appellant attended the hearing. It was confirmed that she would be giving oral evidence as would her son and two of her brothers.

9. I ascertained that the Tribunal had received all documentation upon which the parties intended to rely, and that each party had served the other with any documentation upon which reliance was to be placed. The documents

in question are the Home Office bundle with Annexes A–J, the Appellant's bundle comprising 219 pages, the Appellant's bundle comprising 67 pages, a letter from Harbans Singh dated 5th October 2017 together with enclosures, and the Appellant's bundle comprising 22 pages.

10. The representatives indicated that they were ready to proceed and there was no application for an adjournment.

The Oral Evidence

11. Prior to oral evidence being given I advised the parties that in view of the age of the Appellant's son, and the diagnosis of post traumatic stress disorder in the Appellant's psychiatric report, I would be conducting the hearing by following the Joint Presidential Guidance Note No 2 of 2010 in relation to child, vulnerable adult and sensitive appellant guidance.

12. The Appellant gave evidence with the assistance of an interpreter in Urdu. There were no difficulties in communication. She relied upon her witness statements dated 3rd October 2016 and 7th December 2017.

13. The Appellant's son, MR, gave evidence in English and adopted his witness statement dated 3rd October 2017. There were no difficulties in communication. In the course of his evidence he handed in his year 13 school report.

14. The Appellant's brother, JS, then gave evidence. He did not require an interpreter and adopted his witness statements dated 23rd September 2016 and 3rd November 2017.

15. The Appellant's brother, MS, then gave oral evidence in English. He adopted his undated witness statement contained at pages 52–53 of the Appellant's bundle, and his witness statement dated 3rd October 2017.

16. The Appellant and witnesses were questioned by the representatives. I recorded all questions and answers in my Record of Proceedings and it is not necessary to reiterate them in full here. If relevant I will refer to the oral evidence when I set out my conclusions and reasons.

The Oral Submissions

17. I heard oral submissions from both representatives which are set out in full in my Record of Proceedings and summarised in brief below.

18. On behalf of the Respondent reliance was placed on the refusal decision dated 16th March 2016. It was submitted that the Appellant would not be returning alone but would be accompanied by her son who is nearly 18 years of age. He could provide some emotional support. The Appellant

would be able to access treatment for her mental health issues in Pakistan. Her brothers in the UK provide financial support and could continue to do so.

19. I was asked to note that the Appellant's son is not a qualifying child, in that he does not have settled status in the UK, and he has not resided in this country for seven years. He had given evidence that he was due to take his A levels, but it was submitted that by the time this decision was in force, he would have completed his A levels. I was reminded that education is not a protected right under Article 8.

20. I was also reminded of the considerations contained in section 117B of the Nationality, Immigration and Asylum Act 2002, and I was asked to find that there were no exceptional or compelling circumstances in this case that outweighed the public interest. The Appellant could not speak English and is not financially independent. It was submitted that her appeal with reference to Article 8 should be dismissed.

21. On behalf of the Appellant I was asked to note that a feature of this case was the delay caused by the Respondent. The Appellant had claimed asylum on 8th January 2013 but did not have her substantive interview until January 2016, and the refusal decision was made on 16th March 2016, over three years after the asylum claim had been made. During that time the Appellant and her son had integrated into the UK.

22. With reference to the Appellant's son I was asked to note that he spoke excellent English, letters of support for him had been provided, together with good school reports, and confirmation from the school that he had been made deputy head boy. He had given evidence that he intended to study architecture, although he had been unable to obtain a student loan to go to university because of his uncertain immigration status. It had been accepted by the FtT that the Appellant has no family support in Pakistan, and clear evidence had been submitted to prove that she is a vulnerable person with mental health problems. I was asked to find that it would not be proportionate for her to be removed to Pakistan.

23. It was submitted that the Appellant's son had fully integrated into the UK, and that he would be of positive benefit to this country, and it would be disproportionate to expect him to give everything up, to become his mother’s carer in Pakistan.

24. At the conclusion of oral submissions I reserved by decision.

My Conclusions and Reasons

25. The issue to be decided by the Upper Tribunal relates to Article 8 of the 1950 European Convention on Human Rights. The conclusions reached by the FtT in relation to asylum, humanitarian protection, and Articles 2 and 3

of the 1950 Convention were not successfully challenged and are preserved.

26. The Appellant argues that the Respondent's decision fails to respect her private and family life rights that are protected under Article 8. In considering Article 8 I adopt the balance sheet approach recommended by Lord Thomas at paragraph 83 of Hesham Ali v SSHD [2016] UKSC 60, and in so doing have regard to the guidance as to the functions of this Tribunal given by Lord Reed at paragraphs 39 to 53.

27. The burden of proof lies on the Appellant to establish her personal circumstances and why the decision to refuse her Article 8 human rights claim interferes disproportionately in her private and family life rights in the UK. It is for the Respondent to establish the public interest factors weighing against the Appellant. The standard of proof is a balance of probabilities throughout.

28. I begin by making some findings of fact. I find as a fact that the Appellant and her children arrived in the UK in June 2012 with visit visas and have subsequently remained in this country. The Appellant's daughter has married a British citizen and now has a child. She lives separately from the Appellant but nearby. The Appellant and her son live together.

29. The Appellant has three adult brothers and three adult sisters living in the UK. They are all British citizens. They have their own families. Five of them live in Birmingham as does the Appellant, with one sister living in Manchester.

30. I find that Article 8 is engaged on private life grounds and also family life in relation to the Appellant and her son. I do not find that the Appellant has established family life that would engage Article 8, in relation to her adult daughter and her adult siblings. I accept that the family are close and visit each other, but the Appellant does not live with her siblings, who all have their own families, neither does she live with her daughter who has her own family.

31. In considering the Appellant's private life that she has established in the UK, I find it is appropriate to consider paragraph 276ADE(1) which sets out the requirements to be met by an applicant for leave to remain on the grounds of private life. The only subsection that could assist the Appellant is (vi) which requires that she proves that there would be very significant obstacles to her integration into Pakistan.

32. I have followed the guidance in Treebhawon [2017] UKUT 00013 (IAC) in which it was found that mere hardship, mere difficulty, mere hurdles, mere upheaval and mere inconvenience, even where multiplied, are unlikely to satisfy the test of very significant obstacles.

33. I have also followed the guidance in Kamara [2016] EWCA Civ 813 in relation to integration. At paragraph 14, Sales LJ explains the concept of

integration which calls for a broad evaluative judgment. It must be considered whether an individual is enough of an insider in terms of understanding how life in the society in the country to which she is to be removed is carried on. The individual must have the capacity to participate in life in that country, so as to have a reasonable opportunity to be accepted there, and to be able to operate on a day-to-day basis. She must be able to build up within a reasonable time a variety of human relationships to give substance to her private or family life.

34. I am satisfied that I have received an accurate picture of the Appellant's current circumstances, from the evidence of her brothers and her son, and also her own evidence. I regard the evidence that I have heard and read from those witnesses to be credible. It is clear that the Appellant has spent the majority of her life in Pakistan. I accept that she was only educated up to the age of 16 years. She then married, and it was an unhappy marriage which ended in divorce. Her second marriage also ended in divorce. She has divorced her second husband, while in the UK and has had no further contact from him.

35. I take into account that the Appellant has only been resident in the UK since June 2012, and that she arrived with a visit visa indicating that she intended to return to Pakistan. I find that the Appellant has no close family members in Pakistan. Her family are in the UK. She would not however encounter language difficulties if she returned to Pakistan. If she returned to Pakistan I find that she would find it difficult to obtain employment. She has no relevant employment experience. She does not have accommodation available in Pakistan, having previously lived with her in-laws.

36. The Appellant would however receive financial help from her brothers in the UK. They are supporting her at present and indicated in their evidence that they would continue to do so.

37. I attach weight to the medical evidence. There are letters within the Appellant's first bundle from her GP dated 19th February 2015 and 23rd September 2016 which confirm that she has been suffering from anxiety symptoms since 2013 and has been taking anti-depressant medication on a long term basis. There is a further letter from her GP dated 28th September 2017, confirming a history of depression for which she takes medication. Her symptoms are described as still regularly causing her distress. She had a pulmonary embolism in 2012 and is on Warfarin medication for the rest of her life. The most up-to-date medical evidence is a psychiatric report prepared by Dr Jethwa, a consultant psychiatrist, and which is dated 7th December 2017. It was not suggested that I should not attach weight to this report. At paragraph 68 it is confirmed that the Appellant suffers from recurrent depression which involves low mood, poor sleep and poor concentration, together with poor self-esteem and reduced energy levels. She also suffers significant anxiety symptoms. It is confirmed that she receives anti-depression medication.

38. At paragraph 71 the opinion is given that the Appellant suffers from post traumatic stress disorder. At paragraph 73 the opinion is given that the Appellant suffers from recurrent depressive disorder currently of moderate severity, and post traumatic stress disorder also of moderate severity. Dr Jethwa describes these as being significant mental health problems "clearly having a significant detrimental impact upon her current mental health and significantly adversely affecting her level of functioning and causing a significant amount of personal distress".

39. Dr Jethwa's opinion is that the Appellant displays poor self-care and a reduced ability to attend to household activities such as cooking meals for herself. Her son confirmed in evidence that the Appellant very rarely cooks and that cooking and cleaning the house falls to him.

40. Dr Jethwa suggests that the Appellant's medication is reviewed, and that she be referred for psychological therapy. In Dr Jethwa's opinion stability of accommodation and support from her family, together with the appropriate treatment for depression and PTSD would mean that the Appellant has a good prognosis.

41. The opinion is given that the ongoing support of her family in the UK is vital to the treatment of the Appellant's ongoing mental health problems. This is required to provide practical assistance and emotional support.

42. At paragraph 80 the opinion is given that if the Appellant was returned to Pakistan without the support of her family, she is likely to suffer from a substantial deterioration in mental health and her depression is likely to worsen to a severe episode, as is her PTSD. Dr Jethwa states that without support from her family, there would be serious concern about her ability to self-care and manage her daily living activities to the extent that she would be at high risk of physical health problems due to poor self-care which is often associated with severe depression and anxiety. Dr Jethwa also indicated concern that she may develop thoughts about self-harm or suicide.

43. At paragraph 82 Dr Jethwa does not believe that the Appellant would be capable of looking after her son without the physical support of her family, and would be likely to have significant problems being able to prioritise and attend to her son's basic physical and emotional needs.

44. I find that the opinion of Dr Jethwa is in fact supported by the description of the Appellant given by both her brothers who gave evidence to the Tribunal, and her son. Although her brothers do not live with her, they visit frequently, and the Appellant and her son are invited to visit them. Her son confirmed that he does his best to help his mother, and takes responsibility for cooking and cleaning, but there are occasions when he cannot cope, and he then telephones other family members, either his uncles or his sister, who can attend at short notice.

45. Both the brothers said in evidence that if the Appellant had to return to Pakistan they would send financial support, but both expressed deep concern at her vulnerability and ability to look after herself, taking into account the lack of any family in Pakistan. Cross-examination of the witnesses at the hearing, did not in any way undermine their evidence, and I am satisfied that they are extremely concerned about the mental health of the Appellant. There are facilities in Pakistan for the treatment of mental health issues. What in my view proves that there would be very significant obstacles to integration, is the combination of the Appellant's mental health problems, linked with the lack of any family support, save that of her son who is not yet 18, and I accept the opinion of Dr Jethwa, that without the family support that the Appellant receives from her family members in the UK, her symptoms would worsen, so that there is a substantial deterioration in her mental health. I have considered paragraph 276ADE(1)(vi) in the light of the guidance given in Treebhawon and Kamara, and I conclude because of the Appellant's mental health issues and vulnerability, and the lack of family support in Pakistan, there would be very significant obstacles to her re-integration into that country. She therefore satisfies the requirements of paragraph 276ADE(1)(vi).

46. That does not however mean that the appeal must automatically succeed.

47. In considering family life, no reliance is placed upon Appendix FM. The Appellant has established family life with her son, but I must consider whether the Respondent's decision would interfere with that family life. I find that it would not, as if the Appellant was removed from the UK, her son would accompany her.

48. In considering Article 8 outside the Immigration Rules, I must consider the public interest, and I have to carry out a balancing exercise in relation to proportionality. The best interests of the Appellant's son are considered as a primary consideration but not the only consideration. I find without doubt that his best interests would be served by remaining with his mother. The Appellant's son has very successfully integrated in the UK. He has performed so well at school that he was interviewed for the head boy position, and subsequently became deputy head boy. His school reports are good. His spoken English is excellent. I accept his evidence that he regards the UK as his home. He has family and friends in this country. He does not have family in Pakistan. He has no contact with his father, whom the Appellant divorced while she was in the UK.

49. The Appellant's son is due to take his A levels in May and June, and my conclusion is that his best interests would be served by remaining in the UK, and being allowed to undertake his A levels and continue his education in the UK.

50. Although I have made that finding in relation to the best interests of the Appellant's son, that does not automatically mean that the appeal must succeed. There are other considerations which must be taken into account.

51. I have had regard to the considerations in section 117B of the Nationality, Immigration and Asylum Act 2002. Subsection (1) confirms that the maintenance of effective immigration controls is in the public interest. Subsection (2) confirms that it is in the public interest that a person seeking to remain in the UK can speak English. The Appellant has not satisfactorily demonstrated her ability to speak English. Subsection (3) confirms that it is in the public interest that a person seeking leave to remain is financially independent. The Appellant is not financially independent.

52. Subsection (4) confirms that little weight should be given to a private life established by a person when the person is in the UK unlawfully, and subsection (5) confirms that little weight should be given to a private life established by a person when in the UK with a precarious immigration status. This applies to the Appellant because initially she had a precarious immigration status in that she had a visit visa. She overstayed when that expired and has remained without leave. Therefore little weight must be attached to her private life.

53. Subsection (6) is not applicable because that relates to a person having a genuine and subsisting parental relationship with a qualifying child. The Appellant certainly has a genuine and subsisting parental relationship with her son, but he is not a qualifying child as defined in section 117D because he is not a British citizen, and he has not lived in the UK for a continuous period of seven years.

54. I have not found this an easy decision. I have conducted a balancing exercise. There are points for and against the Appellant. The finding of the FtT means that if returned to Pakistan she would not be at risk from her former husband. I find that it does not assist her case for remaining in the UK that she is a citizen of Pakistan, and has lived by far the greater part of her life in that country. There would be no language difficulties if she returned. If she remains in the UK I find that she would be a burden on public funds, including the NHS. She has not demonstrated the appropriate level of English that would assist with her integration.

55. On the other side of the scales, I take into account the wishes of the Appellant and her son to stay in the UK, although I do not attach substantial weight to that, and it is clear that her family wish her to remain in the UK and are concerned about her vulnerability. Also on this side of the scales is the fact that it would be in the best interests of her son to stay in the UK.

56. What persuades me to find in favour of the Appellant, is my finding that she satisfies the Immigration Rules which set out the requirements to be satisfied in order to be granted leave to remain in the UK, and in her case it is paragraph 276ADE(1)(vi). As previously found, I have placed very significant weight upon the Appellant's vulnerability as described by her family, and in the psychiatric report.

57. Therefore, for the reasons given above, I am persuaded that because paragraph 276ADE(1)(vi) is satisfied, the Respondent's decision to remove the Appellant is disproportionate, and breaches Article 8. Therefore, her appeal is allowed with reference to Article 8 of the 1950 Convention.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and was set aside. I substitute a fresh decision as follows.

The appeal is dismissed with reference to asylum, and humanitarian protection.

The appeal is dismissed with reference to Articles 2 and 3 of the 1950 Convention.

The appeal is allowed with reference to Article 8 of the 1950 Convention.

Anonymity

The First-tier Tribunal made an anonymity direction. This is continued pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No report of these proceedings shall directly or indirectly identify the Appellant or any member of her family. Failure to comply with this direction could lead to a contempt of court. This direction is made because this appeal has involved considering the best interests of a child.

Signed Date 14th March 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

No fee award is made. No fee has been paid or is payable. The appeal was allowed because of evidence considered by the Tribunal that was not before the original decision-maker.

Signed Date 14th March 2018

Deputy Upper Tribunal Judge M A Hall