



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

Appeal Number: HU/19067/2018 (P)

**THE IMMIGRATION ACTS**

**Decided Under Rule 34  
On 23 October 2020**

**Decision & Reasons Promulgated  
On 28 October 2020**

**Before**

**UPPER TRIBUNAL JUDGE JACKSON**

**Between**

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

Appellant

**And**

**MML**

**(ANONYMITY DIRECTION MADE)**

Respondent

**DECISION AND REASONS**

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Buchanan promulgated on 4 March 2020, in which MML's appeal against the decision to refuse a human rights claim dated 5 September 2018 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with MML as the Appellant and the Secretary of State as the Respondent.
2. The Appellant is a national of Pakistan, born on 10 October 2006, who first entered the United Kingdom on 10 November 2009 with entry clearance as a Tier 1 dependent, with leave to remain as sycg valid to 3 March 2011. The Appellant was granted subsequent leave to remain as a dependent child of a Tier 1 migrant on further occasions to 26 February 2016. The Appellant's father made an application for indefinite leave to remain as a Tier 1 migrant, including the Appellant as a dependent child which was

initially refused on 20 March 2018, a decision which was upheld on Administrative Review on 1 May 2018 but subsequently withdrawn following an application for Judicial Review lodged by the Appellant's father on 1 May, settled by an agreement approved on 5 April 2019. It was anticipated initially that a fresh decision would be made within three months but the decision was not taken until 14 August 2020, to refuse the application and it is understood that an appeal against refusal remains pending before the First-tier Tribunal. The respondent's position before the First-tier Tribunal was that as a dependent on her father's application, the Appellant continued to benefit from section 3C of the Immigration Act 1971 such that she had continuing leave to remain on the same grounds as previously.

3. In the interim, whilst the Appellant's father pursued a remedy against the refusal of his application for indefinite leave to remain (including the Appellant as a dependent), the Appellant made an application in her own right for leave to remain on human rights grounds 16 May 2018. The refusal of that application on 5 September 2018 is the subject of this appeal.
4. The Respondent refused the application the basis that the Appellant did not meet any of the requirements for a grant of leave to remain under either Appendix FM or paragraph 276ADE of the Immigration Rules for a grant of leave to remain in the United Kingdom. Specifically, although the Appellant was under the age of 18 and lived continuously in United Kingdom for the last seven years, the Respondent considered that it would be reasonable for her to leave the United Kingdom as she would be returning home with her parents and sibling as part of a family unit (as at the date of decision, the application for indefinite leave to remain had been determined as refused and that decision had not yet been withdrawn) and had resided in Pakistan for three years before travelling to the United Kingdom.
5. The Respondent considered whether there were any exceptional circumstances for a grant of leave to remain outside of the Immigration Rules, which included a consideration of the best interests of the Appellant but did not consider that there were any. The best interests of the Appellant were considered to be to remain with her parents and to return to Pakistan with them (as above, at the date of decision they had no leave to remain and as it was prior to the withdrawal of the refusal of the application for indefinite leave to remain, were not considered to benefit from section 3C of the Immigration Act 1971), where she would be able to access education, where she had at least some awareness of the language and culture, speaking Urdu and having visited Pakistan in 2014.
6. Judge Buchanan allowed the appeal in a decision promulgated on 4 March 2020 on human rights grounds, primarily on the basis that the Appellant satisfied the requirements in paragraph 276ADE(1)(iv) of the Immigration Rules, that it would be unreasonable to expect the Appellant to leave the

United Kingdom. I return below to the more detailed reasons given by the First-tier Tribunal in support of that conclusion.

### **The appeal**

7. The Respondent appeals on two grounds as follows. First, that the First-tier Tribunal made a mistake as to a material fact which amounted to an error of law. This was that the First-tier Tribunal allowed the appeal on the factual basis that the Appellant's father, and potentially the family, would be forced to return to Pakistan if this Appellant's appeal were to be dismissed. However, as recognised by the First-tier Tribunal in its decision, the Appellant had continuing leave to remain pursuant to section 3C of the Immigration Act 1971, as did all of her immediate family members in the United Kingdom and would not be removed unless and until her father's application, on which she was a dependent, was refused and he became appeal rights exhausted. Secondly, that the First-tier Tribunal made a material misdirection in law in artificially separating the evidence and consideration of it. The First-tier Tribunal proceeded on a misinterpretation that the Appellant would be separated from her family, without sufficient information as to the Appellant's father's application for indefinite leave to remain and a failure to carry out a proper assessment of proportionality with the assumption that the public interest in maintaining a fair and just system of immigration had been devalued by the delay in decision making on that other application. Further, the First-tier Tribunal had made expressly clear within the decision that it did not have sufficient information relating to the family circumstances in Pakistan upon which to assess the likely situation of the Appellant on return there, such that the best interests assessment was not made on a full assessment of the facts.
8. Permission to appeal was granted by Upper Tribunal Judge Kekic on 9 June 2020, which included directions in light of the need to take precautions against the spread of Covid-19 and a preliminary view that it would in this case be appropriate to determine (i) whether the making of the First-tier Tribunal's decision involved the making of an error of law, and (ii) if so, whether that would decision should be set aside; without a hearing. A timetable for responses from the parties both as to substance and procedure was then set out. Those deadlines were amended by an Upper Tribunal lawyer on 24 July 2020, requiring the Appellant to make written submissions by on the grounds of appeal by 5 August 2020 and the Respondent to file any written submissions in reply by 19 August 2020.
9. On 17 August 2020, the Appellant's solicitors noted that no submissions had been received on behalf of the Respondent and requested that the appeal be struck out due to non-compliance with the directions in accordance with rule 8 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In the alternative, an extension of time was sought for the Appellant to make written submissions by 26 August 2020.

10. On behalf of the Respondent it was explained that there had earlier been an administrative difficulty during the adapted working conditions pursuant to precautions to prevent the spread of Covid-19 such that there was an oversight of the original directions dated 9 June 2020. Written submissions were however made by the Respondent on 18 August 2020, which although on their face accept that they are late, are actually within the amended directions dated 24 July 2020. On the basis that they were in fact in time in accordance with the amended directions, there is no basis to strike out the appeal in accordance with rule 8 as requested.
11. On 31 August 2020, the Respondent filed written submissions in relation to the appeal. I extend time for the same, given the rather difficult procedural history of this matter in the wider circumstances and Covid-19 restrictions which have caused difficulties to all. It is of benefit to the Upper Tribunal to take into account written submissions from both parties in this appeal.
12. The written submissions made by both parties deal with the substance of the appeal and neither raise any objection to the determination of the error of law issues without a hearing.
13. In my view, this is a case in which it is suitable for the issues of whether the First-tier Tribunal's decision materially erred in law and if so, whether the decision should be set aside, to be determined on the papers on the basis of the written submissions made. This is in light of the unprecedented circumstances surrounding Covid-19 and the need to take precautions to prevent the spread of the disease; is in accordance with the overriding objective for the Upper Tribunal to deal with cases fairly and justly in rule 2(1), (2) and (4) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and in circumstances where detailed written submissions have been made by both parties. This decision has therefore been made under rule 34.
14. The written submissions on behalf of the Respondent continued to rely on the written grounds of appeal and made the following additional points. The Respondent reiterated that in accordance with the Supreme Court's decision in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, the assessment of whether it is reasonable to expect a qualifying child to leave the United Kingdom must be assessed in the real world situation in which the child finds him or herself and that in the present case the First-tier Tribunal has simply not done this, instead considering the appeal on the fiction that the Appellant would be removed alone whilst her father and the rest of her family await the outcome of the application for indefinite leave to remain. This is in circumstances where the First-tier Tribunal had previously and appropriately awaited the outcome of the earlier decision then proceeded to determine this appeal contrary to the wishes of the parties.
15. The Respondent submits that the error as to the real situation is perpetuated in the decision of the First-tier Tribunal by considering as part

of its assessment on reasonableness, the possibility of the Appellant's father having to choose between pursuing his own status by remaining in the United Kingdom pending a decision and any appeal, or accompanying the Appellant on return to Pakistan. The Respondent submits that this is not only speculative of the outcome of the application but also ignores the fact that the Appellant is a dependent on the same application.

16. Further, the First-tier Tribunal assessed the best interests of the Appellant in the absence of any information about what the situation might be for her on return to Pakistan, such that it was found to be in her best interests to remain in the United Kingdom. It is submitted that that conclusion was wholly unreasoned, despite the reference to the Appellant's father not being called to give any evidence on the situation. The Respondent suggests that the family have pursued a strategy to seek status for the Appellant to protect the position of the remaining family members, on the unrealistic pretext that she would have to return to Pakistan alone.
17. In written submissions on behalf of the Appellant, the appeal is opposed. It is noted that the First-tier Tribunal decided to proceed to determine this appeal rather than delay it further pending the outcome of the Appellant's father's application which had not, at the time of the hearing, been determined. The submissions then set out the procedural history and challenges brought by the Appellant's father in relation to the application for indefinite leave to remain and criticise the delays in that process and what is understood to be the Respondent's suggestion that the First-tier Tribunal should have delayed consideration of the present appeal, with the consequences that the Appellant would potentially be committing a criminal offence for overstaying in the United Kingdom for an indeterminate period.
18. The Appellant submits that the decision of the First-tier Tribunal was not only an assessment of whether the Appellant may be removed from the United Kingdom alone, but also whether a decision to remove the Appellant from the state of limbo in which she was required to live was necessary to protect rights under Article 8 of the European Convention on Human Rights. Reference is made to the Respondent's position that the Appellant has continuing leave under section 3C of the Immigration Act 1971, but no reference was made to any of the other negative restrictions upon the Appellant that arise from such status, including uncertainty as to her future. It is submitted on behalf of the Appellant that it is clear that the First-tier Tribunal dealt with the case on this basis, which was an eminently sensible one in the best interests of the child.
19. In relation to potential evidence from the Appellant's father, the Appellant submits that the onus was on the Respondent to establish that her decision to refuse leave to remain was a proportionate one and if the evidence of the Appellant's father about possible circumstances on return to Pakistan was considered to be important, the Respondent should herself have called him as a witness.

20. Overall, when considering whether removal in consequence of the decision would be unlawful under section 6 of the Human Rights Act 1998, it is not necessary for any such removal to be imminent and overall, the First-tier Tribunal was entitled to reach a conclusion that it did as a matter of law and for the reasons given in the decision.

### **Findings and reasons**

21. In consideration of both grounds of appeal, it is necessary to return to the detail of the decision of the First-tier Tribunal and the basis upon which it proceeded to make its assessment not only of the best interests of the Appellant as a child, but also as to whether it was reasonable for her to be expected to leave the United Kingdom. The First-tier Tribunal sets out the basic legal framework in paragraphs 10 to 14 of the decision, including express reference to authority on whether it is reasonable to expect a qualifying child to leave the United Kingdom and the expectation that it would normally be reasonable for a child to be with his or her parents, with consideration therefore needing to be given as to where the parents are expected to be.
22. In consideration of the best interests of the Appellant, the First-tier Tribunal identifies that there needs to be an assessment about whether the Appellant's best interests are to remain in the United Kingdom or return to Pakistan and notes that there is only limited evidence about the likely circumstances in Pakistan on which to determine the question, with little weight being given to the written statement from the Appellant's father as he did not give oral evidence, despite being present at the hearing. In paragraph 18 of the decision, prior to any detailed analysis of the immigration status of the Appellant or any of her family members and prior to any detailed analysis of the evidence, however limited, that was available, the First-tier Tribunal concludes that there would be inevitable disruption to the Appellant's life caused by a move to Pakistan, which would be unwanted and undesirable for the point of view the whole family, following which it is concluded that the Appellant's best interests are to remain as an integral part of her family as presently constituted and for her to remain in the United Kingdom. No further reasons for this conclusion are given at this point in the decision.
23. The First-tier Tribunal go on to consider the Appellant's parent's immigration status in paragraphs 19 to 22 of the decision, with the conclusion that they continue to have leave to remain pursuant to section 3C of the Immigration Act 1971. There is no further consideration as to whether they are therefore expected to remain in the United Kingdom or return to Pakistan, or whether it is simply not possible to be certain either way pending a decision and any subsequent appeal (if the decision is adverse) on the application for indefinite leave to remain.
24. There is no express recognition at this point that the Appellant was also a dependent on the same application and, as accepted by the Respondent (and on behalf of the Appellant in written submissions to the Upper

Tribunal), would also therefore currently have to leave to remain by virtue of section 3C of the Immigration Act 1971. Although there is reference to the Appellant having always exercised her right to remain in the United Kingdom as a child dependent on her parents (paragraph 34 of the decision), there is no assessment or even consideration of whether she continues to be dependent on her parent's application (or the implications thereof) and instead it is concluded that the real-life context in which the present application is made is that the application is made by a child who depends on the care of her parents for her own personal welfare. That is not on all fours with the real-life context envisaged by the Supreme Court in KO (Nigeria), which is more of a factual question as to where the family are expected to be.

25. I pause to note at this stage that there does not appear to have been any consideration by the First-tier Tribunal, or by either party, as to whether in fact the Appellant can have two simultaneous live applications for leave to remain, first, as a dependent on her father's application for indefinite leave to remain and second in her own name on human rights grounds. The parties appear to accept that there remains a live application as well as the present appeal, but the First-tier Tribunal does not express any view or even consider it. It is clear that the situation has arisen that there was apparently two live applications arising from the procedural history of the separate application for Judicial Review which led to the quashing of the original refusal of indefinite leave to remain to the Appellant's father and his dependents, including the Appellant, after the present application on human rights grounds made by the Appellant and after the second application was refused.
26. However, no one appears to have turned their mind to the obvious difficulty that multiple applications are contrary to the requirements of paragraph 34BB of the Immigration Rules (which expressly states that a person may have only one outstanding application at a time) and that a person may not vary an application for leave to remain when their leave has been extended by virtue of section 3C of the Immigration Act 1971. This and the Appellant's immigration status generally are matters which the First-tier Tribunal should have considered and made findings on as being of significance to the assessment both of best interests and reasonableness, as well as the wider family circumstances.
27. Returning to the structure of the decision of the First-tier Tribunal, following the section on the Appellant's parent's immigration status, the First-tier Tribunal considers the Appellant's specific circumstances in paragraphs 23 to 31 of the decision. The first two paragraphs set out the written evidence of the Appellant's parents, that the Appellant and the family are well settled in the United Kingdom, progressing in education and with extremely limited ties to Pakistan and the consideration of the United Kingdom as home. There are extended family members in both the United Kingdom and Pakistan. There follows detailed consideration of an opinion from Dr Ul-Hassan, which is highly critical given the author's lack of knowledge or reference to the likely circumstances in Pakistan for the

Appellant and lack of reasons for the opinions expressed; such that little weight is given to the evidence, found overall to be lacking in factual foundation and being speculative.

28. Upon reading this section of the decision and in the absence of any detailed evidence or reasoning as to the Appellant's likely circumstances on return to Pakistan, it is impossible to understand the earlier conclusion of the First-tier Tribunal that it is in the Appellant's best interest to remain in the United Kingdom. There has simply not been a balanced assessment of where her best interests lie by reference to the likely circumstances in one country compared to another. The same can be said of the assessment of reasonableness which comes later in the decision.
29. In its conclusion on this section, contained in paragraphs 32 to 40 of the decision, the First-tier Tribunal reiterates that little weight is given to the Appellant's father's evidence and also to the opinion of Dr Ul-Hassan; and confirms the context of the Appellant being a child dependent on the care of her parents. In paragraph 35 the First-tier Tribunal poses the question to be answered with regards to the real-life context as follows: *"would it be reasonable to expect a 13 year old child to leave the UK in circumstances in which the father (and head of the appellant's household) has lived in the UK for more than 10 years with valid leave to do so; and who, more than three years after submission, awaits the outcome of his separate application for indefinite leave to remain?"*. There is then reference to the period that the Appellant's father's application has been outstanding since 2016, with the conclusion that no decision is imminent and recognition that the parents continued to have leave to remain in the United Kingdom. What follows, is speculation that no decision will be forthcoming and/or the decision will be refused, with an in country right of appeal and on the assumption that the Appellant is required to return to Pakistan now, her father would have to return with her to avoid fracturing the family unit with the consequence that he would probably be denied the chance to appeal refusal of his application for indefinite leave to remain; or that his continuous residence for the purposes of indefinite leave to remain would be broken.
30. In paragraph 39 of the decision, the First-tier Tribunal concludes: *"In the foregoing circumstances, taking the father's outstanding application alone, I'm not persuaded that it would be reasonable for the appellant to leave the UK as at the date of this appeal."*. Although in the following paragraph, the First-tier Tribunal purports to weigh the circumstances of the Appellant in terms of her own private life developed in the United Kingdom, it is again said that material weight is attached to the Respondent's delay in making a decision on the Appellant's father's application for which it is inferred that effective immigration control for this family has not warranted a decision in more than three years.
31. These two paragraphs show that the First-tier Tribunal has determined that it would be unreasonable to expect the Appellant to leave the United Kingdom for the sole, or at least primary reason, that there has been a



delay by the Respondent in determining her father's application for indefinite leave to remain, which could not be effectively pursued if the Appellant were required to leave the United Kingdom. Contrary to the clear authority that any assessment of reasonableness must be focused on the position of the child, the reasoning is focused in this case not on the Appellant but primarily on the perceived interests of her father. The conclusion is also, again on the earlier assumed premise, that the Appellant would be required to leave the United Kingdom if the application/appeal were not successful, alone and prior to the determination of the application for indefinite leave to remain.

32. However, as above, there was no consideration at all that the Appellant herself was dependent on that application with the protection of section 3C leave pending any decision and right of appeal against the refusal. In these circumstances, the Appellant has a continuing right to remain in the United Kingdom pending resolution of that other application, which if ultimately successful results in a further grant of leave to remain in her favour and if unsuccessful, would lead to the situation that none of the family have a right to remain in the United Kingdom and would be returning to Pakistan together as a family unit. That is the actual real-life factual situation which the First-tier Tribunal should have considered and not the hypothetical, speculative one focused on matters clearly relevant to but extraneous to an assessment focusing on this Appellant's circumstances.
33. The First-tier Tribunal then concludes that the Appellant meets the requirements of paragraph 276ADE(1)(vi) of the Immigration Rules at the date of application in May 2018 when the Appellant's father's application for indefinite leave to remain had been refused but not lawfully. The First-tier Tribunal then suggest that the factors were less cogently applicable after May 2018, but that the requirements were still met at the date of hearing. The decision ends with a lengthy section running to nearly 5 pages relating specifically to Article 8, unnecessarily so given that it is now trite that if a person satisfies the requirements of the Immigration Rules, an appeal should be allowed on human rights grounds.
34. For these reasons, the First-tier Tribunal has materially erred in law in its assessment of both the best interests of the Appellant as a child and whether it would be reasonable to expect her to leave the United Kingdom by (i) failing to have regard to the accepted position between the parties that the Appellant has continuing leave to remain as a Tier 1 child dependent pursuant to section 3C of the Immigration Act 1971 pending final determination of her father's application for indefinite leave to remain which includes her as a dependent; together with speculation about the outcome of that application; (ii) failing to balance the lack of evidence about the Appellant's likely circumstances on return to Pakistan, despite the express finding that little weight was to be attached to the Appellant's father's evidence and that of Dr Ul-Hassan, when concluding that it was in the Appellant's best interests to remain in the United Kingdom and not reasonable for her to leave; and (iii) in focusing on the Appellant's father's

circumstances and the Respondent's delay in making a decision on the separate application for indefinite leave to remain as the sole, if not primary reason for finding that the requirements of paragraph 276ADE(1) (vi) of the Immigration Rules were met. The First-tier Tribunal proceeded on the wrong factual basis, without a balanced assessment including likely circumstances on return to Pakistan, and asked itself the wrong question about the real life context.

35. I have rejected the written submissions made on behalf of the Appellant for the following reasons. First, there is no suggestion of the Appellant potentially committing a criminal offence for overstaying whilst awaiting the final outcome of the application for indefinite leave to remain because, as accepted by the Appellant, she, together with her other family members, benefit from continuing leave to remain on the same basis as before pursuant to section 3C of the Immigration Act 1971.
36. Secondly, there are no identifiable negative restrictions as a result of her leave to remain continuing on that basis, as she is entitled to continue living in the United Kingdom lawfully as before. The only adverse consequence suggested is uncertainty as to her future, but that applies to all of her family in any event and to some extent there will be uncertainty following the outcome of this separate appeal given at most, it could lead to the grant of a limited period of leave to remain. It is also unclear that the Appellant relied on any such claim that her current status was itself sufficient to engage, let alone breach Article 8 of the European Convention on Human Rights.
37. Thirdly, even there was a limbo situation or negative consequences of section 3C leave, even on a generous reading, it cannot be said that the First-tier Tribunal considered the appeal on this alternative basis. To the contrary, for the reasons set out above, they failed to consider the Appellant's immigration status at all and there are no references to any state of limbo or any negative consequences for the Appellant.
38. Fourthly, in relation in particular to an assessment of the best interests of the child, there is no strict burden on either party to establish matters either way; but it is a fact finding exercise and for the purposes of establishing that a person meets the requirements of the Immigration Rules, the burden is on the applicant. The suggestion that the Respondent should have in these circumstances called the Appellant's father to give evidence (likely to be possible only by formal application for a witness summons) on the likely circumstances in Pakistan misunderstands the nature of an appeal such as this and where a person has made a written statement but chooses not to give oral evidence or be tendered for cross-examination. The First-tier Tribunal did not err in attaching little weight to the Appellant's father's evidence in these circumstances.
39. Finally, whilst removal may not need to be imminent for an appeal to be allowed on human rights grounds; in this case the First-tier Tribunal proceeded wrongly on the basis that it was imminent for this Appellant

despite the outstanding application for indefinite leave to remain for her and her family members. As the parties both now accept, there was no imminent prospect of removal and on the facts, no realistic prospect at all of the Appellant being removed to Pakistan alone.

40. The decision of the First-tier Tribunal contains material errors of law such that it is necessary to set aside the decision and for the appeal to be heard de novo. Given that since the decision of the First-tier Tribunal there has now been a decision on the application for indefinite leave to remain and I understand an appeal now pending against that decision; it is appropriate to remit this appeal to the First-tier Tribunal for further consideration as to whether the two appeals should appropriately be linked and heard together given the overlapping factual issues and to prevent further divergence procedurally between the separate applications and decisions relating to the same family members; which arguably led to a number of the issues in the decision before me and could have been avoided.

### **Notice of Decision**

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remit the appeal to the First-tier Tribunal for a de novo hearing before any Judge except Judge Buchanan. As above, it is expected that the First-tier Tribunal will give directions as to the further listing of this appeal, including whether it should be joined or linked to the appeal against refusal of indefinite leave to remain.

### **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 G Jackson

Date

23<sup>rd</sup> October 2020

Upper Tribunal Judge Jackson