



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

Appeal Number: IA/01097/2016

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 7<sup>th</sup> June 2018**

**Decision & Reasons**

**Promulgated**

**On 23<sup>rd</sup> October 2018**

**Before**

**UPPER TRIBUNAL JUDGE MARTIN**

**Between**

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

Appellant

**and**

**BASRA [H]  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr T Lindsay (Senior Home Office Presenting Officer)

For the Respondent: Mr A Burret (Counsel)

**DECISION AND REASONS**

1. This is an appeal to the Upper Tribunal by the Secretary of State in relation to a Decision of Judge S D Lloyd of the First-tier Tribunal. He heard the case at Birmingham on 18<sup>th</sup> December 2017 and in a Decision and Reasons promulgated on 25<sup>th</sup> January 2018 allowed the appeal on Human Rights grounds.
2. For the sake of continuity and clarity in this Judgement I will continue to refer to Mrs [H] as the Appellant and the Secretary of State as the Respondent.

3. There is a considerable history to this appeal.
4. The Appellant is a national of Pakistan born on 1st March 1987.
5. She entered the UK in 2002 as the dependent of her husband who had entered the UK as a student in September 2001. The couple subsequently had two children born in the UK.
6. The Appellant applied for indefinite leave to remain, on the basis of 10 years lawful residence, on 15th August 2013. That application was refused without a right of appeal. However, following judicial review proceedings the Secretary of State reconsidered the application but maintained the decision on 5th December 2015.
7. Following judicial review proceedings, the Secretary of State agreed to reconsider the decisions of 15th August 2013 and 5th December 2013 and in a decision dated 10th February 2016 refused the application but this time with a right of appeal.
8. Between 5th December 2015 and decision of 10<sup>th</sup> February 2016 the Appellant applied, in time, for further leave to remain as a dependent spouse on 23rd April 2015. The result of that application was that she was granted discretionary leave to remain until 30th June 2018.
9. In the 2016 decision the Secretary of State noted there were two gaps in her period of lawful residence. One was between 10th April 2009 and 11th August 2009, a period of 123 days. The other was between 2nd April 2010 and 12th May 2010, a period of 39 days. The Secretary of State was prepared to exercise discretion and discount the second, shorter period without leave but not the first. On that basis the application was refused.
10. The refusal letter reads: - "We have considered your application for indefinite leave to remain and refused it. Your human rights claim has therefore been refused."
11. Before the First-tier Tribunal the Appellant's representative set out in detail how the gaps in lawful residence occurred, arguing that the Appellant should not be held responsible. Unfortunately, there were gaps in the evidence before the First-tier Tribunal in that not all the applications were before the Judge. The Judge did not find in terms however that the Appellant should have succeeded under the Immigration Rules on the basis of 10 years lawful residence.
12. This being a human rights appeal, it was for the Judge to decide human rights only, albeit through the lens of the Immigration Rules. It was appropriate therefore to consider whether in fact the Appellant met the requirements of the Immigration Rules. He did not find that she did.
13. The Judge asked the Appellant's representative, then as now, Mr Burret, to address him on how the decision impacted upon the right to private and

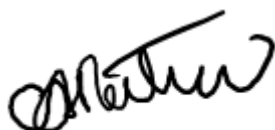
family life as the decision did not require the removal of the Appellant as she had extant leave to remain.

14. The argument was, and remained before me, that the Appellant's situation was more precarious than that of her husband and her rights more limited. She did not have the rights associated with indefinite leave to remain. She remained a dependent spouse from Pakistan and her lack of indefinite leave to remain affected her continuing integration. She was unable to travel freely and unable to make plans beyond the currency of her leave. It was argued that there was an element of unfairness and discrimination in the way she had been treated differently from her husband.
15. The Judge found family and private life to be engaged and that the decision interfered with those rights. The Judge found the precariousness of the Appellant's situation and the disparity between her own and her husband status created unfairness and in the absence of other adverse factors found the decision breached Article 8. He also made a recommendation that the Secretary of State should grant the Appellant indefinite leave to remain
16. I find that the Judge has erred in his approach to Article 8. I cannot see that Article 8 had application. The Judge ought to have followed the guidance of Razgar [2004] UKHL 27. Had he done so he would have asked himself the first question namely, will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for her private or (as the case may be) family life? If the Judge had asked himself that question the answer would inevitably have been in the negative. There was no removal decision. The Appellant, at the date of decision still had two years extant leave and indeed still had a significant period of leave when the matter came before the Judge. The Appellant's private life would continue as it had since she came to the UK and her family life would also continue. It would be open to her to make a further application prior to the expiry of her discretionary leave.
17. I find that in allowing the appeal on Article 8 grounds the Judge made a material error of law and I set aside the Decision and Reasons. The recommendation that the Secretary of State should grant indefinite leave to remain was also ill-advised. It is a matter for the Secretary of State what leave she grants a successful Appellant.; it is not a matter for the Judge.
18. The facts not being in dispute, having so found I proceeded to redecide the appeal.
19. It is true to say that matters have moved on significantly since the First-tier Tribunal's decision. The most significant factor is that the Appellant's discretionary leave expired in June 2018. She still enjoys the benefit of section 3C leave but if her appeal is dismissed she will be without any leave and liable to removal.

20. In redeciding the appeal, I have to consider human rights as at the date of hearing, namely for person with no extant leave in the UK.
21. Article 8 is clearly engaged and without going through all of the Razgar questions this case is clearly about proportionality. The Appellant has been in the United Kingdom since 2002. She is the wife of a British citizen and the mother of two British children. In considering proportionality I am obliged to take into account section 117B of the Immigration and Asylum Act 2002. That instructs that the maintenance of immigration control is in the public interest. Of critical importance however is section 117B 6) which states that where a person is not liable to deportation, the public interest does not require that person's removal where the person has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. A British child is a qualifying child.
22. There is no suggestion of any poor immigration history or offending behaviour and nor is there any suggestion that the family are not self-sufficient. There are no adverse matters to factor into the proportionality exercise when considering reasonableness. Furthermore, both case law and the Secretary of State 's policy have established that it is never reasonable to expect a British child to leave the United Kingdom. On that basis the Appellant is entitled to succeed under Article 8 of the ECHR outwith the Immigration Rules. Mr Lindsay did not seek to argue otherwise.
23. As Mr Lindsay confirmed, the Secretary of State will give anxious scrutiny to the appropriate leave to give to the Appellant, no doubt assisted by representations made by her advisers.

### **Notice of Decision**

24. Having found the First-tier Tribunal made a material error of law in its Decision and Reasons and having set that decision aside, I redecide the human rights appeal and on the basis of what I have already said about the best interests of British children and the reasonableness of expecting them to leave the UK I allow the appeal.
25. I allow the Human Rights appeal
26. There has been no application and I see no necessity for an anonymity order.

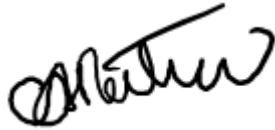


Signed  
Upper Tribunal Judge Martin

Date 16<sup>th</sup> October 2018

**FEE AWARD**

I do not make a fee award because the appeal has been allowed on Article 8 grounds solely as a result of the passage of time since the original decision and not because Secretary of State's decision was wrong at the time she made it.

A handwritten signature in black ink, appearing to read 'Martin', written in a cursive style.

Signed  
Upper Tribunal Judge Martin

Date 16<sup>th</sup> October 2018

## Approval for Promulgation

Name of Upper Tribunal Judge issuing approval:	Mrs C J Martin
Appellant's Name:	ADEEL AHMAD
Case Number:	IA/29622/2015

Oral decision (please indicate)

I approve the attached Decision and Reasons for promulgation

Name: C J Martin

Date: 13<sup>th</sup> June 2018

Amendments that require further action by Promulgation section:

Change of address:

Rep:

Appellant:


Other Information: