



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

Appeal Number: AA/08447/2015

**THE IMMIGRATION ACTS**

**Heard at Bradford**

**On 10<sup>th</sup> July 2017 and 6<sup>th</sup> February 2018**

**Decision & Reasons  
Promulgated  
On 2<sup>nd</sup> March 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR**

**Between**

**L A  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr V Jagadeshram of Counsel, instructed by Ison Harrison Ltd

For the Respondent: Mr M Diwncyz, Home Office Presenting Officer – 10<sup>th</sup> July 2017

Mrs R Pettersen, Home Office Presenting Officer – 6<sup>th</sup> February 2018

**DECISION AND REASONS**

1. This is the appellant's appeal against the decision of Judge Kelly made following a hearing at Bradford on 8<sup>th</sup> December 2016.
2. There is a tortuous history to this matter. The appellant originally succeeded in her asylum appeal, Judge Saffer being satisfied that the

appellant would be at risk on return from the Taliban as a lone woman, a widow of a former interpreter for the Americans. That decision was set aside by Upper Tribunal Judge Lane and when the matter was reheard before Judge Kelly, he dismissed the asylum appeal. There is no challenge to that aspect of his decision.

3. Following the grant of permission by Upper Tribunal Judge Canavan, the respondent served a reply on 30<sup>th</sup> May 2017 defending the determination and put the Tribunal on notice that she intended to adduce a conviction of the appellant for assault for which she was sentenced to twelve months' imprisonment suspended for 24 months. Mr Diwncyz could provide no details of that conviction but Mr Jagadeshm said that the assault was upon the father of the children, with whom the appellant remained in contact albeit that he has another wife living in the UK.
4. Nevertheless, at the hearing, Mr Diwncyz accepted, for the following reasons, that the judge had erred and that the assessment of the question of the reasonableness of the appellant's return to Afghanistan with her two British children would have to be remade.
5. The judge was required to assess, in accordance with Section 117B(6), whether it would be reasonable to expect the children to leave the UK in circumstances where, as here, it is not disputed that the appellant has a genuine and subsisting parental relationship with qualifying children.
6. He considered the question of reasonableness at paragraph 41 of the determination and concluded that the appellant's unlawful entry and her subsequent asylum claim which were made solely for the purpose of circumventing the Immigration Rules governing applications by family members seeking leave to enter the UK required that the public interest should prevail. In reaching that decision he did not make any reference to the best interests of the British citizen children including both the benefits which they would forego of British citizenship and the potential breach of EU rights as a consequence of in practice having to leave the European Community area. In particular, there is no reference to the serious security issues in Afghanistan.
7. In EV (Philippines) v SSHD [2014] EWCA Christopher Clarke LJ referred to the need to consider inter alia:

"35. ... (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens"

and

"36. ... the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance."

8. Given that the FCO guidance advises British citizens against all or all but essential travel to Afghanistan the judge ought to have considered the consequences for the British citizen child of moving there.
9. It is also right to say that there is no engagement by the judge with the issue raised at paragraph 7 of the grounds, namely that the child will in practice be forced to leave the EU. It is clear that the judge accepted that the appellant was the children's primary carer and would in practice be compelled to leave the EU. Mr Jagadesham informed me that it was Social Services' view that the children, if they remained in the UK would be taken into care and would not be looked after by their father.
10. Accordingly, as conceded by the respondent, the judge did not consider all relevant matters in assessing the reasonableness of relocation, in particular the best interests of the children, as well as the public interest in removal. His decision is set aside.
11. Mr Jagadesham told me that Social Services were producing a report in this matter which should be filed with the Tribunal at least seven days before the resumed hearing which was listed to be heard in the Upper Tribunal on 25<sup>th</sup> September 2017. The appellant's representatives were directed to serve a consolidated bundle including the Social Services report at least seven days before the hearing.
12. Unfortunately, there was a considerable delay in Social Services producing the report.
13. Following the adjournment of the hearing listed on 25<sup>th</sup> September, there was a further CMR on 13<sup>th</sup> November 2017. At that point the appellant had received a positive reasonable grounds decision in relation to her claim that she had been trafficked. Mr Jagadesham invited me to exercise my discretion and hear the new protection claim within this challenge to Judge Kelly's decision.
14. There was a further CMR on 19<sup>th</sup> December 2017.
15. Following receipt of the report from Social Services, on 6<sup>th</sup> February 2018, Mrs Pettersen confirmed that the respondent was no longer arguing that it would be reasonable for the children to leave the UK and live with their mother in Afghanistan.
16. Mr Jagadesham confirmed that the asylum decision made by Judge Kelly was not under challenge but said that the appellant may pursue a claim on the basis of being trafficked and indeed was awaiting a conclusive grounds decision by the relevant authority.
17. In view of the concession by the respondent that the appeal ought to be allowed on Article 8 grounds the proper course is for the appellant to make a fresh asylum claim if she is so advised.
18. However, so far as this Tribunal is concerned the decision is as follows.

**Decision**

19. The appellant's asylum appeal is dismissed and in that respect the original judge's decision stands. So far as the decision on Article 8 is concerned, his decision is set aside and re-made as follows. The appellant's appeal is allowed.

**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 her or any member of her 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.

*Deborah Taylor*

Signed

Date 24 February 2018

Deputy Upper Tribunal Judge Taylor