



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

Appeal Number: PA/00082/2016

**THE IMMIGRATION ACTS**

**Heard at Bradford**

**On 4 January 2018**

**Decision & Reasons**

**Promulgated**

**On 18<sup>th</sup> January 2018**

**Before**

**UPPER TRIBUNAL JUDGE LANE**

**Between**

**[F M]**

**~~(ANONYMITY DIRECTION NOT MADE)~~**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: In person

For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant, [FM], was born on [ ] 1990 and is a female citizen of Afghanistan. At an initial hearing, I found that the First-tier Tribunal's [decision] was vitiated by error of law and I set it aside. My decision (dated 15 August 2017) appears below:

"1. The appellant, [FM], was born on [ ] 1990 and is a female citizen of Afghanistan. The appellant had claimed asylum in August 2015 but by a decision dated 16 December 2015, her claim was refused by the respondent who also made a decision to remove her from the United Kingdom. The appellant appealed against that decision to the First-tier

Tribunal (Judge Bradshaw) which, in a decision promulgated on 8 August 2016, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Permission to appeal had initially been refused by both the First-tier Tribunal and the Upper Tribunal. However, by an order dated 13 March 2017, Collins J gave permission in an application for judicial review to review the refusal of permission by the Upper Tribunal. Granting permission, Collins J wrote:

“2. There seems to me to have been a failure both by the FtT Judge and the UT Judge to consider the claim on the basis that the claimant’s partner is a British citizen so that their child is also a British citizen. That, coupled with the two other Danish children should have been fully considered.

3. The claimant and her partner’s breaches of the immigration law may not prevail over the child’s Section 55 rights.

4. I refuse permission on the grounds relating to the claimant’s asylum on Article 3 claims in relation to the alleged risk of persecution in Afghanistan. That was properly rejected by the judge.”

3. Judge Bradshaw considered whether Article 8 ECHR should apply in this case at [35]. After a brief analysis, she decided that it should not. The sole criterion by which she reached that decision concerned the application of Section 55 of the Borders, Citizenship and Immigration Act 2009:

“It is clearly in [the children’s] best interest to be with, preferably, both their parents. The baby will remain with his mother whether she returns to Afghanistan alone or with her husband in a family unit. The family have a choice. The appellant can return and make an application for entry clearance in accordance with the Rules or the family can travel to Afghanistan together and family life can continue as heretofore. There was no cogent evidence to suggest that the decision to remove would undermine her physical or moral integrity.”

4. It should be remembered that this analysis was conducted by the judge while she was still considering whether to proceed with a full Article 8 analysis. This is puzzling because the matters discussed by the judge at [35] clearly go to the question of proportionality, a question which would have been considered if the judge had decided that an Article 8 analysis should be conducted. By considering Section 55 only and by deciding not to proceed with a full Article 8 analysis, the judge has, in effect, carried out a limited and incomplete proportionality assessment. It would perhaps have been better if the judge had decided that Article 8 did apply and that a full Article 8 analysis was required. One consequence of the partial consideration which the judge has conducted is that she has (as Collins J observed) failed to take any or any proper account of the British nationality of the youngest child, a factor very likely to be of importance in any consideration of Article 8 ECHR. I find it likely that, had the judge carried out a full Article 8 analysis, she would have taken the child’s

nationality into account. As it is, the judge has erred in law by failing to consider the nationality of the child.

5. I set aside the judge's decision. I preserve the findings as regards asylum and Articles 2/3 ECHR. I appreciate that the full Article 8 analysis which the Upper Tribunal will now conduct may touch upon questions of risk of return to Afghanistan but I stressed to Mr Hussain, who appeared for the appellant, that the appeal will not be further considered on asylum or Article 2/3 ECHR grounds.

### **Notice of Decision**

6. The decision of the First-tier Tribunal Judge which was promulgated on 8 August 2016 is set aside. The judge's findings as regards asylum and Articles 2/3 ECHR are preserved. The Upper Tribunal will re-make the decision in respect of Article 8 ECHR. For the avoidance of doubt, the Upper Tribunal finds that Article 8 ECHR is engaged in this case and will carry out a full analysis accordingly.

7. No anonymity direction is made.

### **DIRECTIONS**

(1) The parties shall send to the Upper Tribunal and to each other any written evidence upon which they may respectively intend to rely at least ten clear days prior to the next hearing.

(2) The decision will be re-made in the Upper Tribunal following a resumed hearing before Upper Tribunal Judge Clive Lane. The time estimate is two hours. A Dari interpreter will be provided."

2. At the resumed hearing, I was assisted by Mr McVeety, who appeared for the respondent and who told me that, in light of the fact that the Secretary of State accepts that there is a genuine and subsisting relationship between the appellant and her partner in the United Kingdom and that the child of the appellant and her partner is a British citizen, the appeal should be allowed given the provisions of Section 117B(6) of the 2002 Act (as amended) and the Secretary of State's own current policy. The public interest does not require the removal of the appellant from the United Kingdom in such circumstances.
3. I agree and remake the decision allowing the appeal on Article 8 ECHR grounds against the respondent's decision dated 16 December 2015.

### **Notice of decision**

**The appeal on Article 8 ECHR grounds against the respondent's decision dated 16 December 2015 is allowed.**

No anonymity direction is made.

Signed

Date 10 January 2018

Upper Tribunal Judge Lane

**TO THE RESPONDENT**  
**FEE AWARD**

No fee is paid or payable and therefore there can be no fee award.

Signed

Date 10 January 2018

Upper Tribunal Judge Lane