



**Upper Tribunal  
(Immigration and Asylum Chamber)  
PA/06825/2016**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 6<sup>th</sup> October 2017**

**Decision & Reasons  
Promulgated**

**On 17<sup>th</sup> October 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCGINTY**

**Between**

**MR TAHIR NIMATY**

(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr D Sellwood, Counsel, instructed by Duncan Lewis & Co  
Solicitors (Harrow Office)

For the Respondent: Mr E Tufan, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Shand promulgated on 20<sup>th</sup> February 2017 in which she dismissed the Appellant's appeal on asylum grounds, on human rights grounds and under the Immigration Rules. The Appellant has now sought to appeal against that decision for the reasons set out within the Grounds of Appeal. Those are a matter of record and therefore not repeated in their entirety here in the circumstances where there is now an agreed consensus between the parties regarding the appeal itself.

2. However, in summary, within the Grounds of Appeal it is argued that the judge erred in carrying out the public interest centric assessment and only engaged with the facts in favour of the public interest in conducting the balancing exercise when considering the Appellant's right to a family and private life in the UK. It is further argued that the judge erred in treating the Appellant's immigration status as precarious and that the judge further erred in treating the Appellant's illegal entry into the UK as a factor relevant to the precariousness of his status. It is further argued within the Grounds of Appeal that the judge erred by taking into account that but for the Respondent's policy in relation to accompanying minors the Appellant would be in the UK unlawfully.
3. Permission to appeal in this case has been granted by First-tier Tribunal Judge Brunnen on 16<sup>th</sup> June 2017 in which he noted that the grounds sought permission to appeal solely in respect of the Appellant's Article 8 claim outside of the Immigration Rules. He found that it was not arguable that the status of the Appellant in this case was anything other than precarious and that the judge had not erred in paragraph 72 of her decision by treating the Appellant's illegal entry to the UK as being a factor relevant to the precariousness of his status as paragraph 72, he found, was not concerned with precariousness but with the strength of the public interest in immigration control.
4. Judge Brunnen found that it was arguable that the judge erred in taking into account that but for the Respondent's policy in relation to unaccompanied minors the Appellant would be in the UK unlawfully, but found that it was immaterial to the outcome.
5. However, Judge Brunnen did grant permission to appeal and found that it was arguable that the judge failed to give consideration to the positive factors advanced by the Appellant in favour of leave to remain being granted, such as his partner's nationality being British and her background and her pregnancy and the Appellant's family connections in the UK and found that it was arguable that the judge failed to weigh such factors in the balance with the public interest factors that she identified.
6. I am grateful to the submissions of both parties, Mr Sellwood on behalf of the Appellant and Mr Tufan on behalf of the Secretary of State. The parties come before the Upper Tribunal with an agreed position. Mr Tufan concedes that the decision of First-tier Tribunal Judge Shand does contain a material error of law in that although the judge mentioned the fact that the Appellant's partner was pregnant at paragraphs 22 and 53 of the decision, she seemingly has not taken into account the fact that the Appellant's partner was a British woman who was pregnant and who was being asked potentially to go to Afghanistan with her partner, when conducting the balancing exercise when considering proportionality for the purposes of Article 8. He conceded that that is a material error.
7. Mr Tufan further tells me that since the date of the decision, a further child has been born to the Appellant and his partner who was born on 31<sup>st</sup> July 2017 and I was shown a copy of the birth certificate of the child in that

regard. Mr Tufan says that in the particular circumstances of this case where the Appellant is in a relationship with a British woman and has a British citizen child, in circumstances where the partner has not been to Afghanistan, and taking into account all the circumstances in this case, he says that in light of the new circumstances it is conceded by the Secretary of State that in remaking the decision the appeal should be allowed Article 8 grounds on the basis of the Appellant's family life under the ECHR.

8. In light of those concessions I find that the decision of First-tier Tribunal Judge Shand does contain material errors of law and I set aside the decision of First-tier Tribunal Judge Shand to the limited extent that she was dealing with the human rights claim. There has been no challenge made to the findings of Judge Shand in respect of the asylum claim, the claim for humanitarian protection or under Articles 2 and 3 of the ECHR, the only challenge being made was in respect of the human rights claim under Article 8. Therefore I maintain the findings of Judge Shand in respect of the asylum claim, humanitarian protection claim and the claims under Articles 2 and 3 but I do set aside her decision in respect of Article 8 and in light of the concession now made by the Secretary of State that the appeal should be allowed on Article 8 grounds on the basis of the Appellant's right to a family life. I do find that the decision taken is disproportionate to the public end sought to be achieved, as conceded by the Secretary of State, and I allow the appeal on Article 8 grounds.

### **Notice of Decision**

The decision of First-tier Tribunal Judge Shand does contain material errors of law and is set aside to the limited extent of the consideration of the Article 8 claim under the ECHR. The findings in respect of the asylum, humanitarian protection and Articles 2 and 3 claims are maintained.

I remake the decision allowing the Appellant's appeal on Article 8 grounds on the basis of his family life, the decision being unlawful and contrary to the Appellant's rights pursuant to Article 8 of the ECHR.

I make no order in respect of anonymity, no such order having been sought before the First-tier Tribunal and no such order having been sought before me.

Signed

Dated 6<sup>th</sup> October 2017



Deputy Upper Tribunal Judge McGinty

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

As I have allowed the appeal any fee paid by the Appellant should be refunded to him in its entirety.

Signed

Dated 6<sup>th</sup> October 2017

Handwritten signature in black ink, reading "RFM McGinty". The signature is written in a cursive style with a small arrow pointing to the right at the end of the name.

Deputy Upper Tribunal Judge McGinty