



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

Appeal Number: HU/05455/2016

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 16<sup>th</sup> April 2018**

**Decision &  
Promulgated  
On 8 May 2018**

**Reasons**

**Before**

**UPPER TRIBUNAL JUDGE FRANCES**

**Between**

**B W  
(ANONYMITY DIRECTION MADE)**

**and**

Appellant

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

Respondent

**Representation:**

For the Appellant: Mr M Aslam, instructed by Birch Tree Law Chambers

For the Respondent: Ms K Pal, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Afghanistan born in 1989. He appeals against the decision of First-tier Tribunal Judge R Sullivan, dated 4 October 2017, dismissing his appeal against the refusal of leave to remain on Article 8 grounds.
2. The grounds submit that the judge materially erred in law in placing reliance on what the parties had agreed between them as to how he should deal with matters which were in issue before him. By not dealing with the matter of the risk that the Appellant said awaited him in

Afghanistan, the judge failed to give full consideration to the Appellant's claim to a right to remain in the UK as the grounds clearly set out protection claims. The judge failed to decide the matter of whether or not the Appellant was entitled to protection under the Refugee Convention and Article 3 of the ECHR.

3. Further the judge erred in his treatment of Section 117A to 117D of the Nationality, Immigration and Asylum Act 2002. The judge failed to properly assess proportionality and failed to take into account the Appellant's English language certificate and the grant of indefinite leave to remain to his wife.
4. Permission to appeal was originally refused on the grounds that the appeal before the judge was on human rights grounds only and the judge was not in a position to consider protection in the absence of response by the Respondent to the asylum claim, which was still outstanding at the date of the hearing. In addition, the Appellant's representative indicated at the hearing that the only issue was Article 8. The judge did not consider Section 117 to be determinative. If the judge erred about the Appellant's English language ability it was not material as the financial requirements were not met.
5. Permission to appeal was granted by the Upper Tribunal on 9 January 2018 on the grounds that "As the judge recognised, proceeding with the determination of the appellant's appeal in respect only of his Article 8 claim, his asylum claim having been unresolved and outstanding (for some considerable time) before the respondent for a decision, was far from ideal especially as his Article 8 claim was likely to be informed to some extent by findings of fact to be made in respect of his protection claim. The judge recognised also that he was likely to 'trespass' upon ground to be covered in determining the protection claim and to some extent appears to have done so. I consider that the grounds, which may be argued generally, merit closer attention and for that reason permission to appeal will be granted."
6. Mr Aslam submitted that there was no decision on the Appellant's asylum claim and Ms Pal confirmed that no decision would be forthcoming until the conclusion of the Appellant's human rights appeal. Although there seems to be no rational reason for why the Respondent should await the decision of the human rights appeal before making a decision on the asylum claim that was the factual situation which the judge had to deal with and in that respect the appeal was rather unusual.
7. It was agreed by the parties that the only issue before the First-tier Tribunal was Article 8, notwithstanding the asylum claim had been outstanding for some considerable time. It was accepted by the Appellant's representative before the First-tier Tribunal that if the Appellant did not satisfy the suitability criteria in Appendix FM then he was not entitled under the Rules for leave to remain on the basis of family and private life.

8. The Appellant was refused leave to remain under Appendix FM on the basis that he could not satisfy the suitability requirement because of his involvement with the Taliban and that he could not satisfy the financial requirement because his wife's income was below the required threshold. It was accepted that the Appellant had a genuine and subsisting relationship with his wife, but since the Appellant could not satisfy the suitability or the eligibility requirements, paragraph EX.1 did not apply.

### **Submissions**

9. Mr Aslam submitted that firstly, there was a procedural issue in relation to the conduct of the appeal and secondly, the judge's proportionality assessment was inadequate. He submitted that the judge ignored a clear direction which was set out at [4g]: "On 6 September 2017, the Tribunal issued a direction 'Unless the Respondent notifies the Tribunal by 4 pm on 13/9/17 that an asylum decision had been made the Tribunal will proceed on 25/9/17 in relation to the private and family life claim only.' On 12 September 2017 the Respondent's representative wrote that 'I can confirm that the above applicant's asylum claim will not be decided before 25/9/17 and therefore the appeal hearing on this day will proceed in relation to the private and family life claim only.
10. Further at [8] of the decision, both parties agreed that the only issue in the appeal was Article 8. Mr Aslam submitted that the judge had conflated the Appellant's asylum claim with the issue of suitability. The judge's findings on suitability were confused. At [21] the judge went through the Appellant's asylum claim. He essentially assessed the credibility of the Appellant's asylum claim when he should not have done so because there was a clear direction that only family and private life would be dealt with. This was a procedural oddity in the appeal. The judge should have stated at the outset of the appeal how he was going to approach suitability so that the parties could address the credibility of the asylum claim. It was not clear to what extent the parties should deal with the Appellant's screening interview and substantive asylum interview. There was a procedural impropriety which had led to unfairness because it was not clear that the Appellant had had an opportunity to address the judge's findings in respect of his credibility. It was not apparent from the decision that the matters referred to in [24] of the decision had been put to the Appellant in order for him to be able to provide an explanation.
11. Mr Aslam submitted that the conclusions at [34] were based on two errors of fact. At the time of the hearing, the Appellant's wife had indefinite leave to remain, which was granted in July 2017. Confirmation of this fact was in the Appellant's supplementary bundle. The judge was aware from the witness statement that in any event the Appellant's wife was recognised as a refugee. Her status was material notwithstanding the judge's finding at [35] that the Appellant's removal would separate him from his wife who showed no sign of being willing to return to Afghanistan. There was also a

certificate in the Appellant's bundle of the Appellant's English language ability which the judge failed to take into account. The judge failed to balance these two aspects in the Appellant's favour in his assessment of proportionality and this was a key failing in the judge's assessment of the public interest.

12. Ms Pal submitted that the judge had properly directed himself at [18] when he stated: "I am not required in this appeal to assess whether the Appellant would be at real risk of persecution on return to Afghanistan. However, I am required to consider the evidence in the screening and substantive interviews and in the witness statement which form part of his asylum claim. I am also required to make findings as to:
  - (a) the Appellant's past association (if any) with the Taliban (in order to assess his suitability for leave to remain);
  - (b) the existence of any obstacles to his reintegration in Afghanistan; and
  - (c) any circumstances justifying a grant of leave outside the Rules.
13. The judge had properly considered the relevant issues in the appeal and properly assessed suitability. The Appellant was represented by Counsel who had submitted a skeleton argument dealing with submissions on suitability.
14. At paragraph 8 of the skeleton argument it was submitted that the Appellant's previous work for the Taliban did not make it undesirable to allow him to remain in the UK. The Appellant explained in his witness statement that he was forcibly recruited by the Taliban due to his father's and elder brother's roles in the organisation. It was his unwillingness to comply with some of the Taliban activities that led to him first fleeing Afghanistan in 2008 after he was threatened. Upon his return to Afghanistan in 2010, the work the Appellant did for the Taliban was very low level and included the distribution of leaflets, the collection of money and the delivery of food. Again, this work was undertaken out of necessity as the Appellant had few other options. It was submitted that for these reasons the ground for refusal in paragraph S-LTR 1.6 should not be applied to the Appellant's case. If the Tribunal accepted the Appellant met the suitability requirements, he could succeed under the Immigration Rules if one of the exceptions in paragraph EX.1 applied.
15. Ms Pal submitted that the Appellant had ample opportunity to address suitability and Counsel was well aware that this point was in issue. If there had been any unfairness during the course of the hearing then it would have been open to his representative to raise it, but no such point was taken. The judge took into account the screening interview, asylum interview and the Appellant's oral evidence to which he specifically referred at [21f]. The judge had to consider suitability in accordance with Appendix FM.
16. The judge found at [28] "Having considered all the evidence, I find that the Appellant has disclosed past personal involvement with the Taliban, including fund raising and facilitating communications between

commanders (and other activities some of which he now denies). I am not satisfied that he acted only under compulsion. I find that the duration and nature of his participation in Taliban activities are sufficient to mean that by reason of past association and past conduct his presence in the UK is not conducive to the public good. Consequently, he does not qualify by leave to remain under either paragraph 276ADE or Section LTRP of Appendix FM. This is a significant consideration in any Article 8 assessment.”

17. Ms Pal submitted that these findings were open to the judge are on the evidence before her. If the Appellant’s representative considered that the hearing was not fair he would have said so at the time and it was clear from the skeleton argument submitted on the Appellant’s behalf that suitability was an issue.
18. It was agreed at the hearing that only Article 8 was in issue and suitability was properly addressed by Counsel. The Appellant failed to demonstrate that he satisfied the financial requirement and the judge was entitled to find he was not financially independent. The judge acknowledged that the Appellant’s wife would not return and that his removal would result in the separation of the Appellant from his wife. The judge took into account the Appellant’s involvement with the Taliban and concluded that it was not in the public interest for him to remain. This finding was open to the judge notwithstanding the Appellant had an English language certificate and his wife had been granted indefinite leave to remain.
19. In response, Mr Aslam submitted that the procedure during the hearing had caused unfairness because it was not clear from the decision whether the issues referred to at [18] had been brought to the attention of the parties such that the Appellant had a full opportunity to deal with any points raised against him. The judge’s failure to recognise the status of the Appellant’s wife was significant. The judge failed to consider the Appellant’s private life and the delay in deciding the Appellant’s asylum claim. This amounted to a material error of law such that the decision should be set aside and remitted to the First-tier Tribunal with the direction that the Respondent decide the asylum claim prior to any subsequent hearing.

## **Discussion and Conclusions**

20. It is unfortunate that the Respondent has not decided the Appellant’s asylum claim and there has been significant delay. The grounds suggest that the judge erred in law in failing to be a primary fact-finder and make findings on the asylum claim. The submissions made orally were the exact opposite to those relied on in the grounds. Mr Aslam submitted that the judge was limited to deciding Article 8 only and should not have trespassed on the issue of credibility of the asylum claim.

21. I am not persuaded that the judge failed to follow a clear direction or failed to adhere to the matters agreed by the parties. Article 8 was the only matter in issue. It is apparent from [9] that the Appellant's representative accepted that, if the Appellant did not satisfy the suitability criteria under Appendix FM, he was not entitled to leave to remain under the Immigration Rules. Accordingly, whether the Appellant could satisfy the suitability requirement was a crucial issue to be determined in the appeal. The Appellant's representative was well aware of it and addressed it in his skeleton argument. The judge adequately set out the remit of the appeal at [18].
22. The submission that the Appellant did not have an opportunity to respond lacks merit. There was nothing to suggest that the Appellant's representative did not adequately represent the Appellant at the appeal hearing such that he could not put forward his case and deal with any of the issues therein. I am not persuaded by Mr Aslam's procedural point. He has not established that the Appellant's hearing was in any way unfair because of any lack of opportunity to deal with the credibility of the asylum claim. It was clear from the refusal letter that suitability was an issue and the Appellant's involvement with the Taliban was a matter the judge had to address and assess. The judge did so setting out at [21] the Appellant's evidence and making findings which were open to him at [24]. The judge's conclusion that the Appellant's presence in the UK was not conducive to the public good was one which was open to him on the evidence before him and the Appellant had ample opportunity to put forward his case in that respect.
23. In relation to the assessment of proportionality, the judge quite properly took into account the Appellant's failure to satisfy the suitability requirements and the financial requirements of the Immigration Rules. This would weigh heavily in favour of the public interest in refusing leave. Any error in relation to the Appellant's English language ability and his wife's grant of indefinite leave to remain was not material to the assessment of proportionality because those factors were insufficient to outweigh the public interest on the particular facts of the case. The judge stated that the Appellant's wife was not a qualifying partner as defined in Section 117D. This finding was not material to the overall assessment of proportionality because the Appellant could not satisfy either the suitability or the eligibility requirements of the Immigration Rules and he never had leave to enter or remain in the UK. Little weight could be attached to his private life.
24. In any event, the judge dealt with proportionality on the basis that the Appellant's removal would separate him from his wife who was not willing to return to Afghanistan. The judge concluded that this was a serious interference with his right to family life, but it did not outweigh the public interest in the Appellant's removal. This finding was open to the judge on the evidence before him. On the facts, the Appellant's removal and permanent separation from his wife was in the public interest. He had participated in Taliban activities such that, by reason of past association

and past conduct, his presence in the UK was not conducive to the public good and he could not satisfy the financial requirements of the Immigration Rules.

25. Accordingly, I find there was no procedural impropriety in the judge's conduct of the appeal and there was no material error of law in the judge's assessment of proportionality. There was no error of law in the decision of 4 October 2017 and I dismiss the Appellant's appeal.

**Notice of decision**

**Appeal dismissed.**

**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.**

**J Frances**

Signed  
Upper Tribunal Judge Frances

Date: 4 May 2018

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

I have dismissed the appeal and therefore there can be no fee award.

**J Frances**

Signed  
Upper Tribunal Judge Frances

Date: 4 May 2018