



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/12525/2018

THE IMMIGRATION ACTS

Heard at Birmingham  
On 16<sup>th</sup> September 2019

Decision & Reasons Promulgated  
On 20<sup>th</sup> September 2019

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

KHAIR [M]  
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr J Howard, Fountain Solicitors

For the Respondent: Mr C Howells, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Afghanistan. He appeals against the decision of First-tier Tribunal (“FtT”) Judge Smith (“the judge”) promulgated on 11<sup>th</sup> January 2019, dismissing his appeal against a decision by the respondent dated 16<sup>th</sup> October 2018 to refuse his claim for international protection and dismissing his appeal on Article 8 grounds.

2. The background to the appellant's claim for international protection is summarised at paragraphs [6] to [12] of the decision of the FfT. The judge found the appellant to be an unhelpful witness. At paragraph [25] of the decision, the judge considered the core of the appellant's claim that he was an informant for his maternal uncle. Having considered the photographs in the appellant's bundle that show the appellant dressed in uniform, the judge concluded at paragraph [25] as follows:

"... In his screening interview the appellant was asked (q.51) if he had been a member of the security services and he said "No". The photographs clearly depict a person who was dressed in a uniform with a rifle and whilst the appellant claims he liked dressing up it happens that the five separate photographs shows (*sic*) him in well-fitting cloths (*sic*). Having listened to the appellant's account I am satisfied that he has been untruthful. The overwhelming impression of the photographs is then (*sic*) he was a member of the security services, a fact that he accepted in his witness statement which he adopted as his evidence and confirmed it was true but denied when first seen."

3. The judge noted at [26], that the finding made at [25] undermines the appellant's account that he was an informant whilst living on his father's farm living in a relatively small village with almost daily contact with the Taliban. The judge found, at [32], that the appellant is of no interest to the Taliban, and therefore has no reason to fear returning to his home area where he has family who will provide him with support and in the alternative, he can return to Kabul. The judge went on to consider, at [33] to [39] the risk upon return, and having rejected the account of events relied upon by the appellant as incredible and untruthful, found that the appellant will not be at risk upon return to Afghanistan.
4. The judge considered the appellant's article 8 claim at paragraphs [44] to [46] of the decision. The judge heard evidence from the appellant's partner who confirmed that she is in a relationship with the appellant, that she regards as enduring, even though they do not live together. The judge noted that the appellant's partner became distraught when she was asked if she would return to Afghanistan with the appellant. The judge noted "*... It was remarkable to note that the appellant did not show a flicker of concern during [his partner's] distress*". The judge recorded the evidence of the appellant's partner that she would go to Afghanistan if she could be safe there, but

her understanding is that it is not a safe country so she would be reluctant to put herself at risk. The judge was in no doubt that the appellant's partner is genuinely fond of the appellant, but noted that it is unclear whether the feelings are reciprocated. At paragraph [46], the judge considered the article 8 claim outside the immigration rules and in the end, concluded as follows:

"... I have assessed the relationship and the difficulties that Ms [B] has encountered mostly because of her family's insistence that she return to Pakistan at the age of 14 to marry. Whether or not the appellant is in the UK Ms [B] will require help because of that and I have little doubt that the appellant's removal will cause upset. There is no evidence that Ms [B] will suffer further harm if the appellant is removed. I have considered whether it would be disproportionate to remove the appellant who is an untruthful economic migrant because of his relationship with Ms [B]. Having considered all the evidence before me and the public interest and the fact that if need be Ms [B] would return to Afghanistan if she were safe then (*sic*). I am satisfied it is not disproportionate to remove this appellant from the UK."

#### The appeal before me

5. The appellant advances a number of grounds of appeal. Permission to appeal was granted by First-tier Tribunal Judge Keane on 18<sup>th</sup> February 2019. The matter comes before me to consider whether or not the decision of FtT Judge Smith involved the making of a material error of law, and if the decision is set aside, to re-make the decision.
6. At the conclusion of the hearing before me, I informed the parties that in my judgement, the decision of Judge Smith to dismiss the appeal on international protection grounds is infected by a material error of law and to that end, the decision should be set aside. I indicated to the parties that I would preserve the finding at paragraph [25] of the decision, that the appellant is a member of the security service, and that I do not consider there to be any merit in the appeal against the decision of FtT Judge Smith to dismiss the appeal on Article 8 grounds. I said that I would remit the matter for rehearing before the FtT. I said that I would give full reasons for my decision in writing. This I now do.

7. I should like to make it clear that on reflection, and after a careful reading of the decision of Judge Smith, it is in my judgement inappropriate to preserve the finding made at paragraph [25] of the decision, or to dismiss the appellant's appeal before me, against the decision of FtT Judge Smith to dismiss the appeal on Article 8 grounds.
8. I take that view because in my judgement, it is far from clear, precisely what finding is made by the judge in the final sentence at paragraph [25] of the decision. The judge states that "*... The overwhelming impression of the photographs is then (sic) he was a member of the security services, a fact that he accepted in his witness statement ...*". The judge proceeds upon the basis that the overwhelming impression of the photographs is that the appellant was a member of the security services, but that is not to say that the judge found that the appellant was a member of the security services. Furthermore, the judge appears to proceed upon the basis that the appellant accepted in his witness statement that he adopted as his evidence, that he was a member of the security services. I was not taken to the appellant's witness statement during the hearing of the appeal before me, but I have noted that at paragraph 4 of his witness statement dated 30<sup>th</sup> October 2018, the appellant referred to his maternal uncle who he claimed worked on behalf of the government as a commander of the Afghanistan army. His evidence as set out in the witness statement was that "*He always used to fight against the Taliban and Daesh and would tell me often that I should also get recruited into the army and fight and protect our people. My uncle managed to have me enrolled into the army using his contacts and I took part in the army too ...*". The appellant's evidence as set out in the witness statement was not that he was a member of the security services. His evidence was that his uncle managed to have him enrolled into the army using his contacts. His role in the army does not appear to have been explored. It would in my judgement be inappropriate to preserve a finding, that does not properly reflect the evidence.
9. Upon reflection, it also appears that the article 8 claim is inextricably linked to the appellant's international protection claim. In the final analysis, at [46], the Judge

found that, if need be, Ms [B] would return to Afghanistan if she were safe there. The question whether or not she would be safe in Afghanistan, is inextricably linked to the question as to whether the appellant would be at risk upon return.

10. I had informed the parties that the matter is to be remitted for the FfT to determine the risk upon return. In my judgement, the appropriate course is for the matter to be remitted to the FfT for re-hearing de novo.

### Discussion

11. The appellant claims that having found that the appellant was a member of the Afghan security services, the FfT Judge failed to assess the risk from the Taliban that the appellant would be exposed to, should he return to Afghanistan, as a member of the armed forces. On behalf of the appellant Mr Howard submits that the appellant would be at risk as an individual who is associated with, or who is perceived to be supporting the Afghan government, and pro-government armed forces.
12. On behalf of the respondent, Mr Howells concedes that the judge did not consider whether the appellant is at risk upon return as a former member of the Afghan army and that discloses a material error of law in the decision of the judge. He accepts that having found that the appellant was a member of the Afghan army, the judge should have carried out an assessment of whether the Taliban is prominent in the appellant's home area, and if they are, whether it would be unduly harsh for the appellant to internally relocate.
13. As to the Article 8 claim, Mr Howard submits that the judge erred in taking into account the appellant's reaction to the way in which his partner gave evidence. That may have been for cultural reasons, and it does not follow that the appellant is not as fond of Ms [B], as she appear to be of him. Furthermore, he submits that in reaching the decision on the Article 8 claim, the judge unreasonably criticises the appellant for having given evidence through a court interpreter, when considering the public interest considerations under s117B of the 2002 Act. He submits that the appellant

was entitled to give his evidence with the assistance of the interpreter, and it does not necessarily follow that the appellant is unable to speak English. Finally, Mr Howard submits that the Judge failed to adopt the five-stage approach established in Razgar.

14. The judge noted, at [44], that the appellant did not show a flicker of concern when Ms [B] was distressed giving her evidence. The judge found that Ms [B] is genuinely fond of the appellant but noted that it is “... *unclear whether the feelings were reciprocated ...*”. If the judge had gone on to find that there was no genuine relationship between the appellant and Ms [B], I have no doubt that the criticism made would be material. However, here, at paragraph [46], the judge appears to proceed upon the premise that there is a genuine relationship and that Article 8 is engaged, although the judge does not expressly state that she finds there to be a family life between the appellant and his partner. There can be no doubt that in the assessment of proportionality, the judge was required to have regard to the public interest considerations set out in s117B of the 2002 Act. As Mr Howard accepts, even if the appellant were able to speak the English language, that would, at its highest, be a neutral factor. At paragraphs [45] and [46], the judge considered the Article 8 rights of the appellant and Ms [B] and in the end, concluded that it would not be disproportionate to remove the appellant from the UK. On its own, there would in my judgement be no proper basis upon which it can be said that the decision is not one that was open to the Judge on the evidence. However, as I have said, the question whether Ms [B] would be safe in Afghanistan, is inextricably linked to the question whether the appellant would be at risk upon return. It is in all the circumstances entirely appropriate that the assessment of proportionality is undertaken in light of the findings that the tribunal makes regarding the risk upon return.

## DECISION

15. The appeal is allowed, and the decision of FfT Judge E M M Smith is set aside

16. The appeal is remitted for rehearing before the FtT de novo, with no findings preserved.

17. No anonymity direction was made by the FtT.

Signed

Date

16<sup>th</sup> September 2019

**Upper Tribunal Judge Mandalia**