



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

Appeal Number: IA/00331/2020

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 25 January 2022**

**Decision & Reasons Promulgated  
On 9 February 2022**

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**ABDUL MUSHAWER ABDUL WASIA**

Appellant

**and**

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

Respondent

**Representation:**

For the appellant: Mr A. Briddock, instructed by Lighthouse Solicitors

For the respondent: Ms S. Cunha, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appealed the respondent's decision dated 04 May 2020 to refuse a human rights claim in the context of an application to extend leave to remain as the spouse of a British Citizen.
2. First-tier Tribunal Judge Moon ('the judge') dismissed the appeal in a decision promulgated on 15 April 2021. She gave unchallenged reasons for finding that the appellant did not meet the financial requirements of the immigration rules. She went on to consider whether there would be insurmountable obstacles to the appellant continuing his family life with his wife in Afghanistan. It was accepted that his wife entered the UK in

September 2001 and was later recognised as a refugee albeit there was no direct evidence to show the basis of her protection claim. She later naturalised as a British citizen. The evidence showed that she had returned to Afghanistan on five or six occasions for visits. Her evidence was that she remained in the house during those visits because of fear of kidnapping. In considering whether the requirements of paragraph EX.1 of Appendix FM of the immigration rules was met the judge considered how issues relating to the Covid-19 pandemic might effect their ability to continue their family life in Afghanistan. The sole finding relating to the effect on the appellant's wife was:

'46. Whilst it was accepted that Ms Kamiri's previously accepted fear of persecution in Afghanistan could not be relied upon in itself as an insurmountable obstacle, I do not disregard this entirely. I accept that if the appellant's wife returned to Afghanistan her life would be more restricted however, I find that the appellant's wife would not have voluntarily travelled to Afghanistan between five and six times if staying there entailed very serious hardship.'

3. Under a separate heading, the judge then turned to consider a broader assessment of Article 8 in which she considered factors that weighed in favour of the appellant and then factors that weighed in favour of the public interest in maintaining an effective system of immigration control. As part of this assessment she considered further factors that might impact on the appellant's wife.

'54. In the article 8 assessment I am bound to consider the effect on the appellant's wife. She has been living in the United Kingdom for almost twenty years and has become used to the way of life here. In oral evidence she described how when visiting Afghanistan between 2001 and 2014, she had to stay in the house for a lot of the time because of the risk of kidnapping. Returning to Afghanistan would, I find have an impact upon the quality of Ms Kamiri's life and I do not underestimate this. However, this factor has to be mitigated to some extent by the fact that Ms Kamiri was prepared to voluntarily travel to Afghanistan on five or six occasions prior to the appellant's arrival in this country.'

4. The grounds of appeal did not seek to challenge the findings relating to the financial requirements of the immigration rules, but argued that the judge erred in her consideration of paragraph EX.1 and failed to give sufficient weight to matters relating to her previous grant of refugee status despite the qualified concession made at the hearing. She also erred in her assessment of Article 8.

### **Decision and reasons**

5. This is a borderline decision because it is clear from the face of the First-tier Tribunal decision that the judge considered the main factors at some point during the course of her reasoning. However, I am persuaded that the separation of those factors between the findings made with reference to paragraph EX.1 and Article 8 amounts to an error of law.

6. In assessing whether there were insurmountable obstacles to the couple continuing their family life in Afghanistan the evidence given as to the circumstances of the visits should have been considered as part of a holistic assessment. Those circumstances were not considered with reference to the test under paragraph EX.1. There is also a qualitative difference between the sponsor's visits to her husband for short periods of time and the effect of long term residence in Afghanistan in such restricted circumstances. The judge did not consider whether the restrictions described by the appellant's wife would create a longer term obstacle to continuing their family life in Afghanistan. Having recognised that the sponsor's life would be 'more restricted', no reasons were given to explain why those restrictions did not amount to insurmountable obstacles. Whilst saying that she took into account the previous grant of refugee status and did 'not disregard this entirely' the judge failed to make any findings as to how the fact that the sponsor was previously recognised as a refugee impacted on her assessment.
7. The First-tier Tribunal decision involved the making of an error on a point of law and is set aside.
8. Ms Cunha accepted that in light of the change in circumstances in Afghanistan since the Taliban took control of the country in August 2021 that there would now be insurmountable obstacles to the couple continuing their family life there. This concession was properly made in light of the evidence relating to the treatment of women by the Taliban, which is recognised in the respondent's most recent CPIN reports. There was some discussion of the respondent's resettlement policy also recognising women and children as a vulnerable category of people. The CPIN and other publicly available evidence also highlight a serious humanitarian crisis developing in Afghanistan since the Taliban took Kabul. Mr Abdul Wasia told me that his family were Tajiks from the north who had supported the Northern Alliance and were opposed to the Taliban. In the circumstances there is more than sufficient evidence to show that there would now be insurmountable obstacles to the couple continuing their family life in Afghanistan. The appellant meets the requirements of paragraph EX.1 of Appendix FM of the immigration rules, which reflects where the respondent says a fair balance should be struck for the purpose of Article 8 of the European Convention.
9. I conclude that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998.

## DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is remade and the appeal is ALLOWED on human rights grounds

Signed M. Canavan                      Date 25 January 2022  
Upper Tribunal Judge Canavan

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**NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A **“working day”** means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is **“sent”** is that appearing on the covering letter or covering email