



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/02433/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 20<sup>th</sup> September 2018

Decision & Reasons Promulgated  
On 10<sup>th</sup> October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BILAL GHULAM SADIQ  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr L Tarlow, Home Office Presenting Officer

For the Respondent: Mr G Dingley, Counsel, instructed by Tremont Midwest Solicitors

**DECISION AND REASONS**

1. This is a Secretary of State's appeal against the decision of Judge Herbert made following a hearing at Taylor House on 9<sup>th</sup> March 2018.

**Background**

2. The claimant is a citizen of Afghanistan born on 20<sup>th</sup> June 1991. He was granted leave to enter to come to the UK as a student from 2010 to 2012 and further leave to remain successively until 27<sup>th</sup> February 2016.

3. On 10<sup>th</sup> June 2015 his leave was curtailed and he was given 60 days to find a new sponsor as his previous college licence had been revoked by the Home Office. Following a judicial review application he was allowed a further 60 days under a consent order sealed on 17<sup>th</sup> March 2016. On 9<sup>th</sup> August 2016 the Secretary of State undertook a reconsideration of his application and the refusal was maintained.
4. At the hearing before the judge it was accepted that the claimant could not meet the requirements of the Immigration Rules.
5. The claimant was unable to obtain a CAS letter from various universities within the relevant time because, he said, there was no university to which he applied which was willing to provide a CAS letter without him having at least a three month visa in place.
6. The judge set out the law contained in Section 117B of the Nationality, Immigration and Asylum Act 2002 which sets out the factors which have to be taken into account in consideration of Article 8.
7. He said that he viewed the claimant's circumstances in the UK to be triggered in part by his education. If he is wrongly denied his access to education it means that his intending marriage to his fiancée, who is an Afghanistan national residing in the UK with a pending application for indefinite leave to remain, would be significantly jeopardised. The claimant would be forced to return to Afghanistan and spend significant amounts of money and time in seeking to re-enter the UK. He had studied and lived in the UK for several years perfectly lawfully, has complied with immigration control at no cost to the UK taxpayer and if anything had been a benefit to the UK economy through the institutions at which he had studied.
8. The judge accepted that the claimant did not have a right to education, but said it could be argued that the substantial interference with his right to remain is predicated upon his ability to study. If that was removed his ability to stay in the UK was also removed. There would be significant harm done to the claimant's private and family life should his ability to study be jeopardised.
9. The judge set out the five stage step approach set out by Lord Bingham in the case of Razgar and concluded that if the claimant was forced to return to Afghanistan the likelihood is that he would obtain leave to enter. There could therefore be very little in the way of undermining of the UK's immigration policy to permit the claimant and others like him to remain in the UK..
10. He concluded as follows  

"I have taken into account all the prevailing factors and the relevant legislation and whilst the appellant's education is not the trigger point of the exercise of his Article 8 rights the consequences on him are that it would mean his relocating back to Afghanistan with the dislocation of his private and family life with his fiancée and will cost significant amounts of money those are not things which are his right to education but an entrancing part of his right to life to continue insofar as he can in the UK enabled by the grant of leave to remain to continue with his

studies. I therefore believe that the balancing act falls in favour of the appellant not simply under the basis of his education but of the wider effects of his private and family life as are before me. Put in summary there is very little detriment to the necessity of maintaining immigration control but there is substantially greater harm to this individual appellant private and family life in the circumstance. I find that the remedy would simply be that this could be cured if the respondent were to consider the appellant leave to remain for a four month period so that he could obtain his relevant CAS letter which I can understand he can do in August 2018 without difficulty.”

### **The Grounds of Application**

11. The Secretary of State sought permission to appeal on the following grounds
  - (i) First, the judge failed to make any finding as to what Article 8(1) compliant life the claimant has in the UK.
  - (ii) Second, he repeatedly placed weight upon the claimant’s failure to obtain a course of study, albeit stressing that there was no right to education. The public interest is clearly strong in a case where the claimant does not meet the requirements of the Rules. University policy on leave to remain requirements for future students is not a matter for the Secretary of State nor can it weaken the public interest.
  - (iii) Third, there is no suggestion that the claimant argued that he could meet the in country Appendix FM Rules on the basis of his relationship with his fiancée. In fact they require him to have had entry clearance on that basis. The judge erred in placing weight upon a relationship which does not lead to an in country route to settlement.
  - (iv) Finally, the judge erred in giving material weight to the prospects of the claimant’s re-entry via entry clearance on the basis of studies which the claimant has not yet identified or applied for and which would require entry clearance, and a relationship which requires entry clearance (fiancée) where there is no suggestion that the claimant has shown that he would be able to meet the requirements of those Rules.
12. Permission to appeal was granted by Judge Robertson for the reasons stated in the grounds on 1<sup>st</sup> August 2018.

### **The Hearing**

13. Mr Dingley provided a skeleton argument.
14. Ground 1. It was submitted that the judge considered Section 117B at paragraph 13 of the determination.
15. Ground 2. It was accepted that the university’s policies are neither a matter for the claimant nor a matter for consideration of what is in the public interest but the judge was entitled to draw upon a range of particular factors which relate to the claimant’s

specific situation as to whether it would be proportionate under Article 8(2) to expect him to return to Afghanistan.

16. Ground 3. Nowhere in the determination does the judge imply or suggest that the claimant met the Immigration Rules on the basis of his relationship with his fiancée. He plainly did not place any reliance on this aspect as a part of the claimant's successful appeal. Reliance was placed upon Hesham Ali [2016] UKSC 60. Fundamentally the First-tier Tribunal conducted a balance sheet approach and weighed the pros and cons as he was required to do.
17. Ground 4. The Immigration Judge gave no material weight as to the prospects of a possible foreseeable entry clearance application, simply weighing the appropriate circumstances at the time of the hearing in accordance with Razgar. Ultimately the judge correctly applied the considerations of Section 117B and found that the public interest in maintaining immigration control would not be sufficiently undermined by granting the claimant leave, having properly balanced the countervailing features of his case on each side in accordance with the law.

### **Findings and Conclusions**

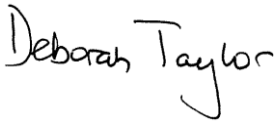
18. I conclude that the judge did err in law, for the reasons set out in the grounds.
19. It is not sufficient for the judge to set out the provisions of Section 117B. It was incumbent on him to demonstrate that he applied those provisions in his consideration of the case. It states in terms that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
20. Mr Dingley was unable to show me anywhere in this determination where the judge applied that Section. Mr Sadiq's private life has been established at a time when his immigration status has always been precarious. Little weight should therefore be given to it. The failure to acknowledge that is a material error of law.
21. Accordingly the decision has to be remade.
22. I invited both parties to make further submissions. Mr Dingley said he had no further submissions to make save to state that the claimant's wife is now expecting a baby.
23. It is acknowledged by the claimant that he cannot meet the requirements of the Immigration Rules because he does not have a CAS letter. He therefore has no basis of stay in the UK. There is clearly a strong public interest in his removal. His private life must be given little weight.
24. No evidence was given in relation to any of the other Section 117B(6) factors either in relation to the claimant's financial situation or his ability to speak English. No further evidence was given save that it is claimed that he is now married and expecting a child. It is not at all clear whether his wife has any status here, but if she does, he can

make a further application. He also has the ability to return to his country of origin and make an application for entry clearance to study.

**Notice of Decision**

25. The original judge erred in law. His decision is set aside. It is remade as follows.
26. The Secretary of State's appeal is allowed and the claimant's original appeal is dismissed.

No anonymity direction is made.



Signed

Date 2 October 2018

Deputy Upper Tribunal Judge Taylor