



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

Appeal Number: AA/09113/2013

THE IMMIGRATION ACTS

**Heard at Glasgow
On 8th May 2014**

**Determination Sent:
On 18^h June 2014**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MISS MANIJEH SADAT ZARGAR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Kerr, Solicitor of Katani & Co

For the Respondent: Mr Mullen, Senior home office presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Iran born on 21st September 1985.
2. The appellant left Iran on 12th August 2011 to come to the United Kingdom. She used her own passport with a visit visa. She had been

granted leave to enter as a spouse to join her husband in the United Kingdom.

3. On 24th July 2012 she claimed asylum and was interviewed in connection with that claim. In essence it was her claim that she was now estranged from her husband and would face violence from him and from family members were she to be returned to Iran.
4. The respondent refused to grant her asylum for the reasons as set out in the decision of 16th September 2013 and issued directions for her removal to Iran.
5. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Wallace on 30th October 2013.
6. At that hearing the appellant repeated her evidence as to her estrangement from her husband. Indeed she had not lived with him at all in the United Kingdom but discovered upon her arrival that he had a girlfriend.
7. She went to live with relatives in Crawley and then with an aunt in Nottingham and finally with a relative in Edinburgh. She began her studies with no direct contact with her spouse.
8. They met together in February 2011 at the Iranian Embassy where the appellant renounced her Mehriyeh rights. Her husband indirectly threatened her in that he would let people know in Iran that she was sleeping around.
9. The appellant returned to Iran on two occasions in 2011 initially for five days in March and a further two days in July. According to the appellant her father told her that she would be safer in the UK and was scared about the family's reputation in Iran. Following her return to the United Kingdom in September 2011 her husband phoned her on a number of occasions.
10. The appellant also maintained that her husband's family were harassing her family in Iran. It was after her father died in June 2012 that she decided to claim asylum.
11. In November 2012 she met her current partner, Mark Davidson, a British citizen. They started living together shortly thereafter. They had been hoping to get married but that was not possible as the appellant seemingly was unable to obtain a divorce from her husband as it was a marriage registered in Iran.
12. Mr Mark Davidson also gave evidence at the hearing and his evidence is set out.

13. The Judge noted that the appellant had first entered the United Kingdom in May 2010 and on no occasion had she lived with her spouse in the United Kingdom. He was a UK citizen. The appellant had undertaken education studies in the United Kingdom but at no occasion had she advised the Home Office or made any attempt to advise the Home Office that she changed her visa type. The appellant had indicated that when she returned to the UK in July 2011 it was to complete her studies.
14. The account of the appellant as to receiving threats from her husband was not found to be credible and her claim for asylum was dismissed. It was the express finding of the judge that the appellant would not be at risk upon return.
15. The judge did not however deal with the issue of Article 8 of the ECHR.
16. Grounds of appeal were submitted contending that the Tribunal failed to consider the appeal in the terms of EX.1. of Appendix FM or under Article 8 of the ECHR. It is contended that there was a good arguable case for the matter to be considered outside the Immigration Rules.
17. Permission to appeal was allowed on the basis that the judge had not fully considered the relationship that the appellant now had living with a British national partner since December 2012.
18. The matter came before Upper Tribunal Judge Macleman on 11th March 2014. He held that the determination of First-tier Tribunal Judge Wallace should be set aside to the extent only that it had failed to deal with issues under Article 8 of the ECHR. He said that the Upper Tribunal would reach a decision on such issues on the basis of the evidence which was before the First-tier Tribunal and upon submissions which may be made.
19. Thus the matter came before me in pursuance of that decision.
20. It was recognised that the scope of the appeal was focused upon that of Article 8 of the ECHR.
21. Miss Kerr, who represents the appellant, invited my attention to EX.1. of Appendix FM. The appellant was in a long-term relationship with a British citizen but there were insurmountable obstacles to that relationship continuing in Iran.
22. Miss Kerr accepted, however, that EX.1. did not apply to the appellant because she could not satisfy the other wider requirements as set out in Appendix FM.
23. Given that she did not succeed under the Immigration Rules it was necessary under the current jurisprudence for her to show that there was a good arguable case for consideration outside the Rules. I was invited to find that in this case there were such compelling circumstances that would

render her return to be in breach of her fundamental human rights with the consequences of her return would be unduly harsh in all the circumstances both for herself and for her current partner.

24. Although the decision of the Upper Tribunal seemed to have focused consideration upon the evidence that had been placed before Judge Wallace, it seemed to me that as I was faced with the task of looking at Article 8 myself, that the facility to give further evidence focused upon Article 8 should be afforded to the appellant and to Mr Davidson who also attended, should they wish to give further evidence.
25. Both the appellant and Mr Davidson indicated that they would welcome the opportunity to expand on the evidence which had previously been given relating to their relationship. It seemed in those circumstances that the fairness of the case should permit that evidence.
26. The evidence of Mr Davidson was briefly recorded in paragraphs 16 and 17 of the determination. Reliance was placed upon the witness statement that he had submitted. He was a British national who had worked off-shore in the North Sea, but following an accident was now retired and no longer fit to work. He met the appellant at a friend's birthday party at the beginning of November 2012 and the relationship developed thereafter very quickly. The appellant moved in with Mr Davidson in December 2012 and the couple have been cohabiting ever since. It is their intention to marry once the appellant has the proper documentation and Mr Davidson indicated that he would be "totally devastated" if the appellant were to be removed from the United Kingdom as he would be unable to leave the United Kingdom. He has children in the United Kingdom from a previous relationship and has to keep in contact with them.
27. Mr Davidson expanded on that matter before me. He has three children.
28. The first daughter is Hannah aged 21 years. Mr Davidson and her mother were together for four years, part of that time when Hannah was very small. Thereafter he left the family home and Hannah's mother married another. Hannah continued to live with them but her natural mother and new husband put up barriers, as a result of which Mr Davidson had not seen Hannah very much for fifteen years.
29. Hannah has now got a job in a publishing company in Edinburgh and his contact with her was re-established some three years ago. He sees her approximately once a month.
30. He has a son, Cousis. He is 15 and stays in Italy with his mother. Mr Davidson goes to Rome about four times a year to see him. He was separated from his son's mother about ten years ago.
31. Mr Davidson also has a daughter, Micu, from another relationship. She is 11 years and also lives in Edinburgh with her mother. Her mother is a

citizen of Burundi and she and Mr Davidson split up about four years ago without any animosity. He sees his daughter three to four times a week. He picks her up from school and has had a close relationship and contact with her throughout her life and continues to see her on a regular basis.

32. Mr Davidson himself indicated that he retired eighteen years ago at the age of 54. He has a work pension. He owns his own property in Edinburgh which is a two bedroomed flat which he has had for nearly 25 years. He maintains his flat and supports himself with his pension.
33. He has never married. He hopes that his relationship with the appellant will break the mould and he wishes to marry her.
34. He is active within the community helping others, particularly in an engineering project for homeless people. He has been in a documentary concerning homeless people.
35. He has no connections with Iran and often fears that were he to live in Iran he would be a stranger and would in any event lose contact with his children.
36. Micu's mother is a British citizen and had that citizenship before he met her. He and the appellant agreed that before they could get married there had to be an annulment of the marriage. He accepted that he and the appellant had taken no legal advice on that issue.
37. The appellant indicated that were it not for her fear of what her husband might do in Iran she would have gone back some time ago. As she and Mr Davidson were not legally married they would be open to the accusation of adultery and suffer as a consequence. The appellant has a brother, a sister and mother living in Iran. She has two nieces. Her sister is an owner of a sports club and her brother runs a business which is an expansion of the family business. Her family has no financial or other problems. She stays in contact with them through Viber and Tango which is a Facebook application. She speaks with her mother every two days. The relationship with her family is good.
38. She said of her husband that he is a British citizen but has two passports. They met in Iran. He came to the United Kingdom. She has been unable to obtain a divorce from him because she will need to go to Iran and get the divorce because the marriage is not registered in the United Kingdom. They married in 2008 according to the normal civil procedures in Iran. They went to the Islamic Centre. Apart from speaking to a Mullah in the local mosque concerning the matter the appellant agreed that she had made no concerted effort to determine how to terminate her marriage with him.
39. Miss Kerr submitted in the light of the evidence that was presented that there was a good arguable case for the consideration of Article 8 outside of the Rules. The rights of Mr Davidson are to be borne in mind and those

of his children, particularly Micu with whom he had a longstanding and close relationship.

40. She submitted that there were insurmountable obstacles to family life continuing in Iran, particularly in a seemingly adulterous relationship.
41. Mr Mullen, who represents the respondent, invited me to find that the relationship with Mr Davidson was less than two years duration and they met when her status was precarious. Although it was claimed that they intended the relationship to be on a permanent basis leading to marriage, neither she nor Mr Davidson had to take any practical steps to determine how a divorce could be implemented. I was asked to bear in mind the findings of Judge Wallace that the appellant was not a credible witness as to her intention in coming to the United Kingdom, nor that she would face any problems or difficulties upon return. She had a loving and supportive family and would have no financial difficulties were she to return. The claimed impediment to a divorce whilst living in the United Kingdom would no longer be such a barrier were she able to institute divorce proceedings in Iran. She had not lived with her husband in the United Kingdom and clearly he had his own life and interests. It was not the finding of the Tribunal that she had cause to fear any threats or he to issue them.
42. I was asked to find that her return to Iran was entirely proportionate and that if need be contact with Mr Davidson could be maintained through Skype and other means, and indeed by his visiting her.
43. A starting point for Article 8 lies in the immigration history of the appellant and the preserved findings in this case. The appellant arrived in the United Kingdom on 31st May 2010 upon a visa in order for her to join her husband in the United Kingdom. At no stage did they live together. It was apparent to the appellant at the earliest time that the marriage was at an end, she living with relatives thereafter. At no stage did she inform the UK authorities of the change of status.
44. Although she claims that she would be at risk from her husband were she to return to Iran she did precisely that on two occasions in 2011. On neither of those occasions did she come to any harm. She returned to the United Kingdom for the last time on 12th August 2011 using the same visa without declaring any change of circumstances to the authorities.
45. Essentially she used her time in the United Kingdom for the purposes of study. At no stage did she seek to change the basis of her leave to remain.
46. Significantly Judge Wallace at paragraph 53 of the determination says as follows:-

“The appellant alleges she did not realise that to be on a spousal visa in the UK, she had to be with her husband. That is not credible. The appellant is highly intelligent; her maternal uncle came from Iran and

is now a British citizen. The appellant says in her own statement that she has engaged in volunteer work in Edinburgh, including as Head of the Persian Society (witness statement, para 62). The appellant's family is conversant to with visa requirements for the UK and the appellant has had, through the Iranian community, the means of accessing the appropriate information to regularise her status."

47. The Judge went on at paragraph 54 as follows:-

"The appellant's spouse is in the UK. The appellant however made no attempt on any occasion to make complaints regarding her spouse's threats to her. She on no occasion reported any threats to the UK police. The appellant merely states that she was afraid that he would harass her. This is not credible given the appellant's spouse was apparently threatening to have her stoned if she returned to Iran."
48. Essentially therefore the Judge found that the appellant's claim for asylum was not credible and that she would face no risk upon return. The Judge concluded at paragraph 65 that the appellant appears to have used the spouse visa route simply to gain entry into the United Kingdom. Her lack of credibility goes to the core of the claim so as to deny it.
49. It was not until 22nd June 2012 that the appellant had contacted UKBA in Croydon to make her claim for asylum. She formed her relationship with Mark Davidson in November 2012 or shortly thereafter.
50. The appellant in her substantive interview conducted on 9th May 2013 makes some reference to her relationship with Mr Davidson. She deals with her relationship with him in answers to questions 117 to 134. She makes a financial contribution to the expenses.
51. When asked as to the plans for the future with Mark she indicated as follows:-

"We were hoping to get married on June 24th 2013, but we had two problems. First I had no documents. At night my purse was stolen and my ARC. My only ID is my student card. The second problem is I cannot get divorced in Iran because they said my mother couldn't do it. If I get documents here I can register it in Iran."
52. She went on to say, "We had an Islamic marriage which hasn't been registered here".
53. She went on to indicate that a reason for not returning to Iran was "No reason other than Mark".
54. It is a matter of concern and to some extent undermining of the credibility of the relationship, that both claim that they wished to be married, but have taken no steps to verify what needs to be done other than a conversation seemingly with the Imam at the mosque. It is far from clear

what documentation is required to facilitate such a divorce. The appellant has a supportive family in Iran who are themselves clearly well-educated and financially capable. There was no indication that they have been requested to make the necessary enquiries of a lawyer in Iran to clarify precisely what needs to be done to obtain such a divorce. The appellant herself had been in Iran on two occasions in 2011 and seemingly had done nothing to further that matter, although clearly by that stage it was entirely obvious that her marriage was at an end.

55. Seemingly she and her husband met at the Iranian Embassy for her to renounce her separation rights. There was no reason at all why arrangements could not have been made in those circumstances for a divorce to have taken place shortly thereafter.
56. Mr Davidson has had a number of long-term relationships that have come to an end. In neither of those was he married. He now maintains however, that the situation as between himself and the appellant is different. I find that it is undermining of the credibility of that long-term relationship that nothing has been done to clarify the issue of divorce.
57. Miss Kerr seeks to persuade me that the situation of the appellant is close to criteria set out in EX.1. of Appendix FM. It is said that there would be insurmountable obstacles to Mr Davidson and the appellant living in Iran. I find there is little evidence that that would be the case. The appellant has a loving and supportive family and were she to obtain her divorce she would be able lawfully therefore to marry Mr Davidson, thereby avoiding any stigma of an illicit relationship.
58. I have regard to the decision of the Tribunal in **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC)**.
59. The Tribunal considered the meaning and extent of insurmountable obstacles. Paragraph 13 of the judgment gave particular regard to paragraph 3.2.7(c) of the guidance. There is a need to consider the seriousness and the difficulties which the appellant and their partner would face in continuing their family life outside the United Kingdom, whether that would entail something that could not (or could not be expected to) be overcome, even with a degree of hardship for one or more of the individuals concerned.
60. The Tribunal made it clear that a significant degree of hardship or inconvenience does not amount to insurmountable obstacles. The decision maker is advised to look at whether there is any inability to live in the country concerned. As to the cultural barriers, the guidance explains that these might be relevant in situations where the partner would be so disadvantaged that they could not be expected to live in that country. It must be a barrier which either cannot be overcome or would present a very high obstacle of hardship to the partner, such that it amounts to an insurmountable obstacle.

61. There has been no evidence as to any significant difficulties which Mr Davidson would meet living in Iran. He has his own means and as I have indicated the appellant has a caring family.
62. In paragraph 14 the issue of exceptionality was considered.
63. Paragraph 15 of the decision is particularly apt in the circumstances of this case, meaning as follows:-

“The Guidance continues that exceptional does not mean unusual or unique. While all cases are to some extent unique, those unique factors do not generally render them exceptional. A case is not exceptional just because the criteria set out in EX.1 of Appendix FM have been missed by a small margin. Rather, the Guidance reads, exceptional ‘means circumstances in which refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal of the application would not be proportionate. That is likely to be the case only very rarely.’ The paragraph continues that in determining whether there are exceptional circumstances, the decision-maker must consider all relevant factors, such as:

- ‘(a) The circumstances around the applicant’s entry to the UK and the proportion of the time they have been in the UK legally as opposed to illegally. Did they form their relationship with their partner at a time when they had no immigration status or this was precarious? Family life which involves the applicant putting down roots in the UK in the full knowledge that their stay here is unlawful or precarious, should be given less weight, when balanced against the factors weighing in favour of removal, than family life formed by a person lawfully present in the UK.
- (b) Cumulative factors should be considered. For example, where the applicant has family members in the UK but their family life does not provide a basis for stay and they have a significant private life in the UK. Although under the Rules family life and private life are considered separately, when considering whether there are exceptional circumstances private and family life can be taken into account.”

64. It is in these circumstances that the immigration history of the appellant is very relevant, particularly when she has put forward a claim for asylum which has been adjudged to be without foundation. I do not find the circumstance of the appellant’s case is one that meets or nearly meets EX.1. of Appendix FM.
65. Given that the appellant does not meet the Immigration Rules, she must show a good arguable case and other factors which are compelling, such as to give rise to the consideration of Article 8 outside the Rules.

66. As the Tribunal in **Gulshan** made clear Article 8 must be viewed in the context of the Immigration Rules and is no longer to be approached on a freewheeling basis. If there were arguably good grounds for granting leave to remain outside the Rules is it necessary for Article 8 purposes to go on and consider whether there were compelling circumstances not sufficiently recognised under the Rules.
67. In this particular case I do not find that such circumstances arise. I recognise in fairness to Mr Davidson that under the Article 8 test rather than the Immigration Rule test it may be unreasonable to expect him to relocate to Iran to be with the appellant. He has close contact with one daughter and some contact with his adult daughter. There is no evidence concerning the emotional dependency which Micu may have upon the father but clearly it is to be recognised that it is in the interests of that daughter that such contact be maintained.
68. That having been said, however, I have to focus upon the nature of the relationship as between Mr Davidson and the appellant and consider whether the removal of the appellant would have such harsh consequences upon the quality of that relationship that it should not be embarked upon.
70. As I have indicated, I do not find that the relationship is of the depths and quality which is claimed. In that connection I bear in mind the lack of credibility of the appellant's claim and of the fact that she embarked upon a relationship in the full knowledge of her precarious immigration history. She has repeatedly sought to attain her residence in the United Kingdom notwithstanding the inappropriate visa which she possesses and took no opportunity when presented to regularise her stay in the United Kingdom. I am far from persuaded, having heard the appellant and having considered all the evidence that she presented, including her remarks in the interview, that she is not otherwise using Mr Davidson for her own purposes. The lack of application in seeking clarification as to the steps for divorce is, as I have already indicated, a significant factor undermining the claimed relationship.
71. Given the appellant's immigration history I see nothing disproportionate in her removal to Iran. There she can no doubt obtain her divorce. Such would further open the possibility of Mr Davidson joining her or for her to make any further application upon a proper footing.
72. In all the circumstances therefore I do not find that the appellant's removal from the United Kingdom would be in breach of her fundamental human rights. I do not find that she has a good arguable case for consideration outside of the Rules or that there are compelling circumstances to enable that to be done. The findings of the judge in relation to her asylum claim remain.

73. In the circumstances therefore the appellant's appeal in respect of asylum remains dismissed. Her appeal in respect of human rights and in particular Article 8 is dismissed.

Signed

Date

Upper Tribunal Judge King TD