



IAC-FH-AR-V1

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

Appeal Number: DA/00764/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 12 October 2015**

**Decision & Reasons Promulgated
On 20 October 2015**

Before

**THE HONOURABLE MR JUSTICE HOLROYDE
UPPER TRIBUNAL JUDGE GILL**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**SHAHOU KHARAZY
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms A Everett, Home Office Presenting Officer
The Respondent appeared in person.

DECISION AND REASONS

1. On 22 April 2014 the Secretary of State for the Home Department made a decision in respect of Mr Kharazy that section 32(5) of the UK Borders Act 2007 applies following his conviction of criminal offences. Mr Kharazy appealed against that decision. In a decision promulgated on 29 October 2014 First-tier Tribunal Judge Colvin allowed the appeal under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The Secretary of State now appeals against that decision of the First-tier Tribunal Judge. Permission for the

appeal was granted by a Judge of the Upper Tribunal on 27 March 2015. This is the judgment of the Tribunal on the hearing of the appeal.

2. We record that Mr Kharazy has acted in person today. He informed us that he would not be able to afford to pay privately for representation and he accepted that it would be difficult for him to obtain legal aid. He informed us that he wished to proceed with the hearing. He has represented himself effectively and has made his submissions with great clarity and considerable courtesy. The appellant Secretary of State has been represented by Miss Everett. We are grateful to both for the assistance they have given us in this case.
3. Mr Kharazy is now 33 years old. He is a citizen of Iran. He came to the United Kingdom illegally on 6 October 2004 and made a claim for asylum. At initial screening he said that he was of Kurdish ethnicity. He said that he had been a member of the Kurdish Democratic Party of Iran ("KDPI") and had for that reason become a man wanted by the Iranian police. He asserted that his life would be at risk if he were to be returned to Iran.
4. His asylum claim was refused on the basis that key parts of his account were not believed and his claimed fear of persecution was rejected. Mr Kharazy was given leave to appeal against that decision to the Upper Tribunal but on 25 May 2005 that appeal was dismissed. The Upper Tribunal Judge hearing that appeal found that Mr Kharazy did not face any real risk of ill-treatment if returned to Iran. The judge found that Mr Kharazy had simply put forward a false story in order to try to remain in the United Kingdom.
5. On 3 June 2005, Mr Kharazy's appeal rights were exhausted and he had no entitlement to remain in the United Kingdom.
6. On 2 December 2010 Mr Kharazy made further representations in support of his asylum and human rights claim. He said that he was now in a relationship with Miss Bahar Cayan whom he said he had met in March 2009. He said they had cohabited since August 2010. Miss Cayan for her part wrote a letter on 30 November 2010 in which she too said that she had been in a serious relationship with Mr Kharazy for about a year and a half and that they planned to marry and to start a family.
7. On 1 September 2013 Mr Kharazy committed two criminal offences to which he pleaded guilty in the Crown Court at Woolwich and for which he was sentenced on 19 November 2013 to twelve months' imprisonment. In his sentencing remarks the sentencing judge summarised the offences, which were offences of causing criminal damage (by damaging the front door of a public house) and having a bladed article in a public place. The judge indicated that on the night of the offences Mr Kharazy had been excluded from the public house in question and by his own admission was drunk. He had returned to the premises carrying a machete with a sixteen inch blade and was seen brandishing it. The judge accepted for sentencing purposes that Mr Kharazy had not intended directly to threaten anyone, but found that those who had seen Mr Kharazy brandishing the

machete would inevitably have felt in fear. He found the offence was aggravated by Mr Kharazy having gone to fetch the machete before returning to the public house. The judge's starting point for sentence was a term of eighteen months' imprisonment which he properly reduced by one-third to reflect Mr Kharazy's early guilty pleas.

8. That unfortunately was not the first offence which Mr Kharazy had committed in this country. Between 15 December 2007 and 19 November 2013, he was convicted on seven occasions of a total of ten offences. We do, however, acknowledge that none of the offences prior to the one for which he was sentenced on 19 November 2013 were of particular seriousness and we note Mr Kharazy's emphatic assertion to us this morning that he has not committed any offence since his release from the twelve month sentence of imprisonment.
9. Having been sentenced to that term of imprisonment Mr Kharazy became liable to deportation. On 22 April 2014 the Secretary of State notified him of her decision that he would be deported. Mr Kharazy promptly gave notice of appeal.
10. Before Judge Colvin in the First-tier Tribunal, both Mr Kharazy and Miss Cayan gave evidence. The judge found that they had been living together for some four years. Mr Kharazy's evidence was that they had met in May 2010 and cohabited since the end of that year. Miss Cayan similarly gave evidence that the relationship began in mid-2010. She was therefore, unsurprisingly, cross-examined about her letter of 30 November 2010 to which we have referred. In that regard the judge noted that Miss Cayan said that she thought the letter had been written wrongly and was not an attempt to bolster the claim.
11. A number of documents were produced by Mr Kharazy, including two letters from the KDPI purporting to confirm that Mr Kharazy is a supporter of that organisation and would risk persecution by the Iranian police if he returned to Iran. The Secretary of State's case was that those letters were of no value. One was not even signed and neither gave any reason as to why Mr Kharazy should be at risk if he returned to Iran.
12. Judge Colvin noted that the incident involving the brandishing of the machete was a serious offence and that the pre-sentence report before the court had assessed Mr Kharazy as posing a medium risk of reoffending. The judge did however take account of a letter from Mr Kharazy's offender manager which provided strong evidence of remorse and a change in attitudes on Mr Kharazy's part.
13. The judge considered the appeal on two principal grounds: asylum considered in conjunction with Article 3, and private and family life considered in conjunction with Article 8. As to the first of those broad aspects of the claim, the judge felt that he could not place any reliance on the letters from the KDPI. He rejected that first ground, saying "*In all these circumstances I do not find even to the lower standard of proof in an asylum claim that the appellant is at risk on return to Iran for having been*

a failed asylum seeker." At the hearing before us, Mr Kharazy said that he was in fear of persecution and that he would be killed if he is returned to Iran. However, Judge Colvin considered his asylum claim and rejected it.

14. As to the Article 8 claim, the judge did not accept the claim insofar as it was based on Mr Kharazy's private life. He did however find that the claim based on family life was well-founded, even taking into account the discrepancy between Miss Cayan's oral evidence and her earlier letter. The judge concluded that there was a genuine and subsisting relationship which had continued for some four years. He went on to say "*It is accepted that this relationship was formed at a time when the appellant had no immigration status in the UK and therefore his position was precarious*".
15. The judge went on to consider other aspects of the Rules to which we will return and he set out at paragraphs 39 to 41 of his judgment the factors which he found to be material. We think it necessary to quote those paragraphs in full:
 39. I have little doubt that the difference between Miss Cayan living all her life in the UK and then being required to live in Iran would entail very serious hardship for her in many, if not most, aspects of her life. Apart from the significant cultural differences and the repressive measures aimed at women, Miss Cayan does not speak the language and is likely to have little opportunity of being economically active in her own right. The other circumstances that I would describe as compelling are that she would be leaving behind her mother, in particular, who is not well. Whilst there may have been some exaggeration of the needs of her mother which might explain the above inconsistencies in the evidence of the appellant and Miss Cayan as mentioned above, I am satisfied that Miss Cayan feels responsible for providing a significant level of support for her mother both physically and emotionally. To be separated from her mother and be unable to provide the support to her is likely to cause significant extra hardship to her.
 40. Miss Cayan might well make the decision not to accompany the appellant to Iran. This would inevitably mean that their 4 year relationship would be terminated. This is because, as [the Secretary of State's representative] confirmed, that there is little or no chance of a person such as the appellant successfully seeking the revocation of the deportation order at a point in the future and, even then, he would have great difficulty in surmounting the provisions of Appendix FM to join his partner in the UK. So it is, in effect, a simple question. Would the termination of this relationship cause undue hardship to Miss Cayan? On the evidence that this is a genuine and subsisting relationship that has sustained for 4 years and that there are plans to marry and have children, the answer is that it is likely that it will cause such hardship for at least a period in the foreseeable future.
 41. I have therefore come to the conclusion that both paragraph 399(b) of the Immigration Rules and Exception 2 in Section 117 apply to the appellant in respect of his Article 8 claim on grounds of family life."
16. The judge was therefore satisfied that it would be disproportionate to deport Mr Kharazy and allowed his appeal.

17. The Secretary of State advances the following grounds of appeal. First, it is submitted that the judge misdirected himself at to Rule 399(b). Secondly, it is submitted that the judge's assessment of the Article 8 claim based on family life was wrong in law because the judge misapplied Exception 2.
18. We therefore turn to the relevant provisions of statutes and Rules. By Section 3(5)(a) of the Immigration Act 1971 a person who is not a British citizen is liable to deportation from the United Kingdom if the Secretary of State deems his deportation to be conducive to the public good. Having been convicted and sentenced to a term of twelve months' imprisonment Mr Kharazy comes within the definition of a foreign criminal under Section 32(1) of the UK Borders Act 2007. Section 32(4) of that Act provides that for the purpose of Section 3(5)(a) of the Immigration Act 1971 the deportation of a foreign criminal is conducive to the public good. Section 32(5) provides that the Secretary of State must make a deportation order in respect of a foreign criminal, subject to Section 33.
19. Thus in the circumstances of this case the Secretary of State was required to order deportation unless one of the Exceptions in Section 33 of the 2007 Act applies. Exception 1, for which Section 33(2) provides, is where "*Removal of the foreign criminal in pursuance of the deportation order would breach (a) a person's Convention rights, or (b) the United Kingdom's obligations under the Refugee Convention.*"
20. The judge having rejected the asylum claim and the Article 3 claim, the relevant Convention right which here falls for consideration is the claim based on family life under Article 8.
21. Consideration of an Article 8 claim in such circumstances necessarily involves assessment of the impact of deportation on the family life of the deportee, and the public interest in maintaining immigration control and the prevention and deterrence of crime.
22. In this regard Section 117A of the Nationality, Immigration and Asylum Act 2002 directs that a Tribunal considering whether interference with an Article 8 right is justified under Article 8(2) must have regard to the considerations in Sections 117B and 117C. So far as is material for present purposes those sections provide as follows:
 - 'Section 117B
 - (1) The maintenance of effective immigration controls is in the public interest.
 - ...
 - (4) Little weight should be given to-
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner,that is established by a person at a time when the person is in the United Kingdom unlawfully.

- (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

Section 117C

- (1) The deportation of foreign criminals is in the public interest.
- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
- (3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

...

- (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.'

23. In the circumstances of this case, Judge Colvin was required to have consideration to all those statutory provisions. The judge relied upon Section 117C(5) and found that Exception 2 applied to the circumstances of this case. We must therefore look at the provisions in Part 13 of the Immigration Rules which amplify the statutory provisions by setting out the criteria which must be considered in these circumstances.

24. Paragraph 398 of the Immigration Rules reads:

'398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

- (b) The deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;

...

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.'

25. Paragraph 399 deals in part with the situation of a parental relationship and we need not read that part of it, but paragraph 399(b) is relevant. It applies to a person who has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, or settled in the UK, and (our emphasis):

- '(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious, and
- (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported because of compelling circumstances over and above those described in paragraph EX2 of Appendix FM and,
- (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.'

26. Those being the relevant statutory provisions, we turn to consider the grounds of appeal.
27. We have already quoted that part of Judge Colvin's decision in which he accepted that the relationship between Mr Kharazy and his partner was formed when Mr Kharazy had no immigration status in the United Kingdom and his position in this country was therefore precarious. It would appear however that the judge nonetheless went on to consider paragraph 399(b) (ii) and (iii).
28. With respect to the judge, that was an error of law. Paragraph 399(b) is conjunctive in its terms. In order to come within that paragraph a foreign criminal must meet all three criteria. Mr Kharazy plainly did not. He fell at the first hurdle, namely that set out in 399(b)(i). The judge's finding that paragraph 399(b) applied to Mr Kharazy's case was therefore wrong in law.
29. The judge's decision insofar as it relates to the Article 8 claim therefore cannot stand. It was wrong in law and we must and do set aside his decision on Mr Kharazy's Article 8 claim. His decision to dismiss Mr Kharazy's appeal on asylum grounds and in relation to Article 3 of the ECHR stands.
30. We must in those circumstances go on to re-make the decision in relation to Mr Kharazy's Article 8 claim applying the Immigration Rules.
31. We are bound to say that we entertain substantial doubts as to whether in the circumstances of this case the judge could properly find that to deport Mr Kharazy from the United Kingdom would have an unduly harsh effect upon him and his partner. Even if that finding were to stand, however, we are bound by the words which we have already quoted from paragraph 398 which directs that the public interest in deportation will only be outweighed by other factors "*... where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.*"
32. In the course of the hearing we asked Mr Kharazy whether there were any matters upon which he wished to rely over and above those mentioned by the judge in his judgment in the paragraphs to which we have already referred. Mr Kharazy, entirely understandably, emphasised

the love between himself and his partner and the consequences which he anticipates for both of them and indeed for Miss Cayan's mother if the couple have to separate. Those were the only matters he wished us to consider in addition to those which had been mentioned by the judge below.

33. We have considered those matters. We are very conscious that the personal situation of Mr Kharazy and his partner is a sad one. It is however not an unusual one in cases of deportation. If Mr Kharazy is deported, Miss Cayan will face a difficult and distressing choice: to go with him to Iran or to remain in this country without him. Neither choice of course would necessarily be permanent. We sympathise with her personal position and with the personal position of Mr Kharazy. We are however quite unable to find that the personal circumstances of the couple amount to "*very compelling circumstances over and above those described in paragraphs 399 and 399A*" of the Immigration Rules" notwithstanding the difficulties faced by women in Iran. This is so even taking into account the impact on Miss Cayan's mother whether as a consequence of losing the company and support of Mr Kharazy alone or, if Miss Cayan chooses to relocate to Iran, both Miss Cayan and Mr Kharazy. Any assistance or support that she needs can be provided by the state if she is eligible, although we accept of course that she will miss receiving assistance and support from Mr Kharazy and, if she relocates, Miss Cayan. Mr Kharazy has never had leave to be in the UK. The relationship was therefore entered into when he was present unlawfully.
34. The circumstances of this case taken cumulatively do not amount to "*very compelling circumstances over and above those described in paragraphs 399 and 399A*" of the Immigration Rules.
35. We are satisfied accordingly that however the position of Mr Kharazy and his partner is analysed, and even taking the most favourable view of the findings below, his appeal against deportation cannot succeed.
36. As we have stated and for the reasons given, we have set aside the decision of the Judge of First-tier Tribunal in relation to Article 8 by reason of the error of law into which he fell. We have re-made the decision on Mr Kharazy's Article 8 claim. Mr Kharazy's appeal against the deportation order under Article 8 must in our judgment fail.

Summary of Decision

1. The decision of the First-tier Tribunal to dismiss Mr Kharazy's appeal against the Secretary of State's decision on asylum grounds stands.
2. The decision of the First-tier Tribunal to dismiss Mr Kharazy's appeal against the Secretary of State's decision under Article 3 of the ECHR stands.
3. The Secretary of State's appeal to the Upper Tribunal is allowed to the extent that the decision of the First-tier Tribunal on Mr Kharazy's appeal under Article 8 is set aside.

4. The Upper Tribunal has re-made the decision in relation to Article 8. Mr Kharazy's appeal against the Secretary of State's decision under Article 8 of the ECHR is dismissed.

Anonymity

The First-tier Tribunal did not make an anonymity order. No application was made to the Upper Tribunal for an anonymity order.

Signed
Mr Justice Holroyde

Date