



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

Appeal Number: DA/01778/2013

THE IMMIGRATION ACTS

Heard at Field House

On 26 November 2015

Prepared 26 November 2015

**Decision & Reasons
Promulgated**

On 20 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR SAMAN GHABOOLI
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Presenting Officer

For the Respondent: Mr E Nicholson, Counsel instructed by Fisher Meredith

DECISION AND REASONS

1. In this decision the Appellant is referred to as the Secretary of State and the Respondent is referred to as the Claimant.
2. The Claimant a national of Iran, date of birth 1 September 1973, appealed against the Secretary of State's decision, dated 6 March 2013, to refuse to revoke a deportation order made on 5 June 2012. The appeal came before First-tier Tribunal Judge Sethi (the judge) who, on 8 October 2014, allowed

the Claimant's appeal on Article 8 ECHR grounds. The Secretary of State sought permission to appeal that decision [D] on 16 October 2014 and was given leave by First-tier Tribunal Judge Foudy on 28 October 2014.

3. On 6 March 2015 the Honourable Mrs Justice Carr DBE and I found that there was an error of law made by the judge in failing to properly apply the Immigration Rules in considering the application to revoke the Secretary of State's deportation order.
4. At the hearing on 7 October 2015 the Claimant gave evidence and adopted statements which he had made in March and September 2014 and in September 2015. In short in cross-examination Mr Melvin established that the Claimant had not had leave to remain, he had become appeal rights exhausted, when he had begun his relationship with Mrs Thanh in about 2010 at a time when he had no legal status to be in the UK.
5. Mrs Thanh adopted her two statements of 10 September 2014 and 14 September 2015. She confirmed that their relationship had commenced in about August 2010. She was aware that he had no right to be in the UK, she thought he had made a political asylum claim and she hoped he would remain. She said that she had learnt of deportation some two years later.
6. Mrs Thanh had come to the United Kingdom when she was 17 years of age and whilst she did not remember when she obtained nationality she had had a UK passport for some seventeen years. Mrs Thanh understood or, more correctly, misunderstood that the Claimant had been divorced.
7. She was free to marry and would do so were the Claimant able to marry her. Their relationship was a firm and settled one that she wished him to stay with her in the United Kingdom. She confirmed that she would not live in Iran because she was British, of the Buddhist faith, she did not speak Iranian, her business activities were in the United Kingdom, that she had no wish, in order to marry the Claimant in Iran to convert to the

Muslim faith. She had two successful businesses in the UK one involving second hand car sales and one involving the sale of souvenirs. She confirmed that they lived in a property which she had purchased and which was subject to a mortgage. The judge did not accept the general claim of the Claimant to be in need of protection.

8. The judge found [D26] that the Claimant had family life with Miss Dung Thanh and that the Secretary of State's decision constituted a material interference with the Claimant's right to respect for private and family life. It was accepted that the Claimant had been in the United Kingdom since 2003 albeit all his years had been without leave to remain. It was accepted that the Claimant had a genuine and subsisting relationship with his partner, Mrs Thanh, of four years who had settled in the UK.
9. It was common ground between the parties that the Claimant was a foreign national who on 23 March 2009 pleaded guilty to an offense of possession and or use of a false instrument for which he was sentenced to a term of imprisonment of twelve months at the Southwark Crown Court (D34). The (IAC) judge accepted the evidence of the Claimant and Miss Thanh as to their genuine and subsisting relationship, their affection for and commitment to each other and their intention to live permanently in a genuine and subsisting relationship. The judge found Miss Thanh to be an entirely credible witness, accepted that she was a British citizen, had resided in the United Kingdom in excess of nineteen years, had worked, was not a burden upon the tax payer, did not require any recourse to public funds, the Claimant and Miss Thanh both spoke English and were readily able to integrate into British society.
10. The judge accepted that Miss Thanh was not of Iranian origin, did not speak any of the languages commonly spoken in Iran, was now 38 years of age, had devoted her adulthood in developing her relations and ties with the United Kingdom and accepted that she was a practising Buddhist; but the Islamic cultural and religious norms and expectations were significantly different from her own. The judge accepted that Miss Thanh

had no links, other than through knowledge, of living with the Claimant in Iran. The judge found that were she to go to Iran there were real obstacles to relocation in order to continue a family life with the Claimant but more so that the move would significantly impact on Miss Thanh in respect of her practise of her faith as a Buddhist and her lifestyle as an ambitious career woman. The judge accepted that Miss Thanh wished to have children by the Claimant and that previous attempts at IVF treatment had failed through miscarriages. The judge also concluded that the relationship had been formed at a time when the Claimant's status was precarious. The judge accepted that the Claimant had not further offended and assessed that there was no direct risk of a repetition of the criminal conduct for which he was convicted.

11. The witness statements before me did not materially advance that evidential position or raise any disputed issues of fact. It was common ground that the Claimant fell within the provisions of paragraph 398(b) of the Immigration Rules (the rules) as a person who had been convicted of an offence for which they had been sentenced to a period of imprisonment of less than four years but at least twelve months. It was also common ground that the Claimant could not meet the requirements of paragraph 399(b) of the rules for although he had a genuine and subsisting relationship with a partner who is in the UK and is a British citizen the relationship was not formed at a time when the Claimant was in the UK lawfully and their immigration status was not precarious. Similarly because the claim could not succeed under paragraph 399(b)(i) then paragraph 399A of the rules did not apply because the Claimant had not been lawfully resident in the United Kingdom for most of his life.
12. Much of the argument at the hearing turned upon the inter-relationship between the Immigration Rules and Sections 117A-D NIAA 2002 as amended. The principal cases referred to were Bossade [2015] UKUT 415, MAB (Para 399; "Unduly Harsh") USA [2015] UKUT 435 and KMO (Section 117 - Unduly Harsh) Nigeria [2015] UKUT 543. For the purposes of Section 117B(4) and the rules, because there plainly is a linguistic difference, the

fact of the matter was that the weight to be given to a relationship formed with a qualifying partner was discounted because the proposed deportee was unlawfully in the UK: This difference was not determinative in this case. Of greater importance was the issue raised is whether or not there is any material difference between the expression 'unduly harsh' as used in Section 117C(5) and paragraph 399 of the rules. This was in the context of whether it would be unduly harsh for Miss Thanh to remain in the United Kingdom without the Claimant.

13. Mr Nicholson argued, by reference to the evidence, that it was not reasonable to expect Miss Thanh, as a committed Buddhist, UK national, to co-habit with the Claimant in Iran. To do so would be unlawful and when discovered, as it surely would be, lead to death or cruel and degrading treatment. More particularly she could not be expected to convert to the Muslim faith in order to be able to participate in a ceremony of marriage in Iran. Thus her life could well be in jeopardy through an unacceptable relationship not recognised in Iran and the Claimant's life too for that matter through being in such a relationship. That is quite apart from the reasonableness of her being expected to change her lifestyle, her objectives, her employment, ambitions and religion.
14. In the context of Section 117C of the NIAA 2002 it was clear under sub-Section (5) that not only is the deportation of foreign criminals in the public interest but the more serious the offence committed the greater is the public interest in deportation. Lesser criminality, where a sentence of less than four years has been imposed, nevertheless is in favour of deportation. In Section 117C "Exception 2" to such removal requirement related to a genuine and subsisting relationship with a qualifying partner and the effect of deportation would be unduly harsh. It seemed to me that paragraph 399 of the rules has effectively through amendment become harmonised with the objectives of Sections 117A-C.
15. In this case I find that the First-tier Tribunal Judge made a number of helpful findings of fact, which have not been in dispute between the

parties before me. The Claimant relied essentially upon the same facts but with more background information relating to circumstances in Iran. In applying *Devaseelan [2002] UKIAT 702* I saw no basis to go behind the judge's findings of fact and from the evidence before me I am satisfied that:- First, the public interest properly indicated that the Claimant should be returned; Second, it would be unduly harsh for Miss Thanh, a British national, to be expected to accompany the Claimant to Iran and were she to remain co-habiting with the Claimant her life would be at significant risk of ill treatment as an adulteress.

16. Third, I find on the evidence it would be unduly harsh to expect her to conceal her practise of the Buddhist faith in Iran or to be forced to abandon her faith and convert to Islam. I further find the Judge's findings demonstrate, were one to consider this under the Immigration Rules or indeed under Section 117C that it would be unduly harsh for the Claimant and Miss Thanh to remove from the United Kingdom and try and make a life together in Iran given the issue of their unmarried relationship or her faith

17. No submissions were made as to the possibility of the Claimant relocating elsewhere with Miss Thanh: The issue was not taken on behalf of the Secretary of State. I agree with the judge that the one-off element of criminality identified with the Claimant was not with a degree of seriousness sometimes seen but that was a matter for the Secretary of State in assessing the public interest. I therefore reach the view that it would be unduly harsh in the circumstances of this Claimant to be removed and I find had it been necessary to do so, that the circumstances of the Claimant and Miss Thanh are or would properly be characterised as exceptional circumstances that would outweigh the public interest in removal

18. I do not accept Mr Melvin's argument that there is no reason why Miss Thanh could not pursue her Buddhist faith in Iran for the background evidence provided to me strongly suggested that her pursuit of her

Buddhist faith would not be acceptable and would make her the obvious object of adverse attention by the religious authorities and religious zealots in Iran let alone Muslims who think Buddhism tenets are derived from Judaism and supported by world Jewry. In the circumstances I do not find the Secretary of State's decision was proportionate.

19. The appeal of the Secretary of State is dismissed.
20. The original Tribunal's decision stands on Article 8 of the ECHR grounds.
21. No anonymity order was sought nor is one necessary.

Signed

Date 12 January 2016

Deputy Upper Tribunal Judge Davey

P.S. I regret the delay in promulgation which is due to the file being mis-located