**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: AA/11319/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 13 May 2015** | **On 22 May 2015** |

**Before**

**LORD MATTHEWS, SITTING AS AN UPPER TRIBUNAL JUDGE**
**DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD**

**Between**

**ABBAS AMELEH SADI**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Party
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a national of Iran whose date of birth is 28 September 1995. He arrived in the United Kingdom on 29 September 2009 and claimed asylum on 6 October 2009. His application was refused on 11 March 2010 but due to his age he was granted discretionary leave until 4 May 2012. He applied for further leave to

remain but his application was refused on 25 November 2014. A decision was made to refuse to vary his leave to remain and to remove him by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. He appealed on asylum grounds, humanitarian grounds and grounds based on Articles 2, 3 and 8 of the European Convention on Human Rights and Fundamental Freedoms. His appeal was heard on 4 February 2015 by First-Tier Tribunal Judge Ford and in a determination promulgated on 19 February 2015 was dismissed on all grounds other than Article 8.

2. The basis of the findings under Article 8 was the appellant's relationship with a Ms Uddin who gave evidence before the F-tT. She is a British citizen with a firmly established private life in the UK, having been born here, grown up here and educated here. At the time of the determination she was completing her third level education and was shortly due to leave university with a Business Studies degree. She wanted to make the best use of the opportunities this would give her in the United Kingdom. The judge did not assume that there would be no opportunities for her in Iran but found that she would face very great difficulties in pursuing her private life there because she was Sunni Muslim. At paragraph 79 of the determination the judge pointed out that around 9% of Iranians are Sunni Muslims and they face difficulties in the free practice of their faith. Those difficulties were set out in that paragraph and we need not go into them here.

3. The parties' relationship commenced in 2012 and Ms Uddin made it clear that she had started it in the full knowledge of the difficulties they could be facing. She married the appellant, a Shia Muslim, in an Islamic ceremony on 22 January 2015. The First-tier Tribunal Judge recognised that this was not a valid marriage under English law. For reasons which are explained in the determination the parties did not live together and her family were very unhappy with the marriage. When she first met the appellant she did not view him as a possible partner because she knew that he had no immigration status, had no money, or job and was not engaged in further education. Her Farsi was very limited.

4. The judge found that the appellant could not show that he met the requirements for leave to remain as a fiancé/partner. She was satisfied however that the decision of the Secretary of State did not involve a proper balancing of all the factors relevant to the Article 8 proportionality exercise. She referred to what she called exceptional circumstances. At paragraph 90 she referred to the difficulties the couple would face in trying to maintain a family relationship in Iran and the difficulties that Ms Uddin would have in creating and maintaining a private life in Iran. The pressures would be so great that even attaching little weight to their family life and balancing it against the public interest of maintaining proper immigration control the judge was satisfied that the decision was disproportionate. The judge was not satisfied that the decision was justified on conducive grounds as she was not satisfied that the appellant had been convicted of any offence or that his continued presence in the UK posed a risk to the public or made it any more difficult to prevent crime or disorder. It was not justified as a deterrent. This was against a background that he had

pleaded guilty to one count of possessing cannabis for his own use and had been charged with certain other offences.

5. The Secretary of State has appealed against the allowance of the appeal on Article 8 grounds. For the sake of continuity we will continue to refer to her as the respondent. Putting it shortly the grounds of appeal were that the judge had failed to have regard to the threshold of "unjustifiably harsh consequences" in her assessment of the proportionality of the decision outside the Rules. The determination disclosed no consideration of the consequences that would ensue following from the separation of the appellant and Ms Uddin. Furthermore it was submitted that the judge had made a free-feeling Article 8 assessment unencumbered by the Rules specifically in referring to Ms Uddin throughout the determination as the appellant's wife or partner or indeed in finding that there was family life between them. The judge recognised that she was not the spouse of the appellant and that they did not co-habit. In terms of the Rules, particularly GEN1.2 of Appendix FM they were not "partners" and the relationship was not one whereby Appendix FM could be engaged. The judge should have considered whether or not the removal of the appellant would lead to unjustifiably harsh consequences in light of the consideration that he did not have a partner in the United Kingdom in terms of the Rules. He would be separated from a person to whom he was not married and with whom he did not live and, given that, the interference was proportionate in the public interest. The judge had focussed her consideration on whether or not Ms Uddin could accompany the appellant to Iran.

6. Permission to appeal was granted on the basis that it was arguable that the judge's consideration of Appendix FM as if the couple were validly married was inappropriate.

7. For the respondent Mr Jarvis said that the determination could not be criticised in respect of the asylum claim but significant errors could be detected in relation to the consideration of Article 8 from paragraph 68 onwards. EX.1 was mentioned at paragraph 82 and the question of insurmountable obstacles but when all was said and done the appellant was outwith the Rules. The approach was flawed in relation to the appellant's criminality. It was accepted by the appellant that he had pleaded guilty to possession of cannabis and the reasons for refusal letter had raised his character at paragraph 49 under reference to paragraph 353B of the Immigration Rules. The judge did not have the power to say that she was not satisfied that the decision was justified on conducive grounds as she did at paragraph 90. That was a matter for the Secretary of State. The judge could, however, take account of the criminal history in the balancing exercise.

8. On the basis of SS (Congo) [2015] EWCA Civ 387 the appellant, whose position was precarious, could only succeed outside the Rules in very exceptional circumstances.

9. There was nothing exceptional or compelling in the circumstances of Ms Uddin as identified by the First-tier Tribunal.

10. All the judge had done was to consider the consequences for the partner being returned to Iran. She had not looked at the consequences of separation of the parties or of the appellant's going out and trying to obtain clearance out-of-country. This was a precarious case. What the judge found to be exceptional was already covered by the Rules and the appellant was clearly excluded by the Rules.

11. Mr Jarvis also referred to the case of Agyarko [2015] EWCA Civ 440. He referred in particular to paragraphs 21, 22 and 25. Paragraph 25 is in the following terms:

> "25. The statement made in Mrs Agyarko's letter of application of 26 September 2012 that "she may be separated from" her husband was very weak, and was not supported by any evidence which might lead to the conclusion that insurmountable obstacles existed to them pursuing their family life together overseas. There was no witness statement from Mrs Agyarko or Mr Benette to explain what obstacles might exist. The mere facts that Mr Benette is a British citizen, has lived all his life in the United Kingdom and has a job here – and hence might find it difficult and might be reluctant to re-locate to Ghana to continue their family life there - could not constitute insurmountable obstacles to his doing so".

12. In the instant case there was no evidence for the suggestion that the appellant could not work or live her own life. Her religion could not be an insurmountable obstacle given that 6.5 to 7 million shared that religion in Iran. Little weight could be given to a relationship formed when the appellant's immigration status was precarious and it was perverse to say there were insurmountable obstacles in the teeth of Section 117B. The structure of the determination was wrong as was the understanding of the relationship between the Rules and considerations outside of the Rules. The proportionality assessment was unlawful and the decision should be set aside and re-made.

13. Although the appellant was present and assisted by an interpreter he had no submissions to make but we were addressed by Ms Uddin. She was unable to assist us in relation to any legal matters but drew our attention to certain difficulties which she said existed in the way of their going to Iran. She also indicated that they had been appallingly represented, as was noted by Judge Ford. A number of witness statements had been given to the solicitor as well as pictures but the solicitor did not turn up or lodge the documents. She said that when the appellant left Iran at 14 he missed his education and he would not be able to do anything if he went back. They could not get married since he had no legal papers. Since they were a mixed marriage they would not survive a day in Iran. He would not survive because of his tattoos, the way he dressed and the way his hair was cut. She would not try to justify his criminal activities but indicated that she had now graduated in Business Studies.

**Conclusions**

14. We indicated at the time and repeat that we are satisfied that the First-tier Tribunal erred in law in relation to the Article 8 claim. It is plain that the appellant cannot succeed under the Rules but in looking for exceptional circumstances in terms of Article 8 the determination of the First-tier Tribunal concentrated only on such difficulties as Ms Uddin might face in Iran. There was no consideration of the proportionality of the parties being separated in circumstances were they were not validly married, did not live together and had entered their relationship when the appellant's immigration status was precarious. The judge was not satisfied that the appellant had told the truth about not being in touch with his family and was satisfied that he had family members in Iran including his mother and uncle. No consideration was given to the question of the appellant himself going to Iran and making an application out-of-country to join Ms Uddin.

15. We think that these are material considerations which ought to have been taken account of in the balancing exercise and in the absence of this the decision is flawed.

16. Even if Mr Jarvis is correct in his criticism of the F-tT's treatment of the appellant's criminality we do not think that this is material. However the F-tT approached the matter she would not have applied much weight to his character and that would have been a matter for her.

17. Having indicated that we were setting aside the decision in relation to Article 8 we enquired of Ms Uddin whether she was in a position to make any further submissions or lead any further evidence before us since the decision had to be re-made. She was not in a position to do so and given the comments by the F-tT about the service with which the appellant was provided by his legal representatives, then we were not surprised. The decision will have to be re-made taking account of any evidence which may be lead as to the effect of any separation of the parties and any difficulties or otherwise which the appellant may face in going to Iran and applying from there. In this particular case, unusually, we have taken the view that it would be better to remit the matter to the First-tier Tribunal for the decision to be made.

18. We made it plain to the appellant and Ms Uddin that it would be in their best interests if possible to obtain the services of a solicitor.

19. There is no basis for overturning the findings of fact made by the First-tier Tribunal or the decision other than that relating to Article 8 and they will stand.

**Notice of Decision**

21. The respondent's appeal is allowed and is remitted to the First-tier Tribunal for the decision to be re-made in relation to Article 8. The findings of fact set out in the determination of the First-tier Tribunal will stand as will the decision on all matters other than Article 8.

LORD MATTHEWS
Sitting as an Upper Tribunal Judge
(Immigration and Asylum Chamber)

Date: