



IAC-FH-AR-V1

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

Appeal Number: IA/07441/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 06 January 2016**

**Decision & Reasons Promulgated
On 21 January 2016**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**SHAHIN SHAMS
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Kandola, Home Office Presenting Officer

For the Respondent: Mr Behbahani, of Behbahani & Co Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge of the First-tier Tribunal Symes who, on 24 July 2015, allowed the appeal of Mr Shahin Shams against the Secretary of State's decision of 09 February 2015 to revoke his Indefinite Leave to Remain.

Background

2. Mr Shams is a citizen of Iran whose date of birth is 01 May 1980. He arrived in the United Kingdom on 03 April 1998 with his mother and brother. Following an asylum claim by his mother the family were recognised as refugees and were granted Indefinite Leave to Remain (ILR) on 04 June 2001.
3. On 21 September 2007 Mr Shams was convicted of kidnapping, false imprisonment and possession of a prohibited weapon. On 06 December 2007 he was sentenced to a total of 12 years imprisonment. The sentencing Judge also recommended him for deportation. On 12 February and 22 November 2008 the Secretary of State wrote to Mr Shams indicating that she was considering deportation action against him. Mr Sham's previous solicitors made representations to the Secretary of State as to why he should not be deported (these related to his own and his family's political activities and the consequent risk that his deportation to Iran would expose him to ill-treatment sufficiently serious to breach Article 3 ECHR).
4. On 04 July 2014 the Secretary of State wrote three letters to Mr Shams informing him that deportation action would not be taken against him in this instance, that his refugee status was not going to be withdrawn, but that it was intended to revoke his ILR.
5. Mr Shams' previous solicitors responded to this letter by making further representations on 21 July 2014. These representations contended, *inter alia*, that revocation ought not to occur as Mr Shams had not committed any further offence, that he had taken positive steps to maintain a lawful presence in the United Kingdom and was not at risk of future misconduct, and that the revocation would cause him 'extreme difficulties' in finding employment and in 'finding a place in society'. No particulars were provided. In an accompanying statement dated 08 July 2014 Mr Shams indicated that he built good relationships with respectable friends and with the local community. He indicated that, because of the expiry of his travel document while in prison, he encountered great difficulty in finding a job. No further details of this difficulty were provided. He indicated that he continued to attend training courses and was trying to work with the probation services to find employment. He then indicated that he was in the process of setting up his own building company. Mr Shams stated, without giving particulars, that if his ILR were revoked this would hold him back from developing the life and positive future he was working so hard to build. The representations were also accompanied by reference letters from a number of individuals including a case manager with Working Links (an organisation helping ex-offenders), a friend who was soon to start a solicitors' training contract, and someone who was described in the First-tier Tribunal determination as his former chemistry teacher.
6. On 14 August 2014 Mr Shams was notified of the possible application of section 72 of the Nationality, Immigration and Asylum Act 2002 which operated a presumption that, as he was sentenced to More than two years imprisonment, he had been convicted of a particularly serious

crime and therefore constituted a danger to the public. Further representations from his previous solicitors contended that Mr Shams had obtained his CSCS card for construction and had obtained a Level 1 certificate in Electrical Installation and had attended mentoring training. It was claimed that the probation service significantly decreased his risk of re-offending since his release from prison. A request was made for the Secretary of State to make inquiries with the probation service and to note Mr Shams' progress.

7. The revocation letter of 09 February 2015 referenced the recommendation for deportation made by the sentencing judge and Mr Shams previous convictions and cautions for possession of controlled drugs. The letter noted that, while Mr Shams' removal to Iran could lead to a potential breach of Article 3, he was still someone liable to deportation. The letter referenced the Secretary of State's earlier letter confirming that Ms Shams' refugee status was not being withdrawn. The revocation letter then considered whether the section 72 presumption applied to Mr Shams. The Secretary of State noted the seriousness of Mr Shams' offending. The Secretary of State was of the view that Mr Shams posed a danger to the community in light of the seriousness of his offending, the recommendation for deportation made by the sentencing judge, the absence of evidence of his attendance on victim awareness courses and Mr Sham's alleged lack of remorse. There was also said to be a lack of evidence that Mr Shams had actually followed up on his mentoring courses.
8. In a witness statement prepared for the First-tier Tribunal appeal hearing Mr Shams indicated that he was remorseful and that he had not committed any further offences and had not been in any further trouble with the police. He confirmed that he had approached his probation officer to ask for a risk assessment report but was told that one could only be provided on request by the Home Office. The Home Office had ignored letters written by his solicitors to make such a request. Mr Shams reiterated that he was facing 'immense difficulties' given that his residence permit and travel document had not been returned to him by the Home Office. He was unable to seek employment or any form of official status in the absence of these documents. He claimed it was 'almost impossible' to seek to secure a positive and settled future if his status were revoked and he were instead given temporary residence. No further clarification was provided in respect of this last assertion.

The First-tier Tribunal hearing and decision

9. At the hearing before the First-tier Tribunal the Judge was provided with further documents including a letter from the Secretary of State to the London Probation Service dated 31 March 2015 stating that Mr Shams' case was being reviewed, noting that he had been assessed at MAPPA category 2, level 1, and inquiring as to whether he was still at the same level.

10. Mr Shams gave oral evidence at his hearing which was summarised by the Judge at paragraph 16 of his determination. In his oral evidence Mr Shams stated, *inter alia*, that it was very hard for him to live without identification and he was unable to participate in everyday life. Submissions were made by both representatives as recorded in paragraphs 17 and 18 of the determination.
11. Having accurately set out the relevant provisions of sections 72 and 76 of the Nationality, Immigration and Asylum Act 2002 the Judge indicated that the 'broad question' before him was whether the revocation of Mr Shams' ILR was conducive to the public good (paragraph 25). This question had to be considered, according to the Judge, within the context of section 72 as the Secretary of State had put her case firmly in reliance on this section in her reasons letter. The Judge noted, with reference to *EN (Serbia) EWCA Civ 630*, that any "danger to the community" within the terms of section 72 had to be 'real', but that if a person was convicted of a particularly serious crime and there was a real risk of its repetition, that person was likely to pose a danger to the community.
12. The Judge proceeded to consider the evidence before him. The Judge deduced that an earlier NOMS1 report categorized Mr Shams as a violent offender but his level 1 status meant that he had been assessed as not posing a high risk of serious harm. The Judge accepted that Mr Shams' solicitors had repeatedly requested the Secretary of State to obtain an updated risk assessment and was critical of the Secretary of State for failing to do so (paragraph 27). The Judge proceeded to consider the evidence before him relating to Mr Shams' rehabilitation including the character references (paragraph 28). On the basis of this evidence the Judge found Mr Shams had real prospects of finding work. The Judge noted the absence of any positive evidence that Mr Shams now posed any risk of re-offending and rejected the Secretary of State's assertion that Mr Shams failed to show remorse (paragraph 29). Having regard to this evidence the Judge found there was no real risk of the repetition of Mr Shams' offending and concluded that Mr Shams had rebutted the presumption that he posed a danger to the community.
13. The Judge then considered whether the revocation of the ILR would be conducive to the public good (paragraph 30). The Judge found that the revocation was not conducive to the public good as Mr Shams was "*likely to continue to form closer links with the community around him so will not find himself in a situation where he consumes drugs or socialises with those now who are criminally inclined, which are the only circumstances in which he might foreseeably reoffend.*"
14. At paragraph 31 the Judge concluded that the less stable Mr Shams' Leave To Remain, the more difficult it would be for him to provide adequate assurance to employers and others that he is present on a long-term basis. The Judge took into account public interest factors other than risk of re-offending (paragraph 31) and accepted that those interested were relevant (paragraph 32). The Judge found that

rehabilitation attracted a greater significance in circumstances where an individual could not be deported for legal reasons. The Judge found, were Mr Shams to face “... a more uncertain and extended, indeed indefinite, period without settled status, than he has done so far, it is possible that he would no longer be able to maintain the fortitude he has shown so far.” The Judge found it ‘obvious’ that Mr Shams rehabilitation would be promoted by full participation in the community, and that it was not only Mr Shams but the broader community who would lose out if he were again “driven by circumstances to the fringes of society.” Noting that the public policy position struck in the reasons letter accompanying the decision was predicated on a finding that Mr Shams posed a danger to the community the Judge allowed the appeal because he did not consider that the Secretary of State had established that the revocation would be conducive to the public good and allowed the appeal as the decision “was not in accordance with the Human Rights Convention.”

The Grounds of Appeal

15. The Grounds of Appeal contended that the Judge misdirected himself in law as the only thing he needed to consider was whether Mr Shams was liable for deportation and the legal reasons for being unable to deport him. It was submitted that the Judge misdirected himself by looking at the public interest when considering whether the Secretary of State had made out her case under section 76. The Grounds further contended that the Judge’s consideration as to whether Mr Shams constituted a risk to the community was irrelevant for the purpose of the question section 76 posed. The Secretary of State’s reference in the reasons letter only added to the legal reasons as to why Mr Shams was not being deported rather than rendering him not liable for deportation. The section 72 certificate did not materially affect the outcome. The Grounds additionally argued that the Judge was not, in any event, entitled to find that Mr Shams did not pose a danger to the community as he failed to properly assess the severity of the sentence in light of the statutory presumption and he applied a test drawn from *EN (Serbia)* when the Court of Appeal had not set out any particular test. It was finally submitted that the Judge took into account irrelevant factors such as the difficulties Mr Shams would encounter in providing adequate assurance to employers that he is present on a long-term basis. This was said to be irrelevant when considered against the available grounds in section 84 of the Nationality, Immigration and Asylum Act 2002. Criticism was also made of the absence of reasons given by the Judge as to why the decision was not in accordance with the Human Rights Convention.

Submissions at the Hearing

16. Mr Kandola adopted the Grounds and sought to amplify them. The issue of whether Mr Shams constituted a danger to the community under the presumption in section 72 entailed, it was submitted, a separate assessment from that under section 76 of the same Act. In response to my comment that, if the determination were to be read in the context of

the impact of the revocation on Mr Shams' Article 8 rights, there was no reference to sections 117A to B of the Nationality, Immigration and Asylum Act 2002, Mr Kandola submitted that there was no adequate assessment of the actual impact on Mr Shams' private life and the Judge was not entitled to speculate that Mr Shams would be 'driven' to the fringes of society.

17. Mr Behbahani accepted that the structure of the determination caused him problems as the Judge failed to evaluate his factual findings within the framework established by *Razgar* [2004] UKHL 27. The Judge had nevertheless considered all that he needed to do. The Secretary of State's consideration of the public interest was heavily fuelled by the section 72 considerations. It could not therefore be said that the section 72 consideration was irrelevant. It was highly relevant when considering whether Mr Shams' presence was conducive to the public good. It was submitted that the Judge's consideration in this regard was not irrational. It was further submitted that the Judge had properly considered the consequences of revocation. It was submitted that an employer would be 'put off' by someone who only had limited leave.

Discussion

18. The decision that is the subject of this appeal was taken under section 76 of the Nationality, Immigration and Asylum Act 2002. This reads, in material part,

'The Secretary of State may revoke a person's indefinite leave to enter or remain in the United Kingdom if the person -

(a) is liable to deportation, but

(b) cannot be deported for legal reasons.'

19. Section 72 of the Nationality, Immigration and Asylum Act 2002 reads, again in material part,

'(1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).

(2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is -

(a) convicted in the United Kingdom of an offence, and

(b) sentenced to a period of imprisonment of at least two years'

20. Subsection 6 of section 72 states that a presumption that a person constitutes a "danger to the community" is rebuttable by that person.

The Court of Appeal in *EN (Serbia) v Secretary of State for the Home Department & Anor* [2009] EWCA Civ 630 held¹ that the danger to the community under section 72 must be 'real'.

21. Also of some relevance is section 3(6) of the Immigration Act 1971. This states that "*a person who is not a British citizen shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so.*"
22. The Grounds of Appeal appear to argue that public interest considerations are not relevant when assessing the decision to revoke an individual's ILR under section 76 of the 2002 Act. The Ground contend that all the Judge needed to do was to consider whether Mr Shams was liable for deportation and look at the legal reasons as to why he cannot be deported. The grounds claim that consideration as to whether an individual constitutes a danger to the community is irrelevant when assessing whether a decision taken under section 76 is lawful.
23. I cannot accept this contention. The revocation of ILR is, for the purposes of this appeal, an immigration decision under s82(2)(f) of the 2002 Act. At the date that the Secretary of State's revocation decision was made it could be appealed under the grounds set out in section 84 of the 2002 Act. One of these grounds, at section 84(1)(c), is that the decision is unlawful under section 6 of the Human Rights Act 1998 as being incompatible with an individual's Convention rights. An individual's private life under Article 8 is one of the protected Convention rights. Article 8 is not however an absolute right. An interference with Article 8 can be justified if, *inter alia*, the interference is proportionate in all the circumstances. An assessment of proportionality is essentially a balancing exercise where the impact of the interference on the individual is weighed against the societal interest. This being the case, an assessment of all relevant public interest considerations, including the risk of harm that an individual poses to the public, are highly relevant when considering the lawfulness of a decision taken under section 76. The requirement to take account of all relevant considerations is not abrogated merely because an individual's presence is regarded, by operation of statute, as not being conducive to the public good. The question whether revocation of an individual's ILR is conducive to the public good is a separate and distinct question.
24. The determination does not identify Mr Sham's Article 8 private life as being the ECHR right in play. This is an unfortunate omission. The Judge should have clearly identified what human rights were at issue given that he allowed the appeal on the basis that the decision was not in accordance with the Human Rights Convention. The Judge should have

¹ At [45]

also clearly structured his determination to reflect the assessment he was required to undertake in line with the principles enunciated in *Razgar*. It is however tolerably clear that the Judge had in mind Mr Shams' private life rights. In light of the above assessment I find that the question whether the revocation decision breaches Mr Shams' Article 8 private life does, to a significant extent, depend on whether he constitutes a danger to the community because that is precisely what the Secretary of State, in her reasons letter, identified the principle public interest to be.

25. I can detect no unlawfulness in the Judge's finding that Mr Shams rebutted the presumption that he poses a danger to the community. The Judge took into account the NOMS1 findings and properly noted the absence of any positive evidence that Mr Shams now poses any risk of re-offending. For the reasons given the Judge was entitled to reject the Secretary of State's assertion that Mr Shams failed to show remorse. Having given rational reasons for so doing the Judge was entitled to attach the weight he did to the various character references before him as well as Mr Shams' oral evidence. It is apparent from a holistic reading of the determination that the Judge had regard to Mr Shams' conduct since his release from custody, and that he was acutely aware of the nature and seriousness of Mr Shams' offending and the views of the sentencing Judge. While the Judge may have been generous in his assessment it cannot be said that he failed to take account of any relevant considerations, or that he attached weight to irrelevant factors, or that his reasons were unclear or his conclusion one not within the range or reasonable conclusions open to him.
26. Having found that the Judge was entitled to conclude, on the evidence before him, that Mr Shams did not pose a danger to the community, it is now necessary to consider whether, in accordance the remaining grounds, the Judge's overall Article 8 conclusion was one he was entitled to reach.
27. At paragraph 30 the Judge found that the revocation was not conducive to the public good as Mr Shams was "*likely to continue to form closer links with the community around him so will not find himself in a situation where he consumes drugs or socialises with those now who are criminally inclined, which are the only circumstances in which he might foreseeably reoffend.*"
28. It is difficult to ascertain from the Judge's reasoning how the revocation of ILR would prevent Mr Shams from continuing to form closer links with the community. He will still have lawful residence in the United Kingdom, albeit limited to 6 months with the likelihood of renewal, and he would still be entitled to work. There was no evidence before the Judge that the grant of limited leave to remain would lead to Mr Shams finding himself back with the criminally inclined. There was no other identified barrier that could conceivably prevent Mr Shams from establishing closer community links.

29. I additionally find that there has been insufficient analysis of the consequences and impact on Mr Shams of the provision of rolling grants of limited leave to remain (which would follow the revocation of his ILR). While it has been recognised that the cumulative effect of the restrictions on a person with six months leave can affect that individual's private life (*R (C) v Secretary of State for the Home Department* [2008] EWHC 2448 (Admin); *Boroumand, R (on the application of) v Secretary of State for the Home Department* [2010] EWHC 225 (Admin)), the relevant cases do not indicate that the operation of the system in general amounts to a disproportionate interference with an individual's private life.
30. In *Boroumand* the Administrative Court held, (at [85]):
- “In principle, if the Secretary of State is entitled not to give a person humanitarian protection because that person has committed a serious crime it is neither irrational nor disproportionate to limit the normal period of leave. Mr Southey accepted for the purpose of this case that there is nothing incompatible with Article 8 in granting leave for periods of six months provided, however, that applications are determined promptly. That is clearly correct. As HHJ Jarman QC stated in C's case:
- “... where, as here, the claimant has committed what is undoubtedly a serious offence, has been the subject of deportation and the only reason he has not been deported is the very commission of that offence, it is proportionate to adopt and implement a policy of giving discretionary leave to remain for periods of six months in order to review not only the claimant's conditions but also the conditions in the country to which deportation might be sought.” (at [39])”
31. I find further that the decision lacks any satisfactory assessment as to the degree of difficulty Mr Shams claims he would encounter in finding employment. The evidence before the Judge suggested Mr Shams wished to become self-employed and had taken steps to establish his own company. If so, it is difficult to see how having time-limited leave to remain would materially impact on his ability to maintain his self-employment. Nor is there any satisfactory assessment as to why Mr Shams would be unable to obtain work as an employee. Any grant of limited leave to remain would be accompanied by a condition entitling him to employment. Mr Shams produced no independent or reliable evidence that he had, or would be refused employment as the beneficiary of time limited leave. His concerns, as expressed in his statement, relating to his inability to seek employment or a form of official status, was occasioned by the absence of a residence permit or travel document, not by the duration of any leave granted to him.
32. Mr Shams has not otherwise identified how his private life has, or will be, affected by the revocation decision. There was no evidence and no suggestion that Mr Shams' mental state would be so adversely affected by the revocation of his ILR and the subsequent grant of time limited

leave such as to invoke his private life rights (in line with *Bensaid v. United Kingdom* (application 44599/98)).

33. Whilst I accept in principle the First-tier Tribunal Judge's comments that the issue of rehabilitation bears more heavily when assessing the lawfulness of a revocation decision, I am not satisfied there was a sufficient evidential basis before the Judge such as to entitle him to find that Mr Shams would be unable to maintain the fortitude he has thus far shown should his ILR be revoked. There was no evidence to support the highly speculative finding that Mr Shams would be "*driven by circumstances to the fringes of society*". The Judge also engaged in an unwarranted degree of speculation when he found that it would be difficult for Mr Shams to provide adequate assurance to employers and others that he is present on a long-term basis. There was no evidence that any such difficulties that may present themselves would prevent Mr Shams from becoming self-employed or obtaining employment. As has already been stated, the only difficulty in obtaining employment identified by Mr Shams in his evidence stemmed from the absence of his residence permit, which was being held by the Secretary of State. But the grants of limited leave would be evidenced in suitable documentation indicating his entitlement to work.
34. I am satisfied that the Judge's conclusions in respect of the impact of the revocation of ILR and the likely subsequent grant of time-limited leave to remain marred by unsupported speculation and without support in the evidence before him. I consequently find that the Judge has materially erred in law.
35. Pursuant to section 12(2) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision. I must either remit the case back to the First-tier Tribunal or remake the decision myself. Mr Behbahani submitted that, in the event that I identify a material error of law, I should relist the appeal to enable further evidence to be provided in respect of Mr Shams' private life. I decline to follow that suggestion. Mr Shams, and certainly his legal representatives, should have been fully aware of the issues at play in the appeal against the section 76 decision. Mr Shams had sufficient opportunity to produce all material evidence at his appeal before the First-tier Tribunal. Mr Behbahani did not identify what type of further evidence could be provided. In these circumstances I deem it appropriate to remake the decision based on the evidence before the First-tier Tribunal and the First-tier Tribunal's factual findings.
36. Following my assessment of the First-tier Tribunal's errors of law, and in particular, the absence of any satisfactory evidence that Mr Shams' ability to obtain employment or become self-employed would be significantly inhibited by the revocation of his ILR and the grant of time-limited leave renewable at 6 monthly intervals, I am satisfied that the decision does not constitute a disproportionate breach with his private life rights. In reaching this conclusion I have considered the seriousness of his offending as disclosed in the overall sentence of 12 years imprisonment. I take into account the First-tier Tribunal's finding that he

does not constitute a danger to the community, the various character references, and the finding that he has real prospects of finding work. I also take into account the greater emphasis that can legitimately be placed on the issue of rehabilitation. I take specific account of the factors identified in sections 117B of the Nationality, Immigration and Asylum Act 2002, and note Mr Shams proficiency in English and the evidence suggesting he is capable of being financially independent. I am not satisfied however that there is a sufficient basis to indicate that Mr Shams will feel himself so much more alienated from society that he is 'compelled to the fringes'. I also take into account the fact that, by operation of statute, his presence is not conducive to the public good, and, as stated by the First-tier Tribunal, the need to reassure the public that action will be taken in appropriate circumstances where a person has failed to respect the law. Having weighed all these factors in the balance I find that the revocation decision does not constitute a disproportionate interference with Mr Shams' private life.

Decision

The decision of the First-tier Tribunal contained a material error of law. I remake the decision, dismissing Mr Shams' appeal on human rights grounds.

No anonymity direction is made.



Signed
Upper Tribunal Judge Blum

19 January 2016
Date