Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09398/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 January 2019	**On 23 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

MR I M
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Profumo, counsel
For the Respondent: Mr Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Iran born on 2 February 1989. The appellant had claimed asylum on the basis of his conversion to Christianity. That claim had been refused and his appeal was dismissed by the First-tier Tribunal in April 2017. That decision was upheld on appeal to the Upper Tribunal. The appellant made a fresh asylum claim on the grounds of his religious conversion and, additionally, his political activity in the UK. The respondent refused his fresh claim on 12 July 2018. Judge of the First-tier Tribunal Cohen ("the FTTJ"), in a decision promulgated on 11 October 2018, dismissed his appeal.

2. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 19 November 2018 who found there were arguable errors of law in the FTTJ's decision.

3. Before me, Ms Profumo adopted the grounds of appeal. She also sought to amend those grounds. With regard to ground 5, she had been provided by counsel instructed for the appellant at the First-tier Tribunal hearing with a note of the evidence of Reverend Young, one of the appellant's witnesses. With the agreement of Mr Kotas, for the respondent, I was provided with a copy. She sought to amend the grounds of appeal at paragraphs 21 and 22 to submit that the FTTJ had made errors of law not only in failing to give adequate reasons for his decision but also having based his decision on a mistake of fact as regards the appellant's evangelising. She submitted that the FTTJ had failed to engage with the appellant's own evidence that he had evangelised outside the church; he had overlooked or discarded Reverend Young's evidence that he was aware, albeit not directly, that the appellant had evangelised in the community. Mr Kotas did not object to this amendment, indicating that he could address this in his oral submissions. I therefore allowed the amendment to be made.

4. Ms Profumo made detailed oral submissions. This appeal was pursued on eight grounds which are summarised in the sub-headings in the application as follows:

    1. the approach to political activity

    2. the approach to evidence of encounter with Ettellat.

    3. Incorrect and unjustifiable disregard of expert evidence.

    4. Incorrect approach to documents.

    5. Incorrect approach to evidence of church members and church attendance.

    6. Failure to consider binding authority and evidence of risk posed on return to an Iranian airport.

    7. Incorrect approach to evidence of appellant's monarchist sympathies.

    8. Incorrect approach to question of **Devaseelan [2002] UKIAT 00702** credibility.

5. I also heard the oral submissions of Mr Kotas who, in summary, made the case for there being no material errors of law.

Discussion

6. I consider the grounds in the order in which Ms Profumo raised them in her oral submissions. The following sub-headings are those in the appellant's application to appeal to this tribunal.

Ground 3 – incorrect and unjustifiable disregard for expert evidence

7. The appellant had produced an "authentication report" by Samim Rashti who had been instructed by the appellant's solicitors to "provide an authentication report of a prescription, a Real Estate Contract, and county [sic] expert report". The FTTJ finds as follows at [31] with regard to this report:

> "… I have significant concerns with this report. The expert does not attach a CV. The English in the report is not of a high quality. There are typographical errors.

> The expert was unable to verify the prescription. In the absence of the same he appears to have contacted a friend in Iran which appears highly unprofessional. He indicates that he has a number of genuine real estate documents in his archive that indicating [sic] the source of the same. He indicates that he has checked the appellant's Facebook account. The same however have a very limited number of postings with increased activity around the dates of his various appeal hearings. The authenticity of the real estate document is based upon a telephone call to the director of a property company in Iran. The expert accepts the appellant's credibility at face value and indicates that the documentation appears genuine. I however as indicated above query the methodology of the expert and his ability to authenticate this documentation. In the light of the same I attach very little weight to this report.

8. It is agreed by the parties before me that the expert had indeed provided a CV, albeit not entitled as such. It is a document at page 33 of the appellant's bundle which lists the expert's "Personal Background and Expertise" as is stated in the heading to it. It is detailed and comprehensive. Thus the FTTJ erred in finding a CV had not been provided.

9. The FTTJ inferred that the degree of weight to be given to the report was undermined by the author's poor use of English and typographical errors. It is not suggested, however, in the decision that the content of the report was in any way unintelligible or incoherent as a result. Given that English is not the first language of the expert and the absence of any suggestion by the FTTJ that the report lacked cogency, this criticism has no bearing on the ability of the expert to give such evidence or the quality of the content.

10. The FTTJ also criticised the expert's reliance on others for verification of the documents. The expert makes various comments on the real estate document. He has confirmed various features of the document, cross-checked the telephone number of the real estate agency which issued it by telephoning the agency himself, telephoned the real estate director on Skype who confirmed the details in the contract. He concluded that "this document, in contrast, can be considered reliable to support any details given by [the appellant] as he was present in the real estate on Monday 29/02/2016". The FTTJ states:

> "the authenticity of the real estate document is based upon a telephone call to the director of a property company in Iran".

This is a misrepresentation of the expert's evidence which is that he contacted the "Real Estate Director Mr Yazdan on Skype, I asked him about this contract by the reference number 20160, and he confirms the details … were correct … Both party (seller and buyer) were present in the office when they signed the contract, otherwise the lawyer name should be given." While it is not clear from the report whether the Director was the same person as that who signed the contract, or whether the director saw the appellant in his office, it is clear from the expert's report that he was in contact with the Director of the real estate agency which purportedly issued the contract. Thus, while there may be scope for criticism of the report as regards the knowledge of the director, the actual criticism of the FTTJ is not sustainable on the evidence. The FTTJ's finding that "the authenticity of the real estate document is based upon a telephone call to the director of a property company in Iran" is based on a misunderstanding of the expert's evidence.

11. The FTTJ states at [31] that the "expert accepts the appellant's credibility at face value". This finding is not sustainable on the content of the expert's CV in which he provides various

statistics to demonstrate the number of occasions on which he finds documents to be genuine and, conversely, not genuine. The expert also makes specific reference to his duties as an expert witness. He states "I understand that credibility assessments are a matter for the court and that my duty is solely to provide my expert opinion on the authentic [sic] of the documents provided to me". In the light of these statements, the FTTJ's finding that the "expert accepts the appellant's credibility at face value" is not sustainable on the evidence.

12. In **FS (Treatment of Expert evidence) Somalia [2009] UKAIT 00004** the Tribunal held that Immigration Judges have a duty to consider all the evidence before them when reaching a decision in an even handed and impartial manner. In assessing the evidence before them they must attach such weight as they consider appropriate to that evidence. It may on occasions be appropriate to reject the conclusions reached by an expert. What is crucial is that a reasoned explanation is given for so doing. The FTTJ's reasons for giving "very little weight to this report" are inadequate. The finding is tainted by error of law.

Ground 4 – Incorrect approach to documents

13. It is submitted the FTTJ failed to take into account the appellant's explanation for the late production of original documents which had not been provided at the First-tier Tribunal appeal hearing in 2017. At that hearing the appellant had relied on copy documents only. In any event, it is submitted, late production did not entitle FTTJ to discount them. It is submitted the FTTJ purported to apply **Tanveer Ahmed** at [32] of the decision but did not address his mind to the multiple stages of that authority; he did not consider the documents in the round. It was submitted that this ground was parasitic to Ground 3.

14. At [30] the FTTJ notes the appellant's explanation for the late production of the documents thus:

> "The appellant referred to documentation which sought to indicate that he was in Iran after being in Greece and indicated that he had sold property. The appellant has produced property documentation and a prescription in support of his claim to have returned to Iran. The appellant was asked why he could not produce these earlier and indicated that official documents and with the court [sic]. This explanation is illogical in respect of a prescription. The appellant still does not explain why when he was put on notice in April 2017 that the original documentation was required that he only obtained the same in summer of 2018. I do not find that the appellant has produced a credible explanation in respect of the significant delay in producing this documentation".

The difficulty with this aspect of the decision is that the FTTJ has only provided a reason for discounting the explanation relating to the production of the prescription. He has not addressed the appellant's explanation for the late production of the real estate document and why, by inference, he rejects it (as can be inferred from the final sentence of this paragraph). An adverse credibility finding must be grounded in the evidence. This finding is inadequately reasoned.

Ground 5 – incorrect approach to evidence of church members and church attendance

15. I have some concerns about the FTTJ's statement that "it is not in Reverend Young's interests to be sceptical about the appellant's motives". Whilst I do not accept the submission that such a comment "might be thought to preclude the possibility of any church member ever giving

evidence in support of genuine conversion" such a finding is not in line with the authorities on the issue, culminating with **TF (Iran) v SSHD [2018] CSIH 58.**

16. At [33] of the decision, the FTTJ notes "Reverend Young and the Bishop of Willesden have written in support of his appeal and Reverend Young has attended before me to give evidence in support of the same. …. Reverend Young and the Bishop of Willesden do not mention that the appellant has undertaken any of Angela activities [sic] which is discrepant with the appellant's own evidence. One would expect them to know about such matters if he had." I have been provided with a contemporaneous note of Reverend Young's the oral evidence before the FTTJ, prepared by the appellant's previous counsel. He told the FTTJ, in response to a question as to whether he was aware of any evangelising activity: "he's come to church with people he knows, usually other Iranians. Met with a girl called Mimi, pastor in Ealing, sometimes done street evangelism." Reverend Young was later asked what else he knew about the appellant evangelising within the Church of England and replied: "No I don't, I see him when comes to church, I've seen him at social occasions at our house. He's coming to practice [sic] faith in context of worship. Couple of example, practiced [sic] what seems to me to be evangelism". Reverend Young was asked if the appellant was bringing Iranians to Church and replied "yes". This is evidence of the appellant evangelising and it is inaccurate therefore for the FTTJ to state that Reverend Young had not mentioned any evangelising activities (which is what I take the reference to "Angela activities" in the decision to mean). This is an error of fact.

Ground 1 – incorrect approach to political activity.

17. It is submitted that the FTTJ's findings showed he had failed to have regard to the objective material that the Iranian authorities monitored protests in other countries. It is submitted the FTTJ had erred in requiring the appellant to be a leader or organiser of the event or hold a significant role to be at risk on return; this was inconsistent with the objective material.

18. The appellant's asylum claim based on his sur place political activities in the UK was a new matter which had not been before the Tribunal in 2017.

19. The appellant had provided a photograph of his attendance at a demonstration against the Iranian government outside the Iranian Embassy in London in 2018. Ms Profumo noted the FTTJ found that this was self-serving because the appellant was facing in a different direction to others. However, the FTTJ does not make findings at [10] where he makes this point; at [10] he merely identifies the evidence and the respondent's reasons for refusal. He does not make a finding.

20. At [38] the FTTJ finds the "appellant has undertaken limited political activity in the UK but he is not a leader is not prominent and participated in a demonstration involving thousands of people and I do not find that these activities would put him at risk upon return to Iran. He is not a member of a political organisation." While this may be a valid finding it is unreasoned and fails to take into account the guidance in **BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 36 (IAC)** where the Tribunal held that, given the large numbers of those who demonstrate here and the publicity which demonstrators receive, for example on Facebook, combined with the inability of the Iranian Government to monitor all returnees who have been involved in demonstrations here, regard must be had to the level of involvement of the individual here as well as any political activity which the individual might have been involved in Iran before seeking asylum in Britain. The appellant has only attended one demonstration. While it correct he is not a political leader and does not hold a significant

role, the FTTJ should have considered the appellant's social media evidence as well as the purpose of the demonstration, the documentary evidence of media coverage in Arab News and the location of the demonstration, when making a finding as to the degree of risk of identification, if any, arising from his attendance at one demonstration outside the Iranian Embassy. The failure to take these matters into account renders unreliable his assessment of the risk arising from his sur place activities. Even if the appellant's motivation for attending the demonstration was not accepted by the FTTJ, he should have considered the impact of his attendance pursuant to the guidance in **BA (Demonstrators in Britain – risk on return)**.

Ground 6 – Failure to consider binding authority and evidence of risk posed on return to an Iranian airport

21. It is submitted the FTTJ failed to address at all the risks on arrival at an Iranian airport. It had been submitted in the appellant's supplementary skeleton argument that **AB & Ors (Internet activity – state of evidence) Iran [2015] UKUT 0257 (IAC)** applied in that "some people were asked about their internet activities on arrival and our client would be at risk as his activities on facebook and blog would identify him as a converted Christian" (paragraph 27 of the skeleton). It was submitted that, irrespective of the motivation for the appellant's activities in the UK and the impact of the expert evidence, **AB (Internet activity – state of evidence)** indicated the appellant would be at risk at the airport on arrival. It was submitted that the appellant's posts on facebook and other social media would put him at risk. It was submitted that the FTTJ's limited findings on this at [44] were inadequate.

22. Mr Kotas submitted that the appellant's internet activities were insufficient to give rise to adverse interest on arrival, both in relation to his claimed conversion and his political activities. He submitted the appellant would state on return that he had made a false asylum claim on religious grounds that he had blogged to support his asylum claim. It was submitted that, if he told the truth, he would not be at risk. Mr Kotas drew my attention to paragraph 467 of **BA (Demonstrators in Britain – risk on return)**: the mere fact of being in the UK for a long period would not lead to persecution.

23. Irrespective of his adverse findings on credibility and the appellant's motive, the FTTJ was required to consider risk on return. The country guidance is in **BA (Demonstrators in Britain – risk on return)**. **AB (Internet activity – state of evidence)** makes it clear in the headnote that "The material put before the tribunal did not disclose a sufficient evidential basis for giving country or other guidance upon what, reliably, can be expected in terms of the reception in Iran for those returning otherwise than with a "regular" passport in relation to whom interest may be excited from the authorities into internet activity as might be revealed by an examination of blogging activity or a Facebook account. However, this determination is reported so that the evidence considered by the Upper Tribunal is available in the public domain." The FTTJ's findings with regard to the appellant's internet activities are limited: he refers to the "appellant's very low-level political activities in the UK [having] been undertaken purely to bolster his asylum claim". He states they "would not have come to the attention of the Iranian authorities. His social media postings are few and far between and would not place him at risk". There is no assessment of the content of the appellant's social media posts or whether they would be perceived to be anti-government or put him at risk. The FTTJ relies principally on the appellant's motive for his political activities and the number of posts rather than their content.

24. In **BA (Demonstrators in Britain – risk on return)** the Tribunal held that a returnee who meets the profile of an activist may be detained while searches of documentation are made.

Those who have exited Iran illegally are likely to be questioned. The FTTJ has not addressed the issue of whether the appellant left Iran illegally. It could perhaps be inferred from the adverse credibility findings that the FTTJ considered he did not, but the decision is silent on this and it is an issue which should have been addressed specifically because it is a risk factor.

25. Paragraph 467 of **AB (Internet activity – state of evidence)** provides as follows:

> "The mere fact of being in the United Kingdom for a prolonged period does not lead to persecution. However it may lead to scrutiny and there is clear evidence that some people are asked about their internet activity and particularly for their Facebook password. The act of returning someone creates a "pinch point" so that a person is brought into direct contact with the authorities in Iran who have both the time and inclination to interrogate them. We think it likely that they will be asked about their internet activity and likely if they have any internet activity for that to be exposed and if it is less than flattering of the government to lead to at the very least a real risk of persecution.

26. The appellant has provided documentary evidence of some of his internet activity. That evidence warranted close scrutiny by the FTTJ in order to decide whether, if exposed on arrival, it would put the appellant at risk on return. The FTTJ has only considered the quantity of such material, not its content ([44] refers). In **AB (Internet activity – state of evidence),** at [455] the Upper Tribunal rejected the submission for the respondent that "a high degree of activity is necessary to attract persecution". It stated "It is probably the case that the more active persons are the more likely they are to be persecuted but the reverse just does not apply. We find that the authorities do not chase everyone who just might be an opponent but if that opponent comes to their attention for some reason then that person might be in quite serious trouble for conduct which to the ideas of western liberal society seems of little consequence." The FTTJ was required to undertake a rounded assessment of the appellant's internet and other activities in the UK in order to assess the extent, if at all, he was at risk on return. His assessment was insufficient and inadequate.

Ground 2 – approach to evidence of encounter with Ettellat

27. The FTTJ found at [35] there was no evidence to support the appellant's claim that the individual who posted on social media was a member of Ettelat. It is unlikely the appellant would have been able to provide such information given the nature of that organisation. The FTTJ found that the "fact that this person commented positively in respect of the appellant's posting of the photo of himself by the graveside of the daughter of the Shah of Iran to be indicative of the fact that they are not a member of the security services in Iran as claimed". This is a sustainable conclusion notwithstanding the presence of other evidence as to the identity of the individual and his contact with the appellant.

Ground 7 – incorrect approach to evidence of Appellant's monarchist sympathies

28. By inference, the FTTJ found the appellant had been in France and visited the grave of the daughter of the Shah of Iran. He noted the photograph taken of the appellant there. He found "this" (presumably the photograph) "would not put the appellant at risk upon return to Iran so long after the Shah was dethroned. There is no other indication of the appellant being a monarchist". It is claimed this photograph was posted on facebook in 2016. A copy was provided. The appellant's visit to the graveside was not the seminal issue, it was the posting of the photograph in 2016. The FTTJ has failed to address the impact of that post on

facebook, an act which, it is claimed, demonstrated his monarchist sympathies at the time. Instead the FTTJ decided that the appellant's attendance at the graveside would not put him at risk "so long after the Shah was dethroned". The issue of the facebook post is relevant to the appellant's perceived profile in Iran and the risk on return. It has not been considered specifically in that context.

Ground 8 – Incorrect approach to question of Devaseelan credibility

29. The earlier adverse credibility findings of the First-tier Tribunal in April 2017 were based, in part, on the failure of the appellant to provide original documents in support of his appeal at that time. Those original documents were produced at the appeal before the FTTJ in 2018. I have already found that the FTTJ erred in his assessment of the original documents.

30. **Devaseelan** is authority for the proposition that the first Tribunal's determination stands as an assessment of the claim the appellant was making at that time (in this case an appeal against the decision to refuse his protection claim solely on the grounds of his conversation to Christianity). That first decision was not binding on the FTTJ. The first decision was the starting point and facts post-dating that decision could be considered. The FTTJ was required to treat with circumspection relevant facts which had not been brought to the attention of the first Tribunal. If issues and evidence in the first and second appeals were materially the same, the second Tribunal should treat the issues as settled by the first decision, rather than being relitigated. While there will be occasions when the circumstances surrounding the first appeal are such that it would be right for the second Tribunal to look at the matter as if the first determination had never been made, this is not one of those situations. The FTTJ was right to consider the circumstances in which the original documents were produced after the first hearing. However, it is not clear the FTTJ applied the guidance in **Devaseelan** as regards the original documents which the appellant produced in 2018 to demonstrate his presence in Iran in 2016. There is no reference by the FTTJ to the appellant's evidence in his witness statement that he had been advised by his representatives that "an emailed copy will be sufficient so I did not even attempt to try and get the originals. I have since managed to get the original deed and prescription proving that I was in Iran from January 2016 to May 2016." The FTTJ merely had regard, judging by the content of [30], to the appellant's oral evidence on the issue. This his assessment was incomplete.

31. Furthermore, as I have found above, his assessment of the expert evidence regarding the authenticity of those documents was erroneous. I do not go so far as to find that the FTTJ was entitled to "revisit… the previous judicial credibility findings" (as is submitted in the grounds to this tribunal), because those findings were made on a wider basis than merely the lack of original documentation to support his claim to have been in Iran in 2016. Nonetheless the FTTJ did not apply the guidance in **Devaseelan**: he states at [41] that, "in the light of my adverse credibility findings herein, I wholeheartedly adopt the findings of the previous Immigration Judge". This was not the correct approach which, according to **Devaseelan**, was to use the first decision as his starting point.

32. I have identified above the adverse credibility findings which are inadequately reasoned. As was said by Keene LJ in **IA (Somalia) v Secretary of State for the Home Department [2007] EWCA Civ 323**:

> "… in public law cases, an error of law will be regarded as material unless the decision-maker must have reached the same conclusion without the error … [A]n

> error of law is material if the Adjudicator might have come to a different conclusion … "

33. The FTTJ's reasoning for ascribing very little weight to the expert report is flawed. He gave greater weight at [32] to the background material regarding the prevalence of fraudulent documents in Iran. The basis for his preferring the background material, and therefore his finding that the original documents warranted very little weight, is erroneous. The authenticity of the documents is but one aspect covered in the expert report which underpins the appellant's claim in several respects. Mr Rashti also gives his opinion on the risk on return on the grounds of the appellant's claimed conversion, support for the Iranian monarchy and political activities in the UK, including his activities on social media. While the FTTJ gives "very little weight", i.e. some weight, to the report, he makes no reference to it in his assessment of the risk on return. Thus the erroneous assessment of the weight to be given to the expert report also impacts on the FTTJ's findings on risk on return. While I acknowledge that many of the FTTJ's adverse credibility findings are not challenged before me, taking into account the flawed assessment of the expert evidence and the unsustainable adverse credibility findings, identified above, I find that the decision as a whole is infected by errors of fact and law and is untenable. While it is possible that the FTTJ might have reached the same conclusion, it cannot be said that he must have done so, given the number and wide-ranging nature of the errors.

34. The decision must be set aside in its entirety. The parties were agreed that, in such circumstances, it was appropriate for the appeal to be decided afresh in the First-tier Tribunal.

Decision

35. The making of the decision of the First-tier Tribunal involved material errors on points of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to Section 12(2)(b)(i) of the Tribunal Courts and Enforcement Act 2007 and Practice Statement 7.2(v), before any judge aside from FTTJ Cohen.

36. I maintain the anonymity direction made in the First-tier Tribunal.

A M Black

Deputy Upper Tribunal Judge Dated: 11 January 2019

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

A M Black

Deputy Upper Tribunal Judge Dated: 11 January 2019