Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09374/2018

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 H S
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Hodson
For the Respondent: Mr Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Iran born on 19 September 1983. He appealed against a decision of the respondent on 16 July 2018 to refuse his protection claim. 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 Lambert on 7 November 2018 on all grounds in the application.

3. Before me, Mr Hodson adopted the grounds of appeal. He made further oral submissions. He noted the appeal been determined on a series of adverse findings. The principal issue was whether the FTTJ had approached the decision with care and anxious scrutiny. He accepted it was relatively detailed. In summary, however, the reasoning was inadequate and based on mistake of fact.

4. Mr Kotas, for the respondent, accepted the FTTJ has mischaracterised the military documentary evidence but submitted it was clear the FTTJ had been referring to the appellant's military record, as adduced. Mr Kotas accepted the FTTJ's findings were inelegant insofar as the absence of an expert report was concerned. However it was clear he meant merely that it was another factor which did not assist the appellant; the outcome of the appeal did not hinge on this finding. Mr Kotas submitted that the grounds were an attempt, principally, to relitigate the appeal. He submitted the errors of the FTTJ were not material to the outcome; the remaining findings were sufficient for an adverse finding on credibility. The decision was overall a rational one. The appellant knew why he had lost the appeal; the decision was sustainable and the FTTJ would have reached the same decision notwithstanding two erroneous findings about visits by the appellant's brother and the absence of an expert report.

Discussion

5. I take the grounds in the order in which they are set out in the application for permission to appeal, as expanded upon by Mr Hodson.

6. At [30] of the decision, the FTTJ made an adverse credibility finding on an alleged inconsistency in the appellant's evidence concerning the sequestration of his family home in Iran. The appellant had provided, at the hearing on 28 August 2018, a letter dated 23 August 2018 from an attorney in Iran, Dr Hadi Azari, who maintained that the appellant's father's "residential home" had been sequestrated on account of the appellant absconding while on bail. The appellant's oral evidence was that the family home was in the process of being sequestrated. The appellant now submits that the discrepancy was explained by the recency of the evidence of Dr Azari and the appellant's lack of contact with his family in Iran; Dr Azari's letter had been sent to the appellant's solicitors rather than to the appellant himself.

7. The appellant's appeal statement is dated 15 August 2018. In that statement he says: "the latest news that I have from Iran is that I continue to be actively sought by the Iranian authorities. Forfeiture proceedings are underway [sic], in an attempt to confiscate the property that was lodged as recognizance for my release on bail." In his asylum interview the appellant said he was not in contact with his family in Iran and had not been since his arrival in the UK; however, he was in contact with two of his friends in Iran since his arrival in the UK.

8. The letter from Dr Azari refers to the appellant as his client. He states the case against the appellant "is under legal prosecution". He refers to the appellant's father as being the appellant's guarantor and having put up a property as surety. He states the "deeds to his property – which is his residential home … have been confiscated and seized and his ownership of the property has been annulled in accordance with Article 140 of the Criminal Procedure Code …". It was submitted by Mr Hodson that, as this letter had been sent to the appellant's solicitors, rather than to the appellant himself, the appellant would not have been aware of the content.

9. The FTTJ makes specific reference at [30] to the existence of Dr Azari's letter. He refers to the discrepancy in the evidence being put to the appellant who said the information in Dr Azari's letter was not correct. If Dr Azari were instructed to provide an update on the legal proceedings in Iran by the appellant's solicitors, in order to assist the appellant's case at the appeal hearing, it is unlikely the appellant would not have been aware of the contact between his solicitors in the UK and his attorney in Iran and that he would not have wanted to know the current position in Iran, if the legal proceedings there were genuine, particularly as they impacted on his father personally. Furthermore, although the FTTJ did not make specific reference to it in his findings, I note the appellant's oral evidence at [18] that "the appellant was asked how he obtained his documents and responded in a wrong [sic] was in touch with his father. They managed to email the documents. He was not in touch with his father directly. It was safe to contact the friend, …, through WhatsApp. He had not been in contact with any of his family since he left." Whilst this phrasing is open to criticism, it indicates the appellant was in touch with his father indirectly, through others, and that he had the opportunity to establish the latest position with regard to the sequestration of his father's property. The FTTJ was entitled, despite the fact the letter from Dr Azari had been recently obtained, to find this was a "significant discrepancy in the appellant's evidence going to the core of his claim and damaging to his credibility". There is no challenge by the appellant to the FTTJ's reference to the "ease with which fabricated documentation may be obtained in Iran". Thus it was open to the FTTJ, on the evidence before him, to give no weight to Dr Azari's letter.

10. Mr Hodson accepted that the second ground of appeal arising from the failure of the appellant to refer to his arrest and detention at Part 5 of his screening interview was not the "strongest". I agree: it was open to the FTTJ to make an adverse credibility finding at [31] on the basis of the appellant's denial, when specifically asked at the screening stage, that he had been arrested and detained in Iran. It was submitted in the grounds of appeal that "most applicants take this section of the screening interview to relate to matters other than those for which they have claimed asylum. Indeed, interpreters at screening interviews often point this out to asylum applicants." It is not clear to me on what basis this proposition is made. The FTTJ noted the appellant had been asked whether

> "he had ever been arrested, charged with or convicted of an offence in any country and indicated, no (5.1). He was asked if he was subject to an arrest warrant or wanted by any law enforcement agency for an offence in any country and responded that Sepah were after him to arrest him (5.2). This is discrepant with the appellant's evidence elsewhere indicating that he was arrested and detained and tortured for 9 days in Iran following being released after his father stood surety and lodged his property deeds."

The FTTJ went on to find this

> "a significant discrepancy in the appellant's evidence and damaging to his credibility. The appellant could not explain why he indicated that he had not been arrested in his screening interview [sic] when this discrepancy was put to before me [sic]. It is not the appellant's case that he did not think he was being asked about events in Iran; if that were the case, there might be merit in the grounds. The appellant sought to make 2 amendments to his interview record following the event for [sic] his representatives but did not address this."

The discrepancy had been put to the appellant and he had not provided a reasonable explanation. This finding is fully reasoned.

11. At [32], the FTTJ made an adverse credibility finding on the basis of an inconsistency in the appellant's evidence at question 104 of the substantive interview record. The appellant had consistently maintained his brother, who lives in the UK, had not visited him in Iran. The FTTJ found, on the basis of his answer to question 104, that the appellant had said otherwise. However, as was conceded before me by Mr Kotas, this finding is based on a misreading of the appellant's evidence in interview when taken in conjunction with the FTTJ's note at [15] that the appellant had clarified at the hearing that he had seen his brother in the UK, not in Iran. The finding that the appellant had stated in interview that he had seen his brother in Iran is not sustainable on the interview evidence when the question and answer are read in full. It is clear from the content of his answer to Question 104, namely whether "he" had visited the appellant in Iran, that the appellant, while answering "yes" then went on to refer to another matter. The content of his answer suggests that he had misunderstood that the interviewer was referring to his brother (who was the subject of the previous question). Furthermore, the FTTJ had not taken account of the appellant's explanation as noted at [15] of his decision. He should have indicated why he did not accept the appellant's clarification on the issue. Taken with the appellant's correction, at the hearing ([15] of the decision), this finding at [32] is not sustainable on the evidence before the FTTJ. I consider the materiality of this error below.

12. Mr Hodson submitted the appellant had not provided a "biometric military service card". The FTTJ found at [33] as follows:

> "the appellant claims that he completed his compulsory military service in 2004. He indicated that he needed to obtain a biometric military completion certificate which necessitated him returning to his old barracks and led to his claimed problems. The appellant has produced his biometric military service card. This does not contain details of his blood type, hair colour, weight, height, eye colour and physical defects or the rank of the cardholder during military service. Having regard to the country policy and information note: Iran military service this information is contained on the new biometric card. I therefore find that the card produced by the appellant is inconsistent with the objective evidence and find this to be a further discrepancy in the appellant's evidence and further damaging to his credibility."

13. Mr Hodson and Mr Kotas were in agreement that the document produced by the appellant is entitled (in translation) "Registration Receipt and Receiving the Completion of Service Card", rather than a "military service card" as described by the FTTJ. Mr Hodson submitted that it was an error "to consider evidence that relates only to that card and then make an adverse finding with regard to a document which relates to the completion of service". He submitted there was a clear material difference which the FTTJ had not noticed. I am unable to accept that submission: the FTTJ referred in the same paragraph to the appellant's needing "to obtain a biometric military completion certificate". While he then refers to the appellant having produced a "military service card" this appears, on its face, to have been a generic description of the card produced by the appellant, rather than a specific one. At paragraph 9 (which is not criticised by the appellant before me) the FTTJ notes the appellant's claim that "in 2013 the government announced that the military service card was being changed to digital. The appellant claimed that to complete his application, he travelled to the barracks where he performed military service for December 2012 [sic]. While there he picked up a confirmation that he had before military service there [sic]." Thus it is clear the FTTJ has understood the appellant's case that the document he has produced is a completion certificate. It is clear both from this paragraph and from [33] that the FTTJ was referring to the Registration Receipt and Receiving the Completion of Service Card, albeit not by its specific title, as translated.

Furthermore, the objective material to which the FTTJ refers, the CPIN, makes specific reference to military service completion cards and there is no doubt the FTTJ was relying on this guidance when listing the specific biographical data which was not in the card the appellant had produced. Paragraph 33 of the decision contains no error of fact or law.

14. It is submitted in the grounds of appeal that the FTTJ's finding at [34] that the appellant's photographic evidence of him standing next to "dummy" missiles does not enhance the appellant's case is perverse. It is suggested that it is highly unlikely the appellant would be able to obtain evidence of access to classified sites. It is submitted the evidence is "wholly plausible". The FTTJ had accepted the appellant "undertook military service and the photographs show him next to missiles but the appellant indicated these were dummies and I do not find that the pictures advance the appellant's claim in any way". This is a sustainable finding: the FTTJ was entitled to find the existence of the photographs was a neutral point given that it was accepted he had been in military service. The appellant's case is based not on the mere fact of his military service but issues arising from it. This is not a perverse finding.

15. As regards [35] of the decision, it is submitted the FTTJ based an adverse credibility finding on the failure of the appellant to provide evidence of an arrest warrant. It was submitted the FTTJ should have been aware that the Iranian authorities did not normally serve arrest warrants in the absence of the accused. However, when I asked Mr Hodson the basis for this proposition, he was unable to direct me to any background material or evidence to support it. He said there was evidence that the authorities in Iran were apt not to follow procedures, whatever they were. He noted a US Department of State report to the effect that the arrested person should be informed of charges against them. The FTTJ noted the appellant's claim that an arrest warrant had been issued against him but that the appellant had failed to supply any evidence to substantiate this "despite having obtained some evidence from Iran". The appellant's attorney in Iran, Dr Azari, refers to the appellant having been "summonsed on numerous occasions in order for him to be notified of the accusations against him and based on the trial procedures and given his failure to present himself…". This document does not specifically refer to the existence of a warrant for his arrest. I do not accept the submission that the FTTJ had placed an unreasonable evidential burden on the appellant given the nature of the claimed contact between his solicitors in the UK and his attorney in Iran. Even if, as is submitted, the arrest warrant were not available, it could be expected that the attorney would refer to a warrant if one had been issued. The existence of an arrest warrant would have been recognised by all concerned as a significant factor as regards risk on return. The FTTJ's finding is sustainable on the evidence.

16. The FTTJ is criticised by the appellant for his finding at [36]; it is submitted that the FTTJ failed to understand that the appellant maintained the Bushehr Nuclear Station was also used for Iran's secret nuclear weapons programme. Mr Hodson submitted the drafting of this paragraph was "questionable": the existence of nuclear missiles would not be in the public domain; this paragraph was "borderline perverse". As Mr Kotas pointed out, the only evidence that this facility was being used for secret purposes was the appellant's own. I have had some difficulty following the sense of this paragraph which is poorly phrased but it can reasonably be inferred that the FTTJ accepted the site was a military one and that the documentary evidence demonstrated this. There is no suggestion in this paragraph that the appellant could have been expected to provide documentary evidence that the site was being used for other secret purposes. I agree that such a finding would have been perverse. It can be inferred that the FTTJ merely found that the documentary evidence, including google maps,

did not demonstrate the existence of a claimed secret facility at the military base, merely the military base itself. Importantly the FTTJ did not suggest this was an adverse credibility point. He has treated it as neutral.

17. The FTTJ states the following at [37]:

> "The appellant has failed to submit an expert report in support of his claim which in the light of my findings above I find to be further damaging to his credibility".

Both parties are in agreement that this, on the face of it, amounts to an error of law in that the failure of the appellant to produce such evidence should not be taken against him. I agree that, while it was open to the appellant to obtain an expert report, this could not form the basis for an adverse credibility finding. It was submitted by Mr Kotas that this paragraph is inelegantly phrased; I agree. He submitted that it could be inferred that the FTTJ considered the absence of such a report did not damage the appellant's case but was a relevant factor to be taken into account. I do not accept that submission: it is clear from the decision that the FTTJ found the absence of such a report warranted an adverse credibility finding. That is an error of law. I consider the materiality of that error below.

18. The FTTJ gave weight to the failure of the appellant's brother to attend the hearing albeit he knew about the appellant's "problems in Iran". He found this damaged the appellant's credibility ([38]). Mr Hodson submitted the appellant's brother's evidence would have been hearsay. It was submitted that if the FTTJ considered this evidence would have been helpful he should have indicated why that was. The appellant was himself in contact indirectly with his family in Iran. It could reasonably be inferred that his brother was also and thus that he could have provided evidence of his knowledge of the family situation in Iran, particularly with regard to the sequestration of property there. His evidence might have been hearsay in some respects but it was potentially corroborative in others. While it would have been preferable for the FTTJ to have indicated in what regard the brother's evidence would have been of assistance, it was open to the FTTJ to give some adverse weight to the failure of the appellant's brother to attend to support the appellant or even to give a witness statement.

19. As Mr Hodson submitted, the nub of the appellant's case is that he had access to secret information while a military conscript in Iran. The respondent had averred that, as a conscript, the appellant would not have had access to such information. This was a matter of dispute which the FTTJ had to resolve. It was submitted that the FTTJ's findings at [39] did not adequately address the arguments on both sides. However, that was not the purpose of [39]. The FTTJ, in that paragraph, deals only with the plausibility of a conscript having "access to secret documentation relating to the existence and whereabouts of nuclear missiles". In the grounds of appeal it is submitted that the appellant had explained why he had become privy to such information. The FTTJ does not seek to address that issue in this paragraph, merely the fact of the appellant's being of "lowly conscript rank" as he puts it. Indeed, to his credit, Mr Hodson accepted that the FTTJ's finding in this paragraph might be one which he was entitled to make but it was a key issue and he should have given his reasons for it. I am satisfied that the reasoning is clear from the paragraph: this was a "lowly conscript" who claimed to have been privy to detailed secret and highly sensitive information and, on the face of it, this was inherently implausible.

20. I have considered whether the failure of the FTTJ to deal specifically with the appellant's claim that he had acquired secret information as a result of his relationship with a senior officer can be criticised, as is, by inference, submitted at paragraph 12 of the grounds of

appeal. The FTTJ has considered the evidence in the round; he has identified various strands of the evidence which he finds to be inconsistent. He states at [44] that there were "further discrepancies in the appellant's evidence and evidence which I find to be implausible but which I will not set out in further detail herein". The latter is unclear and adds nothing to the specific findings. This was an issue on which the appellant relied only on his own evidence; thus his credibility was key to this finding. It can reasonably be inferred from the decision taken as a whole that the FTTJ did not find the core of the appellant's account to be credible or reliable. This included the claimed relationship of trust with a senior officer.

21. Mr Hodson indicated that the appellant did not pursue the ground at paragraph 40 of the application to the Upper Tribunal which related to [40] of the decision. I do not therefore consider it.

22. The appellant submits the FTTJ's finding at [41] that it was implausible the appellant was able to escape from his home while under surveillance is an error of law. It is submitted that "no intelligence organization in the world, no matter how sophisticated, can guarantee the prevention of an escape. The Appellant provided a plausible account of escaping in the boot of his neighbour's car". Mr Hodson submitted the FTTJ had merely reached a conclusion without consideration of the appellant's explanation; he had not reasoned his decision. He submitted that sometimes the "implausible happens"; it was not impossible. The FTTJ has given brief reasons for his conclusion that the appellant's account was implausible: he finds that "if the appellant was under surveillance he would not be able to escape with such ease". Thus he has considered the appellant's account of the escape. The appellant's account is that he had disclosed the presence of a secret nuclear facility to others. This was a highly sensitive issue, he was accused of committing an offence punishable by death and he was being guarded while on bail yet claims he was able to leave in the boot of a car from the back of the house. It was open to the FTTJ to find that this was an inherently implausible account given the seriousness of his alleged offence against the state.

23. As regards [42] the Mr Hodson submitted the FTTJ had not considered the background material in the appellant's bundle. He directed me to one document in the appellant's bundle before the FTTJ but was unable to tell me its relevance. There was a further document before the FTTJ (a BBC article relating to the arrest of a nuclear deal negotiator on a spying charge, dated 28 August 2016). In that article a dual national in charge of "banking issues during the two-year negotiations, was arrested for "selling the country's economic details to foreigners"". It is reported he "was a member of a parallel team working on lifting economic sanctions, under one of the main negotiations for the deal". He was released on bail after being held for several days. It was submitted that this case was analogous to that of the appellant and that the FTTJ should have borne it in mind. The FTTJ noted as follows:

> "The appellant claims that he was suspected of an accused [sic] of espionage for which the sentence is death. Despite this he claims that he was released from detention on the depositing of his father's property deeds and father's surety. I find if the appellant was accused was suspected [sic] of such a crime that he would not be released from detention in the manner claimed particularly having been told of the crimes that he was accused of as this would more than likely cause him to attempt to flee the country. I find the appellants [sic] evidence to be further implausible and further damaging to his credibility."

24. It is correct the FTTJ did not refer to the BBC article. However, I do not consider the circumstances of the accused in that article to be analogous to those of the appellant: the

appellant was a member of the military at the material time. His disclosures related to the existence and location of nuclear weapons facilities rather than confidential economic information. His activities were described as espionage against the state and warranted a death sentence if found proved. His actions would have been viewed far more seriously than those of the individual in the BBC article. In the grounds of appeal it is submitted that there is a "wealth of evidence showing high profile prisoners in Iran being released for short periods". This is not the appellant's case: he is not a high profile person in Iran: he is a former conscript of modest rank who claims to have disclosed secret information about the existence and location of a nuclear weapons facility. The finding at [42] does not amount to an error of law; the finding is adequately reasoned.

25. I agree with Mr Hodson that there are numerous typographical errors in the FTTJ's decision which distract the reader. However, the decision is otherwise coherent and its meaning is clear overall.

26. As Mr Hodson himself conceded at the outset of the hearing before me, this is a detailed decision. There is no challenge to the FTTJ's adverse finding at [43] regarding the manner in which the appellant gave oral evidence. Nor is there any challenge to the finding at [45] that it is implausible that the "appellant would meet up with colleagues from some 9 years previously who were members of Sepah and openly talk to them about military secrets that he held and find his knowledge was likely to be highly out of date in any event." These are but two of various adverse credibility findings regarding the appellant's account.

27. I turn to the issue of materiality. 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 … "

28. Taking the decision as a whole, the adverse credibility findings as regards the core of the appellant's claim (in summary that he had disclosed to others secret information, obtained as a conscript from a senior officer, and this had led to the issue of an arrest warrant and the grant of bail) is sustainable on the evidence before the FTTJ. It is not the case that the FTTJ might have come to have a different conclusion were it not for the errors of law identified above. For these reasons, the decision of the First-tier Tribunal does not contain material errors of law in the assessment of the evidence. The decision stands.

Decision

29. This appeal is dismissed.

30. Given the nature of this appeal, the appellant is entitled to anonymity in these proceedings and I make a direction accordingly.

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