



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

Appeal Numbers: AA/06425/2013
AA/06426/2013
AA/06427/2013

THE IMMIGRATION ACTS

**Heard at Columbus House, Newport
On 10 June 2014**

**Determination Sent
On 7 July 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

**M P
M K
M P**

(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms S Nowaparast of Duncan Moghal Solicitors & Advocates
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REMITTAL

1. These appeals are subject to anonymity orders made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the orders and I continue them pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Background

2. The three appellants are citizens of Iran who were born respectively on 22 September 1970, 12 June 1979 and 20 June 2008. The first and second appellants are married and the third appellant is their daughter.
3. The appellants initially arrived in the UK together as visitors on 24 March 2013 with leave valid until 24 July 2013. The second and third appellants left the UK for Iran on 14 May 2013 and returned to the UK on 19 May 2013.
4. On 30 May 2013, the first appellant claimed asylum with the second and third appellant as his dependants. The basis of his claim was two-fold.
5. First, he claimed that he had written two e-books on his work computer which were critical of Islam. Whilst in the UK, the appellant was told that the e-books had been discovered on his works computer. The first appellant's wife and daughter returned to Iran. Whilst they were in Iran, the family house was raided on 15 May 2013 and searched. During that search, the first appellant claimed that incriminating material was discovered and taken away. The first appellant claimed that he has been charged with compromising national security, distributing false articles and insulting Islam. His wife and daughter returned to the UK bringing with them a flash drive (or memory stick) which the first appellant claimed contained the e-books that he had written.
6. Secondly, the appellant claimed that he was in the process of becoming a Christian and would as a result be at risk on return to Iran.
7. On 19 June 2013, the Secretary of State refused the first appellant's claim for asylum and that of the second and third appellant as his dependants. The Secretary of State did not accept the appellant's account that he had written two e-books critical of Islam and that his house had been searched when incriminating material had been discovered. Further, the Secretary of State did not accept that, although the first appellant was in the process of becoming a Christian, he had converted to Christianity and would be at risk as a result. The Secretary of State also refused the appellants' claims for humanitarian protection and under Art 8 of the ECHR.

The Appeal to the First-tier Tribunal

8. The appellants appealed to the First-tier Tribunal. In a determination promulgated on 13 August 2013, Judge Whiting dismissed each of the appellants' appeals. Judge Whiting did not accept the first appellant's evidence that he had written two e-books critical of Islam which had been discovered by the Iranian authorities and which would put him at risk on return to Iran. In addition, Judge Whiting did not accept that the first appellant had genuinely converted to the Christian faith from Islam and would be at risk on that basis as an apostate if he returned to Iran. Judge

Whiting dismissed the appellants' appeals on asylum and humanitarian protection grounds and under Arts 2, 3 and 8 of the ECHR.

The Appeal to the Upper Tribunal

9. The appellants sought permission to appeal to the Upper Tribunal, challenging the judge's adverse finding in relation to the first appellant's claim based upon authorship of the two e-books critical of Islam. No challenge was made to the judge's adverse findings in relation to any risk to the first appellant based upon his conversion to Christianity or to the judge's finding that the appellants' removal would not breach Art 8 of the ECHR.
10. Permission to appeal was initially refused by the First-tier Tribunal on 6 September 2013. However, on 2 October 2013, UTJ Perkins granted the appellants' applications for permission to appeal. The principal basis upon which he did so was that the judge had arguably erred in law in failing to take into account an expert report assessing the authenticity of a document relied upon by the first appellant which he claimed was an official document showing an inventory of the items discovered when his family home was searched by the Iranian authorities on 15 May 2013. The grant of permission was in the following terms.
 - "2. I have to give permission to appeal because it seems clear that an expert report tending to give some weight to a document produced by the appellants was not considered at all by the First-tier Tribunal. The document is in a paginated bundle placed incongruously at the end of a section marked "Case Law" under the heading "Appendix A". I have considerable sympathy with the First-tier Tribunal Judges who have missed it. It was expressly brought to my attention in the grounds. It is arguable that it would have made a difference.
 3. Otherwise the grounds do not impress me although each point can be argued.
 4. My own reading suggests that ground 6 is quite wrong and the letter, read as a whole, supports the First-tier Tribunal's finding that the first appellant voluntarily gave up his job before travelling to the United Kingdom. This is why the former employer looked forward to the possibility of their working together in the future.
 5. Grounds 9, 10 and 11 will require careful explanation. Presently I do not see how the memory sticks can show that the critical documents were ever on a computer owned by the appellant's employers, but that is a matter for argument at the appropriate time.
 6. For a case rooted in an alleged conversion to Christianity the supporting evidence from the Church is very weak.
 7. However, as indicated above, I am quite satisfied that it is arguable that the First-tier Tribunal erred in law by failing to consider an expert report that was before it. The appellants must be astute to show that any error that they establish is material."
11. Thus, the appeals came before me.

The Submissions

12. On behalf of the appellants, Ms Nowaparast relied upon the grounds of appeal. In particular she relied upon the judge's failure to consider an expert report provided by Mr Hedayati-Kakhki dated 2 August 2013 which considered the document relied upon by the first appellant as an inventory issued by the Teheran Revolutionary Court relating to the search of his home by officials on 15 May 2013. In that report, Mr Hedayati-Kakhki states that:

"This Inventory consists of a list of seized items confiscated from the address, including a satellite receiver and its accessories, three photograph albums, a computer with its accessories, camera and CDs, as well as seven prohibited books. The document specifies that the search took place on 15 May 2013 (25/2/1392) and [the first appellant's wife] was present during the search. I can confirm that all necessary legal attributes as well as elements of procedure expected of an inventory are observed within this document"

13. Mr Hedayati-Kakhki goes on in his report to analyse the contents of the document and concludes as follows:

"From what can be observed, the document is procedurally consistent as such inventories are common to be produced at the end of a search and handed over to persons present at the premises at the relevant time. The search warrant itself which authorises a raid will only be shown to individuals present at the premises to justify their actions but will not be served upon them as it is regarded as an internal correspondence between the court and officials undertaking the search."

14. Having stated that, Mr Hedayati-Kakhki concludes:

"In view of the above analysis, I have no reason to doubt the authenticity of this inventory. I must mention that I have only been instructed to comment on the authenticity of this document and for this reason the report is restricted to this aspect of [the first appellant's] case."

15. Ms Nowaparast submitted that the judge had erred in law by failing to take this expert opinion into account. She submitted that it was clear that the document had been relied upon before the First-tier Tribunal and was specifically mentioned in para 30 of the skeleton argument.

16. In addition, Ms Nowaparast submitted that the judge had wrongly assessed the evidence which the first appellant provided of a flash drive on which he claimed the two e-books which he had written were stored. Ms Nowaparast referred to the screen print-out of the flash drive at page 8 of the bundle. She submitted that the judge had been wrong to infer that the PDF files of the two documents had been transferred to the flash drive on 17 May 2013 and 2 July 2013 on the basis of the stated "date created". As a result, the judge had been wrong to doubt the first appellant's account that these documents could not have been obtained by the first appellant from his work computer (where he said that he wrote the books in his lunchtime) since he had left his employment with his employer on 20

March 2013 when his contract had been terminated. Ms Nowaparast submitted, relying upon the grounds, that the judge had failed to take into account that the screen print-outs showed both of these documents in Word format as having been created and last saved at a time when the first appellant was indeed employed. Ms Nowaparast's argument is helpfully summarised at paras 9-14 of the grounds as follows:

- “9. The IJ makes reference firstly to the Cinema Rex properties document which states that the date created was 17 May 2013. The IJ has failed to note that the first box on this page is also entitled 'rex'. The first document is a 'Word' document, the other a 'PDF'. The IJ has failed to note that both of these documents are likely to contain the same content. The IJ has further failed to note that one document is saved in the 'Word' format which is editable and the other in 'PDF' format which is not editable. The IJ has stated that given that the appellant's contract was terminated in March 2013, the appellant would not have had access to the work computer, and therefore could not have transferred the book to his USB after March 2013. The IJ has failed to see that the 'Word' document was clearly on the USB prior to the appellant leaving work as the content was created on 6 February 2013. It is the PDF document of the rex book which states that it is created 17 May. The IJ has failed to note that the modification date of this document is 18 February 2013. From As PDF documents cannot be amended, once resaved, the date the content is created in the properties will change again to the date it is saved. Therefore if the appellant's wife opened the word document in Iran, and resaved it in the PDF format on the same USB this would have been the date it was created.

The appellant was not given the opportunity to address these issues at the appeal hearing.

10. The IJ further states at paragraph 33 that another file was created/saved onto the USB on 2 July 2013, after the appellant and his spouse left Iran. Again this refers to the PDF document for the book entitled 'Crossing the Dark'. The IJ has again ignored the word document for the same book which states that the content was created in November 2012, and last saved in January 2013, which is consistent with the appellant's evidence that he last added to the book approximately 6 months ago.
11. In any case the UK has ignored the fact that the PDF document states that it was last modified in December 2012. Again we submit that the date that the content was created on the PDF was the date on which it was resaved, not the date on which it was saved onto the USB itself. All other properties in the USB point to the content already being present.
12. Furthermore, it is submitted that the UK failed to consider further evidence in the same document namely the Word document of the book entitled Crossing the Dark states that the 'Company' is ODCC which is the appellant's employer. This content clearly states that it was created in November 2012.
13. Furthermore the IJ has erred in failing to consider the document entitled 'Osool e Kafi' which the appellant states he used as a reference to write his book. The document shows that this was last modified on 22 April 2012. It is submitted that the existence of this document goes to the credibility of the appellant who stated that he had been researching his books for some time, and this in particular was one of the references

used. It is submitted that the IJ erred in failing to take this into consideration and make a finding on the same.

14. At paragraph 35 the UK makes the finding that the appellant has created the files in anticipation of claiming asylum in the UK. It is submitted that the IJ has failed to consider the above evidence in the round.”
17. Ms Nowaparast submitted that there was nothing peculiar about the dates on which the Word files were created and saved and, even putting aside the PDF document, it was clear that the documents which the first appellant claimed generated the adverse interest of the Iranian authorities were on the memory stick.
18. Ms Nowaparast sought to put forward her instructions from the first appellant at the hearing that the entry for “date created” for the PDF file was no more than reflecting a date when they were last saved as such which had nothing to do, therefore, necessarily with the date they were first put on the memory stick itself. The judge had, therefore, she submitted, been wrong to draw the inference that he did in paras 32-33 that these dates were inconsistent with the first appellant’s account that he had obtained the documents on the memory stick from his employment computer which was, of course, only available to him up until his employment ended on 20 March 2013.
19. In addition, Ms Nowaparast placed some weight upon the remaining grounds. She submitted that the judge had been wrong to infer in para 21 of his determination that the first appellant’s contract of employment had been ended by mutual agreement on 20 March 2013 and that therefore, it counted against the first appellant’s credibility, that he had severed his employment links in Iran before travelling to the UK. She submitted that the appellant had not been aware that his contract was to be terminated and, in any event, he had obtained a visit visa prior to its termination in January 2013.
20. Finally, she submitted that the judge was wrong to find at para 26 that it was not plausible that the first appellant would distribute ten copies of his e-books to his friends given the increased risk this would create of their discovery and of the authorities’ tracing back to him as the author of the books.
21. On behalf of the respondent, Mr Wilding submitted that the judge was entitled to conclude that the “date created” for the PDF file was the date that the documents were created and saved to the memory stick. Mr Wilding pointed out that the first appellant had not provided any evidence as to the proper meaning of “date created”. He submitted that the judge was entitled to conclude that this was inconsistent with the first appellant’s claim to have put the documents on the memory stick whilst in employment which had terminated by the relevant “date created” for each file. In addition, he pointed out that in relation to the “Crossing the Dark Properties” book the “date created” was 2 July 2013 when neither the first appellant nor the second appellant were in Iran. Mr Wilding accepted that

the “date created” for the other book, namely the “Cinema Rex” document of 17 May 2013 was a date when the second appellant was in Iran but that still did not explain how the document could have been obtained at that date from the first appellant’s work computer to which there was no access at that date.

22. In relation to the expert report, Mr Wilding accepted that it was regrettable that the judge had not made reference to the expert report but he relied on the fact that the expert only stated that there was: “no reason to doubt the authenticity of this Inventory”. Mr Wilding submitted that the judge gave a number of sustainable reasons for rejecting the appellant’s account. He submitted that the judge was entitled to take into account that the first appellant’s contract of employment had been ended by mutual agreement shortly before he came to the UK. The judge was entitled to infer that the first appellant by leaving his employment before coming to the UK demonstrated that he had no intention of returning to Iran. Mr Wilding submitted that the judge was simply not impressed with the first appellant as a witness, nor the chronology of the claim. That, Mr Wilding submitted, was not limited to the dates relating to the creation of the PDF file but also that the first appellant allowed his wife and child to return to Iran when he was aware that (as he claimed) the books had been discovered on his works computer.
23. Mr Wilding submitted that the judge gave ample reason for his adverse credibility finding and his failure to take into account the expert report was not a material error. That evidence did not relate to any other aspect of the first appellant’s evidence. Mr Wilding invited me to uphold the judge’s adverse credibility finding.

Discussion

24. Dealing first with the judge’s failure to take into account Mr Hedayati-Kakhki’s report, there is no doubt that the judge was wrong not to do so. It was clearly relied upon by the appellant in para 38 of the skeleton argument which was before the First-tier Tribunal.
25. That report provided material support for a core aspect of the first appellant’s claim, namely that his family home had been searched by the Iranian authorities on 15 May 2013 and a number of items had been seized including seven prohibited books. It also supported the first appellant’s account that his wife, the second appellant, was present at that search. Whilst Mr Hedayati-Kakhki states his conclusion as being that he has “no reason to doubt the authenticity” of the inventory, it is clear from reading his report that, having given the document a most thorough analysis, it is in his view authentic. It may well be, as UTJ Perkins pointed out when granting permission to appeal, that the judge explicitly missed the report as it was “incongruously” placed at the end of the appellant’s bundle of documents apparently in a section headed “Case Law”. The fact, nevertheless, remains that the appellants relied upon this document and the judge was under an obligation to take it into account. His failure

to do so amounted to an error of law in reaching his adverse credibility findings. I did not understand Mr Wilding strenuously to argue to the contrary rather, he argued, that error was not material. I will consider that argument in the context of the second principal ground relied upon by Ms Nowaparast to which I now turn.

26. That ground relates to the judge's assessment of the screenshot of the contents of the first appellant's memory stick. The judge dealt with this at paras 32-33 of his determination as follows:

"32. In the appellant's bundle is to be found a document upon which are recorded the properties of a USB stick upon which are to be found e-copies of documents entitled Cinema Rex; 'rex', a single page document; Crossing the Dark and Crossing the Dark2. That document has been created and submitted solely in order to demonstrate the properties of the documents found on that stick, and that the stick upon which those documents were stored was brought to the UK by the appellant's spouse. The first such document is recorded as being created on 17 May 2013 and modified on 18 February 2013. The second document is recorded as being created on 11 December 2012 and last saved on 13 January 2013. The third document is recorded as being created on 17 May 2013 and last modified on 18 February 2013; the fourth document is created on 17 May 2013 and last modified on 18 February 2013; the fourth document is recorded as being created on 2 July 2013 and last modified on 8 December 2012. Although where the date of creation appears to postdate the last saving or modification date, the creation date would be the date on which the document is transferred to a memory stick from another source. Revision numbers and editing time recorded are not of particular assistance in that such information exists in consequence of each addition or amendment made and also the length of time a document is left in an opened state on a computer. The dates utilised by a computer can be altered at will and are not locked within the operating system. What does emerge is that those documents were last amended either shortly before the appellant applied for entry clearance as a visitor to the UK or shortly after the appellant was granted his visa on 24 January 2014.

33. In his asylum interview the appellant recorded that a flash drive/USB stick which he then produced and upon which the incriminating documents had been stored had been brought to the UK at his request by his wife when she travelled to the UK on the last occasion to rejoin him. That journey was made by her on 19 May 2013. The appellant left Iran on 24 March 2013 following the termination of his employment on 20 March 2013, after which latter date he would not have had access to any work computer. Three of those files were transferred to or created upon that stick on 17 May 2013 and 2 July 2013 from another source. Given that the appellant left his employment in March 2013 those files could not have been transferred to that USB stick from his works computer. One of those files on the USB stick was created/transferred to that stick on 2 July 2013, some six weeks after the appellant's spouse left Iran. it is clear that file could not have been on that computer stick at the date she finally travelled to the UK."

27. In their submissions, both Ms Nowaparast and Mr Wilding sought to unpack the proper meaning of the screenshot and, in particular, whether the judge was entitled to conclude that the "date created" for the two PDF files was correctly understood to mean "first saved on the memory stick".

In truth, there was no evidence before Judge Whiting as to the proper meaning of the phrase “date created”. It was not a matter on which he could take judicial notice. Mr Wilding might be correct, in principle, that it was for the first appellant to establish its proper meaning. However, the flaw in that argument in these appeals is that it is entirely unclear whether the meaning of this phrase was raised at the hearing. Mr Wilding did not seek to argue that the ground misrepresented the factual position when it is stated at para 9 of those grounds that: “The appellant was not given the opportunity to address these issues at the appeal hearing.”

28. There is certainly nothing in Judge Whiting’s determination to suggest that this matter was raised and that he invited submissions upon it. That, in itself, creates considerable difficulties in sustaining the judge’s reasoning and findings in relation to the screenshot. As I have said, it cannot be a matter of judicial knowledge that the phrase necessarily bears the meaning that the judge attributed to it. But, in addition, in assessing the evidence of the screenshot, the judge did not take into account, as Ms Nowaparast submitted, that the Word document had clearly been “last saved” on a date when the first appellant was in employment, namely 17 February 2013 and 13 January 2013. One of the documents refers to “ODCC” under the “Company” name. That, Ms Nowaparast told me without contradiction by Mr Wilding, is the name of the company where the first appellant was employed until 20 March 2013.
29. In my judgment, therefore, the judge’s reasoning in paras 32-33 leading him to doubt a core aspect of the appellant’s claim is not properly sustainable in law.
30. What, then, is the effect of these two errors in law? There were undoubtedly difficulties with the appellant’s account including that he had allowed his wife and child to return to Iran at a time when he knew that the authorities were interested in him. It also was, in my judgment, properly open to the judge to take into account the timing of the termination of the first appellant’s employment and also that he had distributed e-copies of the books to his friends despite the increasing risk of discovery that that created. I do not accept Ms Nowaparast’s submissions that the judge was not entitled to take these matters into account. There were also other difficulties with the evidence, including some inconsistencies between the evidence of the first appellant and his wife. Nevertheless, the judge did, in my view, fall into error in two significant respects. The issue of whether his family home was searched on 15 May 2013 was a centrepiece of his claim as was the existence of the documents on the memory stick which he claimed to have authored. It may well be, as Mr Wilding submitted, that the mere existence of these documents did not establish the first appellant’s authorship. However, there is no doubt that the judge’s assessment of the screenshot (erroneous for the reasons I have already given) was an important part of his reasoning that led him to not accept the appellant’s evidence.

31. Reading the determination as a whole and the totality of the judge's reasoning, I cannot be confident that had he taken into account the expert's report and had he not fallen into error in his assessment of the screenshot, he would nevertheless have reached the same adverse credibility finding. For those reasons, those errors were, in my judgment, material to his findings and ultimate decision to reject the appellant's evidence and to find that he was not at risk on that account on return to Iran.
32. For these reasons, the judge's adverse credibility finding in relation to this aspect of the appellant's account involved the making of a material error of law.

Decision and Disposal

33. The decision of the First-tier Tribunal to dismiss the appellants' appeals on asylum grounds involved the making of an error of law. That decision cannot stand and is set aside.
34. Both representatives invited me to remit the appeal to the First-tier Tribunal for rehearing. It was accepted that Judge Whiting's findings that the first appellant had not converted to Christianity and was not at risk on return to Iran as a consequence were unchallenged and should stand. That is also the case in relation to his decision to dismiss the appellants' appeals under Art 8 of the ECHR.
35. Given the nature and extent of the fact-finding required, applying para 7.2 of the Senior President's Practice Statement, it is appropriate that this appeal should be remitted to the First-tier Tribunal for rehearing limited to remaking the decision in respect of the appellants' claim to be at risk on return to Iran because of the first appellant's claimed authorship of material critical of Islam.
36. To that extent, the appeal is remitted to the First-tier Tribunal to be heard by a judge other than Judge Whiting.

Signed

A Grubb
Judge of the Upper Tribunal