Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/11641/2017

THE IMMIGRATION ACTS

Heard at Birmingham
On 4 December 2018

Decision & Reasons Promulgated
On 22 January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TK
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mrs Obone, Senior Home Office Presenting Officer
For the Respondent: Mr Beckford, Counsel, instructed by Freedom Solicitors

DECISION AND REASONS

1 This is an appeal brought by the Secretary of State for the Home Department against the decision of Judge the First tier Tribunal Broe dated 4 January 2018, allowing the appellant's appeal against the Secretary of State's decision of 27 October 2017 refusing his protection claim. In this decision, I shall refer to the parties by their titles in the First tier Tribunal.

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2 The appellant is a national of Iran and arrived in United Kingdom on 17 September 2016 and claimed asylum. He is of Kurdish origin. His claim for protection was on the basis that he feared serious harm in Iran due to political activity which he claimed to have undertaken in support of the Kurdish political party PJAK. He also claimed to have posted Kurdish political material, critical of the Iranian regime, online in a Facebook account.

3 The appellant was interviewed in relation to his claim, including his Facebook activity [SEF questions 177-185]. In the decision of 27 October 2017, the respondent disputed the appellant's account of events in Iran. The decision letter acknowledged at [38] that the appellant had submitted print-outs from his Facebook page, containing material that was supportive of PJAK, but expressed the view that the documents were considered to be self-serving.

4 The appellant appealed that decision, the matter coming before the judge on 11 December 2017. The appellant gave evidence. The judge gave reasons at [24] -[26] for finding the appellant's account of events in Iran unreliable.

5 However, the judge also held as follows at [27]:

> "The appellant has nonetheless provided evidence of his internet activity which has not been significantly challenged by the respondent. I accept that the documents before me are downloads of posts on his Facebook page. It has not been suggested that they are anything but critical of the Iranian regime. I note that they were all created after the appellant was released from detention in this country. He did not claim to have been involved in such activity in Iran. Against the background of my findings above I find that this activity was opportunistic."

6 The judge recorded at [28] that his attention had been drawn to the case of <u>AB and others (Internet activity – state of evidence) Iran</u> [2015] UKUT 0257 (IAC), and acknowledged that this was not a country guidance case, but he stated that he took the determination into account, in particular the summary, beginning at paragraph 466. The judge also referred to paragraph 457.

7 The judge held at [30] as follows:

> "The Tribunal found that a risk could arise what is described as the "pinch point" which occurs when a person is returned to Iran. The evidence before it was that Iranian nationals returned without their passports would be questioned and could be asked to provide information enabling the authorities to gain access to their Facebook page. They thought 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 a real risk of persecution.*""

8 The judge then set out paragraph 472 of <u>AB and others</u>:

> "The mere fact that a person, if extremely discrete, blogged in the United Kingdom would not mean they would necessarily come to the attention of the authorities in Iran. However, if there was a lapse of discretion they could face hostile interrogation on return which might expose them to risk. The more active a person had been on the internet the greater the risk. It is not relevant if a person

had used the internet in an opportunistic way. The authorities are not concerned with a person's motivation. However in cases in which they have taken an interest claiming asylum is viewed negatively. This may not of itself be sufficient to lead to persecution but it may enhance the risk"

The judge then held as follows at [32]:

> "In this case I have found the appellant to lack credibility. I have rejected his account of events in Iran for his departure. He has nonetheless made a number of Facebook posts critical of the Iranian regime. That they are opportunistic does not matter. I have been guided by the findings in AB and must therefore conclude that he would face a real risk of persecution on return for that reason."

9 At [33] the judge held the appellant had made out his case, and allowed the appeal at [34].

10 The respondent sought permission to appeal against that decision in grounds dated 9 January 2018 arguing, in summary, that the judge erred in law in:

(i) failing to give reasons which were adequate in law for concluding that there was a reasonable degree of likelihood that the appellant would be perceived as anti-regime on Iran, given that his account of events in Iran had been rejected, and his internet activity was opportunistic;

(ii) failing to give consideration into the country guidance case of SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 [IAC], in particular paragraph 30:

> *"We can understand the sensitivity that the Iranian authorities may have towards perceived slights against their own state in the form of untruthful allegations about the conduct of the state, but equally one can expect a degree of reality on their part in relation to people who in the interests of advancing their economic circumstances would make up a story in order to secure economic betterment in a wealthier country. We consider that the suggestion by Dr Kakhki that the use of the term "national security" extends as broadly as to encompass people who have made failed asylum claims abroad is excessively speculative and has no evidential foundation to it."*

(iii) failing to have regard to the relevant consideration that even if interrogated, the "truth" that the appellant could be expected to reveal was that his posts on his Facebook page were not genuinely motivated and were prompted solely by desire to deceive the UK authorities for reason of economic betterment, which would be unlikely to raise concerns for the Iranian authorities;

(iv) failing to consider whether the appellant would or could be expected to delete the potentially offending Facebook posts prior to returning to Iran;

(v) failing to make findings about whether the posts were likely to attract wider social media attention, and no clear finding were made as to how widely the published the posts were, nor any indication as to how many people did/were reasonably likely to read the posts;

(vi) failing to appreciate at [31], when referring to AB and others , that para 472 of that decision provided "...*this might not of itself lead to persecution but it may enhance risk on return*"; given that the risk was otherwise nonexistent it was contended that the judge had failed to adequately reason the level of risk on return, and had failed to adequately explain how that reached the threshold of persecution.

11 Permission to appeal was given by Judge of the First-tier Tribunal O'Brien on 30 January 2018 on the basis that the grounds were arguable, and commenting that it was arguable that the judge had considered himself bound to follow AB and others, which he was not obliged to follow, and failed to follow SSH, which he was.

12 I have heard from the parties in this matter. Mrs Aboni relied upon the grounds of appeal, and Mr. Beckford relied upon a Rule 24 reply dated 22 February 2018, together with a further skeleton argument.

Discussion

13 The judge referred to a number of paragraphs of AB and Others. It is appropriate to set out the section of the decision where those paragraphs are to be found:

> "457. We accept the evidence that some people who have expected no trouble have found trouble and that does concern us. We also accept the evidence that very few people seem to be returned unwillingly and this makes it very difficult to predict with any degree of confidence what fate, if any, awaits them. There is clear evidence that some people are asked about their internet activity and particularly for their Facebook password. We can think of no reason whatsoever to doubt this evidence. It is absolutely clear that blogging and activities on Facebook are very common amongst Iranian citizens and it is very clear that the Iranian authorities are exceedingly twitchy about them. We cannot see why a person who would attract the authorities sufficiently to be interrogated and asked to give account of his conduct outside of Iran would not be asked what he had done on the internet. Such a person could not be expected to lie, partly because that is how the law is developed and partly because, as is illustrated in one of the examples given above, it is often quite easy to check up and expose such a person. We find that the act of returning someone creates a "pinch point" so that returnees are 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 a real risk of persecution.
>
> ...
>
> In summary
>
> 466. It is very difficult to establish any kind of clear picture about the risks consequent on blogging activities in Iran. Very few people seem to be returned unwillingly and this makes it very difficult to predict with any degree of confidence what fate, if any, awaits them. Some monitoring of activities outside Iran is possible and it occurs. It is not possible to determine what circumstances,

if any, enhance or dilute the risk although a high degree of activity is not necessary to attract persecution.

467. 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.

468. Social and other internet-based media is used widely through Iran by a very high percentage of the population and activities such as blogging may be perceived as criticisms of the state which is very aware of the power of the internet. The Iranian authorities in their various guises both regulate and police the internet, closing down or marking internet sites although this does not appear to be linked directly to persecution.

469. The capability to monitor outside Iran is not very different from the capability to monitor inside Iran. The Iranian authorities clearly have the capacity to restrict access to social internet-based media. Overall it is very difficult to make any sensible findings about anything that converts a technical possibility of something being discovered into a real risk of it being discovered.

470. The main concern is the pinch point of return. A person who was returning to Iran after a reasonably short period of time on an ordinary passport having left Iran illegally would almost certainly not attract any particular attention at all and for the small number of people who would be returning on an ordinary passport having left lawfully we do not think that there would be any risk to them at all.

471. However, as might more frequently be the case, where a person's leave to remain had lapsed and who might be travelling on a special passport, there would be enhanced interest. The more active they had been the more likely the authorities' interest could lead to persecution.

472. The mere fact that a person, if extremely discrete, blogged in the United Kingdom would not mean they would necessarily come to the attention of the authorities in Iran. However, if there was a lapse of discretion they could face hostile interrogation on return which might expose them to risk. The more active a person had been on the internet the greater the risk. It is not relevant if a person had used the internet in an opportunistic way. The authorities are not concerned with a person's motivation. However in cases in which they have taken an interest claiming asylum is viewed negatively. This may not of itself be sufficient to lead to persecution but it may enhance the risk.

14 The crux of the respondent's case is that in referring to the Tribunal's findings within AB and others, which was not, as the judge was aware, country guidance, and in failing to direct himself as to the content of SSH and HR, which is country guidance, paragraph 30 in particular, the judge has failed to take into account relevant considerations.

15 However, I find no tension between the content of paragraph 30 of SSH and HR (see para 10 (iii) above) and the findings in AB and Others that were relied upon by the judge. As Mr. Beckett argues, the Tribunal in SSH and HR were discussing at paragraph 30 the potential treatment of failed asylum seekers by the Iranian authorities. The Tribunal's conclusion in that point was given shortly thereafter, at [33], as follows:

> "We summarise our conclusions on the country guidance issues in these appeals as follows:
>
> (a) An Iranian male whom it is sought to return to Iran, who does not possess a passport, will be returnable on a laissez passer, which he can obtain from the Iranian Embassy on proof of identity and nationality.
>
> (b) An Iranian male in respect of whom no adverse interest has previously been manifested by the Iranian State does not face a real risk of persecution/breach of his Article 3 rights on return to Iran **on account of having left Iran illegally and/or being a failed asylum seeker**. No such risk exists at the time of questioning on return to Iran nor after the facts (i.e. of illegal exit and being a failed asylum seeker) have been established. In particular, there is not a real risk of prosecution leading to imprisonment." (Emphasis added)

16 The expectation of a degree of reality on the part of the Iranian authorities was to failed asylum seekers who had made up a story in support of an unsuccessful protection claim. The appellant is such person, but, I find, only in respect of the story he gave of events in Iran.

17 In the present case, it was also the case that the appellant had posted potentially inflammatory material on his Facebook account. That fact that he had done so was not disputed, nor was the judge's assessment at [32] that the material was indeed critical of the Iranian regime.

18 Even if, as per the conclusions of SSH and HR, a returnee would not be at risk of harm in Iran merely on the basis that the Iranian authorities came to know that the returnee had given an unflattering but false account of alleged events in Iran *to the UK authorities* in an unsuccessful claim for protection, a rational distinction can properly be made between their likely reaction to such matters, on the one hand, and their discovery that an individual had, without any attempt at being 'discreet' (AB and Others, para 472), posted critical material about the Iranian government on a Facebook page, to a potentially global forum, even if done cynically, on the other.

19 It is appropriate to note that at [11] in SSH and HR itself, the Tribunal make reference to the case of AB and others:

> "In AB & Others (internet activity - state of evidence) Iran [2015] UKUT 257 (IAC), there is reference at paragraph 457 to the act of returning someone creating a "pinch point" so that returnees are brought into direct contact with the authorities in Iran who have both the time and inclination to interrogate them. That however was in the context of people who had engaged in internet activity, and it is relevant to note also that at paragraph 470 the Tribunal said that a

person who is returning to Iran after a reasonably short period of time on an ordinary passport, having left illegally, would almost certainly not attract any particular attention at all. "

20 Therefore, in SSH and HR, AB and Others is distinguished on the basis that it considers matters *additional to* a returnee merely being a failed asylum seeker. For my part, I cannot see any tension between paragraph 30 of SSH and HR, and the findings made in AB and Others regarding potential risk arising from internet activity. The judge's lack of reference to SSH and HR does not, therefore, disclose a material error of law.

21 I also find that the judge was entitled to make reference to paragraph 472 of AB and Others, in which he had been observed that the authorities were not concerned with a person's motivation. I find that the judge was entitled to find that a real risk of harm arose for the appellant, notwithstanding that he had also find the appellant's online activity to be opportunistic. The approach that the judge took, that the appellant may be asked about internet activity at the pinch point of return, did not pre-suppose that the appellant's material would have come to the Iranian authorities' prior attention, and the fact that the judge did not make any finding as to how widely the appellant's material may have been viewed would not in my view have affected the judge's decision.

22 Further, in relation to the respondent's argument that the judge erred in law by failing to consider the potential for the appellant to delete his Facebook account I find the judge had not erred. The respondent engaged very little with the appellant's online activity within the decision letter of 27 October 2017, and specifically did not make any suggestion that the appellant could delete the material, or the whole of his account, on the basis that they postings were opportunistic. Nor does the suggestion appear to have made in the course of the First tier hearing; there is no reference to such an argument being advanced by the respondent before the judge.

23 It could be raised in a given case as to whether an individual could, where the content of a Facebook account does not represent any genuinely held belief, be expected to delete offending posts, or indeed the whole of the account. When that argument is raised, the question would also need to be asked, and answered satisfactorily, as to whether the deletion of a Facebook account would have the effect of permanently removing material from the internet. Those matters were simply not raised by the Respondent in the present case and no evidence was adduced by the respondent as to the effect of deletion of Facebook posts. I also find that these matters were not 'Robinson obvious'[1] points which the judge was obliged to consider of his own notion in the absence of them being raised by the parties.

[1] Robinson, R (on the application of) v Secretary of State for the Home Department & Anor [1997] EWCA Civ 3090

24 Thus, the respondent's belated argument, raised for the first time in the grounds of appeal dated 9 February 2018, that the appellant could be expected to delete his Facebook account, does not disclose any material error of law in the judge's decision.

25 Finally, I note that Mrs Oboni no longer pursues the argument advanced in the grounds of appeal as summarised at [10(vi)] above.

Decision

The judge's decision did not include the making of any material error of law.

I dismiss the Secretary of State's appeal.

I uphold the decision of the judge, allowing the appellant's appeal.

Signed: Date: 9.1.19

Deputy Upper Tribunal Judge O'Ryan

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

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

Signed: Date: 9.1.19

Deputy Upper Tribunal Judge O'Ryan