Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/13943/2018**

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On the 10 March 2022	**On the 19 April 2022**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

M S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Walker, instructed by Turpin & Miller, Solicitors
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the

appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

Introduction

2. This is the decision of the Upper Tribunal ("UT") remaking the decision in the appellant's appeal following UTJ Kebede's decision sent on 4 December 2020 that the First-tier Tribunal ("FtT") had erred in law and to set aside its decision.

Background

3. The appellant is a citizen of Iran of Kurdish ethnicity. He was born on 15 August 1989. He arrived in the United Kingdom clandestinely on 21 January 2006.

4. On 25 January 2006, the appellant claimed asylum. He claimed that his uncle had been a fighter for the Kurdish Democratic Party of Iran ("KDPI") who was killed in 1985. The appellant claimed that he had been involved in anti-government demonstrations in Iran on 3 October 2005 and that shortly after, he was informed that the Iranian authorities were looking for him. As a result, he went into hiding and on 1 January 2006 came to the UK.

5. On 6 March 2007, the Secretary of State refused the appellant's claim for asylum. The appellant appealed to the FtT. On 30 May 2007, the FtT (Judge Morris) dismissed the appellant's appeal. Judge Morris made an adverse credibility finding and concluded that the appellant had fabricated the core of his account of persecution in order to gain access to the UK. Thereafter, permission to appeal to the Upper Tribunal was refused by both the FtT and the UT itself. On 30 November 2007, the appellant became appeal rights exhausted.

6. On 22 January 2010, the appellant made further submissions but, on 8 June 2010, that application was withdrawn as the appellant was granted indefinite leave to remain under the 'Legacy' scheme.

7. Between 9 January 2012 and 14 July 2016, the appellant was convicted of a number of criminal offences involving, inter alia, driving offences and possession of Class B controlled drugs. None of these convictions resulted in terms of imprisonment.

8. On 14 November 2016 at the Swansea Crown Court the appellant was convicted of wounding with intent to cause grievous bodily harm contrary to s.18 of the Offences against the Person Act 1861. He was sentenced to a term of six and a half years' imprisonment. He did not appeal against that conviction or sentence.

9. On 30 April 2018, the appellant was informed of the respondent's intention to deport the appellant in accordance with the automatic deportation provisions in s.32(5) of the UK Borders Act 2007. The appellant was

invited to make representations in response, including by a further letter dated 30 October 2018, why he should not be deported and why s.72 of the Nationality, Immigration and Asylum Act 2002 (as amended) ("the NIA Act 2002") should not apply.

10. On 10 May 2018 the appellant responded making both international protection and human rights claims.

11. On 30 November 2018, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR.

The Appeal to the First-tier Tribunal

12. The appellant appealed to the FtT. In a decision sent on 31 July 2020, Judge I D Boyes dismissed the appellant's appeal on all grounds.

13. First, as had Judge Morris before him, Judge Boyes rejected the appellant's claim to be at risk on return based upon his account of his family's (and his own) involvement with the KDPI and Kurdish causes in Iran.

14. Secondly, Judge Boyes also rejected the appellant's new claim based upon his *sur place* activities in the UK. Judge Boyes did not accept that the appellant and a witness, whom he called to give evidence on his behalf, were reliable witnesses of truth. Judge Boyes did not accept that the appellant had, as he claimed, attended a anti-Iranian demonstration in Birmingham in 2007.

15. Further, Judge Boyes rejected the appellant's claim based upon his Facebook posts which, it was said, were pro-Kurdish. The judge did not accept that any of the posts were visible, other than to his own circle of friends and that, further, the appellant was "apolitical" and that the creation of the pro-Kurdish posts on his Facebook pages was "nothing more than a mendacious and deception based act by the appellant trying to create some leave in the United Kingdom" (see paras 104 and 105). On the basis that the appellant's activity was not based upon a "genuine and sincerely held political opinion or belief", Judge Boyes concluded that the appellant could be expected to delete his Facebook account. There was nothing in the appellant's history, including his being "Kurdish" which would create a real risk to him on return to Iran.

16. Thirdly, in any event, as regards the appellant's asylum (and humanitarian protection) claims, Judge Boyes found that Art 33(2) of the Refugee Convention applied as the appellant had not rebutted the presumptions in s.72 of the NIA Act 2002 that he had been convicted of a "particularly serious crime" and was a "danger to the community".

17. Finally, as regards Art 8 Judge Boyes found that neither Exception 1 nor Exception 2 in ss.117C(4) and (5) of the NIA Act 2002 applied and there were not "very compelling circumstances" over and above those Exceptions sufficient to outweigh the public interest reflected in the serious offence committed by the appellant (s.117(6)).

18. As a consequence, Judge Boyes dismissed the appellant's international protection claims and under Art 8 of the ECHR.

The Appeal to the Upper Tribunal

19. The appellant sought permission to appeal to the Upper Tribunal on a number of grounds challenging the judge's findings in respect of the appellant's claimed political activity in Iran; his rejection of the appellant's claimed risk on the basis of his *sur place* activities on Facebook; and on the basis that the judge had failed properly to take into account the appellant's Kurdish ethnicity. Also, the judge's application of s.72 of the NIA Act 2002 was challenged.

20. The First-tier Tribunal (Judge Nightingale), on 20 August 2020 granted the appellant permission to appeal, limited to the challenge to the judge's adverse finding in relation to the appellant's *sur place* activities.

21. Thereafter, on 8 October 2020, the Upper Tribunal issued directions provisionally expressing the view that the error of law issue could be determined without a hearing and seeking submissions on that and the substantive issues in the appeal from the parties.

22. In response, the appellant filed submissions dated 19 October 2020 and the respondent filed submissions dated 23 October 2020.

23. The respondent accepted that the judge's decision in relation to the appellant's *sur place* claim should be set aside and further findings of fact made on that issue. However, the remainder of the judge's findings, against which the appellant had not been granted permission to appeal, should be preserved.

24. The appellant accepted, in his submissions, that an oral hearing was not required if the respondent conceded the error of law in relation to the judge's findings in respect of the appellant's *sur place* claim.

25. On 24 November 2020, in the light of the parties' respective submissions, in particular the respondent's concession as regards the judge's adverse finding in relation to the *sur place* claim, UTJ Kebede found that the judge had erred in law in that regard and set aside his decision. The identified error of law was that the judge had failed to take into account, when assessing the risk to the appellant and the genuineness of his [political activity, the fact that the appellant had made his posts at a time when he had settled status in the UK and was thus not facing the prospect of removal to Iran.

26. However, all the remaining findings made by Judge Boyes were preserved. UTJ Kebede directed that the appeal be relisted in the UT in order to remake the decision in respect of the appellant's claim, limited to Art 3 on the basis of his *sur place* claim. The asylum appeal was correctly dismissed because Art 33(2) of the Refugee Convention applied.

27. Following a Case Management Review Hearing on 3 June 2021, UTJ Kebede directed that the resumed hearing should await the publication by the UT of a new country guidance case relating to Facebook activity and risk on return to Iran. Following the publication of XX (PJAK – sur place activities – Facebook) Iran CG [2022] UKUT 23 (IAC) (hereafter "XX"), the appeal was relisted for a resumed hearing on 10 March 2022. At the hearing at the Cardiff Civil Justice Centre, the appellant was represented by Ms Sophie Walker and the respondent by Ms Sian Rushforth. The appellant gave oral evidence at the hearing and I heard oral submissions from both representatives.

The Issues

28. The appeal was relisted for a resumed evidential hearing in order to remake the appellant's international protection claim, in particular under Art 3 of the ECHR. Ms Walker also sought to reopen the First-tier Tribunal's decision dismissing the appellant's appeal under Art 8. Ms Rushforth resisted that application. I will return to Art 8 below.

29. For the present, I am concerned with the issues arising in relation to the appellant's Art 3 claim. He cannot, of course, rely upon asylum grounds because Judge Boyes concluded that Art 33(2) of the Refugee Convention (read with s.72 of the NIA Act 2002) applied and he could be refouled without a breach of the Refugee Convention. His appeal on asylum grounds stands dismissed.

30. It was accepted before me that there were a number of preserved facts relevant to the appellant's international protection claim:

    (i) The appellant had been found not to be credible by Judge Boyes, who did not accept the appellant's evidence, in relation to his claimed political activity in Iran before coming to the UK (see paras 92-94 of his decision). The appellant's account was rejected that his uncle had been a fighter with the KDPI and that the appellant had attended anti-government demonstrations in October 2005, as a result of which, the Iranian authorities had been making inquiries about him.

    (ii) Judge Boyes' finding that the appellant had not been a reliable or truthful witness in relation to some of his claimed *sur place* activity in the UK (at paras 95-101 of his decision) Also preserved, as a result, was Judge Boyes' finding that it was not established that the appellant had attended a demonstration in Birmingham in 2007 or that the Iranian regime were aware of any involvement by the appellant at that demonstration. Indeed, Judge Boyes found that the appellant's evidence was a "fabrication" (see para 97 of his decision).

31. It was accepted by both representatives that the international protection claim issues under Art 3 arose exclusively in relation to the appellant's

Facebook activity in the UK. It was further accepted that, in reaching a decision in relation to that issue, I should place reliance upon the recent country guidance decision in XX. It was common ground that the only material that was before me concerning the functioning of Facebook and what, if any, risk Facebook activity of an anti-government nature posed for an Iranian citizen on return to Iran was that set out in XX.

32. Ms Walker accepted that the appellant's Facebook posts would not, at present, have brought him to the attention of the Iranian authorities as his profile would not be such, following XX, as to make it reasonably likely that he had already been the subject of targeted Facebook surveillance.

33. Instead, Ms Walker submitted, again rely upon XX, that the risk to the appellant would arise at the point at which he was to be returned to Iran and an emergency travel document (ETD) was sought from the Iranian Embassy in London. At that point, Ms Walker submitted that a search by the Iranian authorities created a reasonable likelihood or real risk that his "posts" and "likes" on his Facebook page would come to the Iranian authorities' attention and would put him at real risk because of their anti-government, political content, in the light of his Kurdish ethnicity and the anti-Kurdish content, applying BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 36 (IAC) and HB (Kurds) Iran CG [2018] UKUT 00430 (IAC) which were endorsed in XX.

34. In that regard, Ms Walker submitted that, even if the appellant's Facebook page was only visible to his "friends" and not the general public, including the Iranian authorities, the latter would be able to access his Facebook pages, and therefore see his "posts" and "likes", by accessing the Facebook pages of his friends.

35. Ms Walker submitted that the appellant would be at risk whether his political opinion expressed through his Facebook pages was genuine or not. The Iranian authorities were not interested in whether the expression of political opinion was genuine or otherwise; he would be perceived to have a political opinion and so would be at risk as a consequence.

36. Ms Walker submitted that, in any event, the appellant should be found to have a genuine political opinion. That was his oral evidence and he had made the posts at a time when he had ILR and so had no reason to present disingenuous political opinion.

37. Further, Ms Walker submitted that if the appellant's opinion or expression of political opinion was genuine then he could not be required to delete his Facebook pages in order to avoid persecution. That followed from the Supreme Court's decision in HJ (Iran) v SSHD [2010] UKSC 31. She submitted that nothing in XX at [99]-[102] should be read inconsistently with HJ (Iran).

The Respondent's Submissions

38. On behalf of the respondent, Ms Rushforth submitted that, applying XX, the appellant had failed to establish that he would be at risk because of his "posts" and "likes" on his Facebook page.

39. First, Ms Rushforth submitted that the appellant had failed to give a full account of his Facebook pages, providing only photocopied extracts of individual pages which, the UT in XX at paras (7) and (8) of the judicial headnote, considered had "very limited evidential value".

40. Secondly, Ms Rushforth submitted that applying what was said in XX, based upon the expert evidence, if the appellant's settings only allowed his pages to be visible to "friends", the Iranian authorities would not be able to view his pages through the pages of "friends of his friends". Those pages would only visible to his friends.

41. Thirdly, as regards the appellant's own pages, Judge Boyes had found, and this has not been challenged, that the appellant's Facebook pages were, in effect, limited to access by his friends and was not visible to the world at large (see para 104 of Judge Boyes' decision).

42. Fourthly, Ms Rushforth placed reliance upon the preserved findings, including the adverse credibility findings and findings that the appellant had not been engaged in political activity in Iran or in attending demonstrations in the UK. She submitted that there were only a small number of posts and the most recent was in 2014. Ms Rushforth invited me to find that the appellant did not have a genuine political opinion as he had not posted anything for eight years.

43. Fifthly, Ms Rushforth submitted, applying XX, that consistently with HJ (Iran) the appellant could be expected to delete his Facebook account and provided this was done more than 30 days before his ETD application then his Facebook account could not be viewed by the Iranian authorities even if they could, contrary to her principal submission, obtain access to it through the pages of "friends of friends".

44. Ms Rushforth submitted in order for the appellant to be at risk, as a result of his anti-government, pro-Kurdish "posts" and "likes" on his Facebook pages, the Iranian authorities would need to be aware of that content and, she submitted, they would not be so aware.

The Law

45. Article 3 of the ECHR states that:

> "no one shall be subjected to torture or to inhumane or degrading treatment or punishment".

46. The appellant has the burden of proving that there are substantial grounds for believing that, on return to Iran, he will be subjected to a real risk of serious ill-treatment contrary to Art 3 of the ECHR.

47. For these purposes, it suffices to note the definition set out by the Strasbourg Court in Ireland v UK (1978) 2 EHRR 25 at [162]:

> "…ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.

Discussion and Findings

48. In approaching the legal issues raised by the parties' submissions, it will be helpful at the outset to make relevant findings in relation to the appellant and his evidence.

The Evidence

49. I have set out above (paras 29 and 30) the preserved findings arising from Judge Boyes' decision.

50. Before me, the appellant gave oral evidence in which he adopted his witness statement dated 1 March 2022 which is at pages 1-3 of the digital bundle. So far as relevant to this appeal, that evidence concerned the content of his Facebook pages, the workings of his Facebook profile, his political beliefs and what he would do about his Facebook page if he were to be returned to Iran.

51. In examination-in-chief, Ms Walker took the appellant through the pages of his Facebook account. Those pages can be found extracted and photocopied at pages 109-136 of the digital bundle.

52. At page 112, the appellant identified that the post showed a Kurdish commander who was fighting against the Iranian regime. Page 113 showed the Kurdistan flag displayed at the entrance to a site in Swansea. The appellant confirmed he had taken the picture and he had taken it because he is Kurdish and wanted to show he was Kurdish. He said he had put the flag there. At page 114, the appellant confirmed that this showed a photograph of a Kurdish singer who was exiled in America. Page 115 showed an original map of Kurdistan before 1945. Pages 116 and 117 show, the appellant said, that Iran had nuclear weapons. Page 118 showed the actress Angelina Jolie whom, the appellant said, supported Kurdish causes. Page 119 showed the Kurdish flag for independence and, with two pistols, indicated that independence could only be achieved by force. Page 123 showed, inter alia, an icon for the "Kurdsat Broadcasting Corporation" which, the appellant confirmed, provides news about Kurdish issues but is not permitted in Iran. At page 124, the appellant confirmed that the "KNN" was a news organisation dealing with Kurdish life and Kurdish news. It also was not allowed in Iran. At page 125, the appellant confirmed that this showed one icon concerned with the "Goran Party". Page 130 also showed a Kurdish politician, Yousif Mohammed Sadiq – who was not living in Iran but in another country. Page 131 showed an icon for

the Kurdistan broadcasting organisation outside Iran and a Kurdish politician. Page 132 referred to "Roj New" who was Kurdish and fighting ISIS in Syria. Page 163 showed, the appellant said, "likes" with a news personality and news organisation and website concerned with Kurdish issues.

53. The appellant was asked why he had posted on Facebook pro-Kurdish causes, to which he replied that he wanted to show "solidarity". He wanted to show how people feel. He said that he was trying to show support.

54. The appellant was asked whether he would delete his Facebook pages, in particular the posts and likes, if he was deported to Iran and he replied "no". When asked why he would not do that, the appellant replied that it was his life and his belief. He believed in democracy and independence and everyone living in peace. He was asked whether he would change his view about deleting his Facebook pages if he were told that the expert evidence was that if he went to Iran he would be at risk. He replied "never. This is my life".

55. In cross-examination, Ms Rushforth asked the appellant why there was no evidence of how many Facebook friends he had or who they were. The appellant replied that nobody had asked him and that he could provide the evidence. He said that everybody could see his Facebook pages. He said that since 2012 he had many friends and he honestly did not know who were his friends. He said some people add others which he did not know. He was asked why there were very few likes on his pictures, at most seven and on some none. The appellant said that they may have been seen even though there was no "like". He was asked why he should be believed that he would not delete his Facebook pages given that two judges had found him not to be credible. The appellant said he was telling the truth.

56. In re-examination, the appellant asked who could see his "likes". He confirmed that everyone could. It was visible to others. He said that his Facebook pages were not only visible to his friends.

Findings

57. I begin with the appellant himself. His evidence has previously not been accepted on two occasions by Judges of the First-tier Tribunal. In her decision on 30 May 2007, Judge Morris made an adverse credibility finding and rejected, in its totality, the appellant's account of what he claimed had occurred to him in Iran, including his father's involvement with the KDPI and his own involvement in demonstrations which had led to the Iranian authorities showing an interest in him. The appellant sought, unsuccessfully, to challenge Judge Morris' decision on appeal. At para 21 Judge Morris said this:

> "having considered the whole of the evidence in the round, I find that the core of the appellant's account of persecution lacks credibility and is a fabrication designed to gain access to the United Kingdom".

58. That is a strong finding that the appellant has made up his claim.

59. Further, Judge Boyes in his decision in July 2020 maintained that finding but also found that the appellant had fabricated his account that he had attended a demonstration in Birmingham in 2007 in the UK. Judge Boyes concluded that he was satisfied that the appellant "did not attend the demonstration as he alleges". That finding is preserved.

60. Assessing the appellant and the veracity and reliability of his evidence before me, I have regard to those strong adverse findings made by two judges following hearings at which the appellant gave oral evidence. I accept, of course, that an individual may be untruthful about one matter but tell the truth about another. The well-known Lucas direction used in criminal cases was approved by the Court of Appeal in the context of international protection or human rights appeals in Uddin v SSHD [2020] EWCA Civ 338 at [11] where, Sir Ernest Ryder, Senior President of Tribunals said this:

> "I note in that regard the conventional warning which judges give themselves that a person may be untruthful about one matter (in this case his history) without necessarily being untruthful about another (in this case the existence of family life with the foster mother's family), known as a 'Lucas direction' (derived in part from the judgment of the CACD in *R v Lucas* [1981] QB 720 per Lord Lane CJ at 723C). The classic formulation of the principle is said to be this: if a court concludes that a witness has lied about one matter, it does not follow that he has lied about everything. A witness may lie for many reasons, for example, out of shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure. That is because a person's motives may be different as respects different questions. The warning is not to be found in the judgments before this court. This is perhaps a useful opportunity to emphasise that the utility of the self-direction is of general application and not limited to family and criminal cases."

61. I take into account, as Ms Walker submitted, that the appellant posted the material he now relies upon on his Facebook pages at a time when he had ILR and therefore was not directly contemplating that he would be returned to Iran. As Ms Walker submitted that counted (at least to some degree) against any inference that his posting was disingenuous.

62. Their remains, however, the fact that since 2014 the appellant has made no further posts, at least upon which he has placed any reliance before me, of a political nature. Yet, in his oral evidence he maintains that, in effect, he supports pro-Kurdish causes against the Iranian government and that his activities furthered his political beliefs and support for those causes. The appellant's evidence as to why nothing more recent had been put on his Facebook pages was simply that nobody had asked him and he could provide that evidence. The evidence was, of course, not provided and the only evidence relates to no later than 2014 in relation to his Facebook pages. There is, in my judgment, no satisfactory explanation why a politically motivated pro-Kurdish individual would cease to post on his Facebook page over eight years ago.

63. Even if it was the case that the appellant posted the material upon which he now relies up to 2014 because of his political views, the evidence does not establish, in my view, a reasonable likelihood that he continues to hold those beliefs given the total absence of evidence supporting any political activity in the last eight years. However, given that the appellant has a history of fabricating his accounts, including *sur place* activity in the UK by claiming he was involved in a demonstration in 2007, I am not satisfied on the lower standard applicable in international protection claims that the appellant has ever had the genuine political beliefs he now claims. The absence of any current, genuine political belief, is an important issue in itself in determining what, if any, risk there would be to the appellant on return to Iran. Consequently, I find that the appellant has not established a genuine political belief antithetical to the Iranian government and which is pro-Kurdish.

64. I now turn to consider the evidence concerning the appellant's Facebook account. I do this in the light of the country guidance and evidence set out in XX alone.

65. The first issue concerns what, if any, risk the appellant's Facebook pages, including his "posts" and "likes" may create for him if the Iranian authorities were able to access it. The only evidence is a series of screenshots of pages said to be part of that account. I treat this Facebook evidence with some caution, as the UT in XX at headnote paras (7)-(8) indicates:

> "7) Social media evidence is often limited to production of printed photographs, without full disclosure in electronic format. Production of a small part of a Facebook or social media account, for example, photocopied photographs, may be of very limited evidential value in a protection claim, when such a wealth of wider information, including a person's locations of access to Facebook and full timeline of social media activities, readily available on the "Download Your Information" function of Facebook in a matter of moments, has not been disclosed.
>
> 8) It is easy for an apparent printout or electronic excerpt of an internet page to be manipulated by changing the page source data. For the same reason, where a decision maker does not have access to an actual account, purported printouts from such an account may also have very limited evidential value."

66. Nevertheless, I accept that these are pages on the appellant's Facebook account. I also accept that applying the country guidance in HB, there is sufficient pro-Kurdish and anti-government material that there would be a real risk to the appellant if this material was seen by the Iranian authorities. It suffices to set out the country guidance in HB at paras (1)-(10) of the headnote as follows:

> "(1) SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 308 (IAC) remains valid country guidance in terms of the country guidance offered in the headnote. For the avoidance of doubt, that decision is not authority for any proposition in relation to the risk on return for refused Kurdish asylum-seekers on account of their Kurdish ethnicity alone.

(2) Kurds in Iran face discrimination. However, the evidence does not support a contention that such discrimination is, in general, at such a level as to amount to persecution or Article 3 ill-treatment.

(3) Since 2016 the Iranian authorities have become increasingly suspicious of, and sensitive to, Kurdish political activity. Those of Kurdish ethnicity are thus regarded with even greater suspicion than hitherto and are reasonably likely to be subjected to heightened scrutiny on return to Iran.

(4) However, the mere fact of being a returnee of Kurdish ethnicity with or without a valid passport, and even if combined with illegal exit, does not create a risk of persecution or Article 3 ill-treatment.

(5) Kurdish ethnicity is nevertheless a risk factor which, when combined with other factors, may create a real risk of persecution or Article 3 ill-treatment. Being a risk factor it means that Kurdish ethnicity is a factor of particular significance when assessing risk. Those "other factors" will include the matters identified in paragraphs (6)-(9) below.

(6) A period of residence in the KRI by a Kurdish returnee is reasonably likely to result in additional questioning by the authorities on return. However, this is a factor that will be highly fact-specific and the degree of interest that such residence will excite will depend, non-exhaustively, on matters such as the length of residence in the KRI, what the person concerned was doing there and why they left.

(7) Kurds involved in Kurdish political groups or activity are at risk of arrest, prolonged detention and physical abuse by the Iranian authorities. Even Kurds expressing peaceful dissent or who speak out about Kurdish rights also face a real risk of persecution or Article 3 ill-treatment.

(8) Activities that can be perceived to be political by the Iranian authorities include social welfare and charitable activities on behalf of Kurds. Indeed, involvement with any organised activity on behalf of or in support of Kurds can be perceived as political and thus involve a risk of adverse attention by the Iranian authorities with the consequent risk of persecution or Article 3 ill-treatment.

(9) Even 'low-level' political activity, or activity that is perceived to be political, such as, by way of example only, mere possession of leaflets espousing or supporting Kurdish rights, if discovered, involves the same risk of persecution or Article 3 ill-treatment. Each case however, depends on its own facts and an assessment will need to be made as to the nature of the material possessed and how it would be likely to be viewed by the Iranian authorities in the context of the foregoing guidance.

(10) The Iranian authorities demonstrate what could be described as a 'hair-trigger' approach to those suspected of or perceived to be involved in Kurdish political activities or support for Kurdish rights. By 'hair-trigger' it means that the threshold for suspicion is low and the reaction of the authorities is reasonably likely to be extreme."

67. In XX, the UT approved the approach in BA to risk on return based upon *sur place* activity ([93]-[95]:

"93. We accept Mr Thomann's submission that any assessment of risk caused by social media activity needs to be on a nuanced and fact-sensitive basis, analogous to the nuanced assessment of risk factors in

relation to physical sur place activity. We regard the first headnote of the Country Guidance case of BA as remaining accurate, namely:

> "1. Given the large numbers of those who demonstrated 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 before the individual might have been involved in Iran before seeking asylum in Britain."

94. We also refer to the second headnote:

> "2(a). Iranians returning to Iran are screened on arrival. A returnee who meets the profile of an activist may be detained while searches of documentation are made. Students, particularly those who have known political profiles are likely to be questioned as well as those who have exited illegally."

95. We also conclude that headnotes (3) and (4) of BA remain accurate, namely that the following factors remain relevant when assessing risk on return having regard to sur place activities: the level of political involvement and the nature of any sur place activity, including the theme of demonstrations; the role of an individual in demonstrations and their political profile; the extent of participation; and the publicity attracted. All remain relevant and social media activity cannot be considered in isolation. All will be relevant to where a person fits into a "social graph," which in turn impacts on the level of surveillance to which they may be subject."

68. I fully bear in mind the guidance in HB and BA. Particularly pertinent, in making a fact-sensitive assessment, are paras (3) and (7)-(9) of HB. The appellant is Kurdish but, that alone, would not create a real risk of serious ill-treatment on return. However, applying headnote paras (3) and (8)-(9), I am satisfied that the appellant's activity – even though 'low-level' - would be perceived as political by the Iranian authorities given its content, including multiple references to pro-Kurdish causes, politicians and Kurdish independence.

69. I am also satisfied that, if seen by the Iranian authorities, the fact that the appellant does not actually have a genuine political belief, consistent with his posts and likes, would not prevent the Iranian authorities from *perceiving* him as having a political opinion (see e.g. AB and Others (internet activity – state of evidence) Iran [2015] UKUT 257 (IAC)). At [464] the UT said this:

> "We do not find it at all relevant if a person had used the internet in an opportunistic way. We are aware of examples in some countries where there is clear evidence that the authorities are scornful of people who try to create a claim by being rude overseas. There is no evidence remotely similar to that in this case. *The touchiness of the Iranian authorities does not seem to be in the least concerned with the motives of the person making a claim* but if it is interested it makes the situation worse, not better because seeking asylum is being rude about the government of Iran and whilst that may not of itself be sufficient to lead to persecution it is a point in that direction." (my emphasis)

70. In HB, the UT also emphasised that the Iranian authorities' interest was in those "suspected of or perceived to be involved in Kurdish political activities or support for Kurdish rights" (see [95]). Likewise in XX the UT recognised (at [118]) that an individual could be at risk even if disingenuous:

> "On return to Iran, there is a real risk that he would be presented with that material, of a highly provocative and incendiary nature. The nature of the material, although contrived and even if seen as contrived, combined with his Kurdish ethnic origin, would result in a real risk of adverse treatment, sufficiently serious to constitute persecution. He is analogous to the appellant in the well-known authority of Danian v SSHD [1999] INLR 533."

(See also [103].)

71. The crucial issue is, therefore, whether there is a real risk that the appellant's Facebook activity will become known to the Iranian authorities. It is accepted that this would not occur until, at least, the ETD process was reached as the appellant's Facebook activity, in itself, was not such as to create a "significant adverse interest" in him, such that he would be the subject of targeted surveillance whilst in the UK (see headnote para (2) of XX).

72. In my judgment, there are two reasons why the appellant's Facebook pages, including the "posts" and "likes" would not come to the attention of the Iranian authorities.

73. First, despite the appellant's claim in his evidence that his Facebook pages are available to the world, that is contrary to the unchallenged factual finding by Judge Boyes in this appeal. The appellant provided no evidence as to the security settings that he had placed on his account. It was, at least, common ground before me that there were two possibilities. Either the appellant had open settings such that any member of the public (including the Iranian government) could search for, and access, his account so as to see the "posts" and "likes" or that access was limited to his "friends". The appellant led no evidence, as indeed he could have, as to the settings on his Facebook account. That is precisely the missing evidence which the UT in XX emphasised, merited a cautionary approach and that the actual evidence produced might be of "very limited evidential value". Given the multiple adverse credibility findings, I do not accept the appellant's evidence, simply asserted in his oral evidence before me without any supporting printout from his Facebook account, that he has open to the public settings on his account. In my judgment, it is reasonably likely that his account is set with security settings allowing access only by "friends".

74. In relation to that, Ms Rushforth's submission was not gainsaid by Ms Walker that the evidence showed that the appellant only had a limited number of "friends". When it was put to the appellant in cross-examination that at most he had seven likes and sometimes none, he only replied that pages may have been seen by others even though they were

not liked. The appellant did not submit any evidence of a list of his "friends". I am satisfied, on the limited evidence before me, that the appellant has failed to establish that he has more than a few friends who can directly access his Facebook account. There are, therefore, a very , limited number of people who may directly access his account. This contrasts with the appellant in XX who had almost 3,000 friends (see [110]).

75. That then leads to the issue upon which the parties, in their submissions, invited me to reach diametrically opposed findings. Ms Walker's position was that the "friends of friends" could access the appellant's account. Ms Rushforth's submitted that was not supported by XX and the expert evidence of Dr Clayton given in that case.

76. Whilst there was some discussion before me in relation to evidence of "groups" on Facebook, it seems to me that that is not relevant to the appellant who is not part of a Facebook "group". He has a personal account and the issue is simply who has access directly to it or, potentially on Ms Walker's submissions, access to it through other individual's (friends') accounts. The relevant material, as was accepted before me, has to be based upon XX in this appeal. At [73]-[75], the UT explained the basic framework of a Facebook account as follows:

> "73. Facebook accounts are free to use, funded by targeted advertising and the monetary value of personal data that its users choose to share on, and with, Facebook. It numbers billions of the world's population amongst its users (see §49 above). People over specified ages, depending on the country in which a user is based, can register on the site and create a personal profile of themselves. The required age for users in the UK is currently 13.
>
> 74. Creation of a Facebook account requires a prospective user to visit a Facebook registration and account set-up page and provide their details, which include: their name; email address or telephone number; a password; birthday and gender. While users are required to add these details, the veracity or accuracy of someone's identity are not routinely checked and other than the need for an accurate email address, false or inaccurate details may be provided either to disguise someone's identity, or for example, to avoid restrictions around people's ages.
>
> 75. Once a Facebook account has been created, a user may search Facebook or already have the details of someone they know is a user of Facebook and then invite them to become a "friend"; or similarly may receive "friend" requests. By means of that network of "friends", who may or may not know each other well, or not at all, people may share photographs; provide details of their activities; their locations; add "posts" on their own or others' "pages"; "like" posts of another user; or name and "tag" a friend in a photograph, provided that friend is content to be tagged."

77. At [34], the UT set out the evidence of Dr Clayton (the expert) as regards privacy settings as follows:

> "Facebook users can set up a variety of "privacy" settings, but these are typically complex in nature. As a result, people tend either to have their

> account privacy setting as entirely "public," or to have posts shared with their "friends", because these are default settings set by Facebook and do not require adjustment by the user. However, Dr Clayton's view is that it is to misunderstand Facebook to think that merely because there is a privacy setting limited to friends, that only those friends can view the material posted by an individual user. Access also depends on the privacy settings of those friends."

78. That evidence indicates that an individual's Facebook account, even though engaging a privacy setting limited to access by friends, could be seen by a third party if those friends, themselves, do not have a privacy setting set on their own accounts. For example, that might arise where the friend has an open or public access setting. At [80], the UT adopted Dr Clayton's evidence as follows:

> "If someone has public Facebook settings, it requires going through their various posts. If they have private settings, another option is to identify friends with whom the targets materially shared and who have public settings. Alternative, there is the route of having a 'friend request' accepted by the target."

79. In my judgment, this evidence supports, at least in principle, Ms Walker's submission that not only a friend of the appellant could access his posts and likes but also others who gain access through the Facebook pages of those friends. In order for the latter to be the case, the appellant's friends would either have to have an open, public setting or the third party would have to be a friend of that friend.

80. Even though I accept that position in principle, there remains an evidential difficulty for the appellant in this appeal which, in my judgment, he cannot overcome. Not only is there no direct evidence from his Facebook account as to his privacy settings, there is no direct evidence as to who (or what number of) friends he has or of any privacy settings they may, in turn, have on their Facebook accounts. It is, therefore, in my view entirely speculation whether or not the Iranian authorities if they were to know of the appellant's Facebook account could access it via his friends who, themselves, either have open, public settings or would (perhaps implausibly) allow an Iranian official to befriend them and therefore obtain access as a "friend of a friend" of the appellant. These are matters which, in order to allow me to make any positive findings in favour of the appellant, require evidential support which is wholly lacking in this appeal.

81. For that reason, therefore, I am not satisfied that there is a real risk that the Iranian authorities would be able to obtain access to the appellant's posts and likes even at a 'pinch point' such as his application for an ETD.

82. Secondly, however, I am satisfied that it is reasonable to expect the appellant to delete his Facebook account prior to his making an ETD application such that there would be no possibility of the Iranian authorities obtaining, on any basis, access to its content.

83. In XX, the UT accepted, on the basis of the expert evidence, that the closure of a Facebook account, i.e. its deletion, could not be reversed after 30 days so that its contents could not be recovered and viewed after 30 days. At [84], the UT said this:

> " 84. The evidence about Facebook account closure is unequivocal. It may be reversed before 30 days, but not after that time, and after deletion, the data on the person's Facebook account is irretrievable, even if their password is later discovered. The only exceptions to this are two limited pieces of residual data - limited caches of data, for a temporary period, on internet search engines; and photographs (but not links) on other people's Facebook accounts and messages sent to other people. Facebook account closure causes the data to be wholly inaccessible through or from Facebook or the user. However, if the data has been exported by a third party, that third party will continue to have access to the exported data, as stored."

84. At [103], the UT recognised that the timely closure of an account neutralised the risk of any "critical" Facebook account:

> "103. Closure of a Facebook account 30 days before an ETD is applied for will, in our view, make a material difference to the risk faced by someone returning to Iran, who has a "critical" Facebook account. The timely closure of an account neutralises the risk consequential on having had a "critical" Facebook account, provided that someone's Facebook account was not specifically monitored prior to closure…."

85. In this appeal, it is accepted that the appellant's account would not be "monitored" until the ETD process and there is no evidence that any of the material posted, etc. on the appellant's Facebook account has been "exported" to a third party.

86. Ms Rushforth submitted that in XX the UT concluded that it would be reasonable to expect an individual to delete their Facebook account whether or not they held genuine political beliefs reflected in the posts, etc. She relied on [98]-[102] of XX as follows:

> "**To what extent can a person be expected not to volunteer the fact of having previously had a Facebook account, on return to his country of origin?**
>
> 98. Our answer is in two parts. The first is whether the law prevents a decision maker from asking if a person will volunteer to the Iranian authorities the fact of a previous lie to the UK authorities, such as a protection claim made on fabricated grounds, or a deleted Facebook account. We conclude that the law does not prevent such a question, in this case. Whilst we consider Mr Jaffey's suggestion that Lord Kerr had specifically counselled against asking the question at §72 of RT (Zimbabwe), that was in a very different context, namely where political loyalty, as opposed to neutrality, was required by the Zimbabwean regime. In that case, the relevant facts included the risk of persecution because of the activities of ill-disciplined militia at road blocks. The means used by those manning road blocks to test whether someone was loyal to the ruling Zanu-PF party included requiring them to produce a Zanu-PF card or to sing the latest Zanu-PF campaign song. An inability to do these things would be taken as evidence of disloyalty, where even political neutrality (as opposed to opposition) would result in

a real risk of serious harm (§16). In that context, Lord Kerr regarded an analysis of whether a person could avoid persecution by fabricating loyalty as unattractive. He raised practical concerns in evaluating whether lying to a group of ill-disciplined and unpredictable militia would be successful (§72) but made clear that his comments were by way of "incidental preamble," as the critical question was whether the appellant in that case had the right to political neutrality (§(73).

99. The key differences in our case are that the Iranian authorities do not persecute people because of their political neutrality, or perceived neutrality; and a returnee to Iran will not face an unpredictable militia, but a highly organised state. In our case, a decision maker is not falling into the trap of applying a test of what a claimant "ought to do," in cases of imputed political opinion. That was counselled against by Beatson LJ in SSHD v MSM (Somalia) and UNHCR [2016] EWCA Civ 715.

100. Instead, in deciding the issue of risk on return involving a Facebook account, a decision maker may legitimately consider whether a person will close a Facebook account and not volunteer the fact of a previously closed Facebook account, prior to the application for an ETD: HJ (Iran) v SSHD [2011] AC 596. Decision makers are allowed to consider first, what a person will do to mitigate a risk of persecution, and second, the reason for their actions. If the person will refrain from engaging in a particular activity, that may nullify their claim that they would be at risk, unless the reason for their restraint is suppression of a characteristic that they have a right not to be required to suppress, because if the suppression was at the instance of another it might amount to persecution. *It is difficult to see circumstances in which the deletion of a Facebook account could equate to persecution in this sense, because there is no fundamental right protected by the Refugee Convention to have access to a particular social media platform, as opposed to the right to political neutrality.*

101. The second part of our answer relates to Lord Kerr's concern about whether an analysis of what a person will do is too speculative or artificial an exercise. We accept Mr Jaffey's submission that there may be cases where the exercise is too speculative, particularly in the context of a volatile militia. That is not the case here.

102. We consider that it may be perfectly permissible for a decision maker to ask what a returnee to Iran will do, in relation to a contrived Facebook account or fabricated protection claim. Whether such an inquiry is too speculative needs to be considered on a case-by-case basis, but factors which may point to that question not being impermissibly speculative include: where a person has a past history of destroying material, such as identification documents, or deception or dishonesty in relation to dealings with state officials; whether the government has well-established methods of questioning (in the Iranian state's case, these are well-documented and therefore predictable); and whether the risks around discovery of social media material, prior to account deletion, are minimal, because a personal's social graph or social media activities are limited." (my emphasis)

87. On reading the UT's statement highlighted in [100], it might well be considered that the UT had concluded that an individual could be expected to delete a Facebook account *whether or not* they genuinely held a political opinion expressed in that account. In my judgment, however I do not consider that the UT intended to go so far.

88. First, in [98] the UT posed the issue in the context of whether a decision maker was prevented from asking if a person would volunteer to the Iranian authorities:

> "the fact of a previous lie to the UK authorities, such as a protection claim made on fabricated grounds, or a deleted Facebook account".

89. The context is, therefore, set as being that of a disingenuous individual and whether or not he would either volunteer his disingenuous political activity or that he had a deleted Facebook account.

90. Likewise at [102] the UT again considered that it was "perfectly permissible" for a decision maker to ask what a returnee would do:

> "in relation to a contrived Facebook account or fabricated protection claim".

91. Thus, the premise of the discussion as to whether or not an individual can be asked whether they would disclose their "activity" in the UK, including in a Facebook account, again concerns a "contrived" Facebook account or "fabricated" protection claim. It is not concerned with the circumstances in which an individual can be required not to disclose, i.e. lie, about their genuine political opinion or, by analogy, be required to delete their Facebook account which discloses material furthering their genuine political opinion.

92. Secondly, if the UT contemplated the possibility of requiring a person to delete their Facebook account when that individual had genuine political beliefs that would, in my judgment, run counter to the decision of the Supreme Court in HJ (Iran). Just as an individual cannot be required to lie or act discreetly so as to avoid persecution for a Convention reason (including their political beliefs), likewise an individual cannot be expected to 'cancel' their political opinion by being required not to express it through their Facebook account. There is no suggestion in XX that the UT was other than applying the decision in HJ (Iran) in the context of Facebook accounts.

93. Consequently, in this appeal as I have found that the appellant has not established that he has a genuine political opinion, he can reasonably be expected to delete his fabricated or disingenuous political opinion expressed in his Facebook account which, if he does it more than 30 days prior to the application for an ETD, would result in an irreversible deletion such that the Iranian authorities would be unable to access it and the pro-Kurdish material it presently contains.

94. One final point, though not addressed in Ms Walker's submissions, is whether the appellant would actually delete his Facebook account or disclose that it had existed. The appellant says that he would not delete his Facebook account. That statement has to be considered in the context of the overall findings of the earlier judges concerning the appellant's credibility and my adverse findings concerning his political beliefs in this

appeal. His beliefs are not genuine and there is no reason to believe that the appellant, if presented with the potential risk to him which could arise from his Facebook account, would when approaching the Iranian authorities expose himself to that risk unnecessarily, in the sense of persisting with or disclosing disingenuous political activity represented in his Facebook account, rather than remove the risk by deleting it. In my judgment, the appellant would not place himself 'in harm's way' by persisting with his fabricated political beliefs.

Conclusion

95. For the above reasons, I am satisfied that the appellant has failed to establish a real risk or reasonable likelihood that he would face treatment contrary to Art 3 on the basis of his *sur place* activities in the UK, in particular on the basis of the content of his Facebook account.

96. For these reasons, together with the preserved findings in relation to the appellant's asylum claim made by Judge Boyes, the appellant fails in his international protection claim.

Article 8

97. One final point arises: it is in relation to Art 8.

98. Judge Boyes made an adverse finding in relation to Art 8 and his reasons are set out at paras 109-128 of his decision. Judge Boyes made the following findings. First, Exception 2 in s.117C(5) of the NIA Act 2002 did not apply as the consequences of the appellant's deportation would not be "unduly harsh" on his son (J), his daughter (A) or his (then) partner (I). Second, there were not "very compelling reasons" over and above Exceptions 1 and 2 so as to make the appellant's deportation disproportionate applying s.117C(6) of the NIA Act 2002.

99. The grounds of appeal challenging Judge Boyes' decision did not raise any issue with his findings in relation to Art 8 but were limited to his decision in relation to the international protection claim. Consequently, and unsurprisingly, the error of law identified by UTJ Kebede in her decision sent on 4 December 2020 related exclusively to the appellant's international protection claim and, in particular in relation to the appellant's *sur place* activities arising from his Facebook pages. In her decision at para 14, UTJ Kebede indicated that the remaking of the decision in the appeal was limited to the latter issue.

100. Ms Walker invited me to remake the decision in relation to Art 8. She relied upon the appellant's most recent witness statement dated 1 March 2022 in which he dealt with his mental health issues, his contact with his probation officer (in respect of which e-mails were enclosed in the bundle) and his continuing contact with his daughter (A), although he had no contact with his son (J) and he had split up with his partner (I) and had a new partner.

101. Ms Rushforth invited me not to consider Art 8 as the judge's findings and decision in that regard had not been challenged and were preserved.

102. I indicated at the hearing that I considered there were difficulties with Ms Walker's position but that I would reserve my decision as to whether Art 8 could be reopened and I invited both representatives to make submissions on it *de bene esse*.

103. In that regard, Ms Walker relied on the fact that the appellant has now been longer outside prison committing no further offences; his mental health problems; and that he has a relationship with a new person.

104. Ms Walker relied on the evidence in relation to his post-release behaviour set out in the probation officer's e-mails dated 2 March 2022 (at pages 4-5 and 6 of the digital bundle) supporting the appellant's continued desire to "stay out of trouble" and pointing out that he insists that he is "not having any contact with his co-defendants or the victim of his offence, and he wishes to distance himself from the Kurdish community". He is reported as having stopped using cannabis and that he is "progressing well and there have been no significant concerns".

105. As regards the appellant's mental health, the appellant's statement says that he suffers from depression and he is taking medication. He attends his GP regularly and his medication has side effects which makes him "drowsy and feel weak" and affects adversely his ability to search for a job.

106. As regards his relationships, the appellant's statement says that the mother of his son (J) does not wish for him to have contact with J and he is looking at ways to challenge this through the law. In relation to his daughter (A), it was difficult for him to see his daughter after he was released when he was placed in a hostel in north Wales but he has now moved locally and is able to be near his daughter. In lockdown he spoke to his daughter over the phone or, when permitted, through the window of her home. Since the easing of lockdown, he has seen his daughter more often, he takes her to the park and spends time with her outside. He takes her to school when her mother is feeling unwell and he sees her at least once a week. He states that he is a changed man since he has come out of prison; he has just stayed out of trouble for two years and his daughter needs him in her life.

107. Ms Walker invited me to remake the decision under Art 8 applying s.117C(6) on the basis that there were "very compelling circumstances" sufficient to outweigh the public interest.

108. Ms Rushforth submitted that I should not go behind Judge Boyes' findings as there was nothing in the evidence to justify it. There were no legal proceedings in relation to J and the appellant had, in effect, the same contact with his daughter, A. There was no evidence about his new relationship and no statement from his new partner. She submitted that

his claim was, if anything, weaker now than it was before as there was no evidence to establish a "subsisting" relationship with a partner and he was not, any longer, living with his daughter A. There was no supporting evidence concerning his mental health and any medication that he was on.

109. The question of whether the appellant can reopen the Art 8 issue in the UT is addressed in AB (preserved FtT findings; *Wisniewski* principles) Iraq [2020] UKUT 268 (IAC) (Lane J, President; UTJ O'Connor). In AB, the Upper Tribunal considered the relevant case law in the Court of Appeal and the relevant higher court jurisprudence on the issue at [37]-[40] as follows:

> " 37. In Sarkar v Secretary of State for the Home Department [2014] EWCA Civ 195, the Court of Appeal was faced with the submission that, once it had embarked upon the task under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal had, in effect, to start again and should, therefore, make its own findings on all matters that had been before the First-tier Tribunal, whether or not those matters had been infected by legal error. Giving the judgment of the Court, Moore-Bick LJ regarded that submission as going too far:-
>
> > "14. … Of course, the Upper Tribunal may hear the appeal afresh, if it considers that appropriate, and for that purpose may hear such evidence and argument as it considers necessary, but it is not bound to do so and can (and often does) decide the disputed question of law on the basis of the findings of fact made by the First-tier Tribunal."
> >
> > 15. If it finds that the First-tier Tribunal has made a material error of law the Upper Tribunal may (but need not) set aside its decision. If it decides to do so, it has only two options: to remit the case with directions for its reconsideration or to re-make the decision itself. Remission, however, does not necessarily require the First-tier Tribunal to start all over again; the Upper Tribunal has power to give directions which limit the scope of the reconsideration. It would be surprising, therefore, if, when re-making the decision itself, the Upper Tribunal were required in every case to carry out a complete re-hearing of the original appeal. In my view that is not what Parliament intended. In this context re-making the decision, by contrast with remitting the case to the First-tier Tribunal, involves no more than substituting the tribunal's own decision for that of the tribunal below. It is for the Upper Tribunal to decide the nature and scope of the hearing that is required for that purpose. The purpose of section 12(4)(a) is simply to ensure that, when re-making the decision, the Upper Tribunal has at its disposal the full range of powers available to the First-Tier Tribunal. Nor do I think that the appellants obtain any assistance from the decision in *Kizhakudan v Secretary of State for the Home Department* [2012] EWCA Civ 566, to which Mr. Malik drew our attention. That case decided no more than that one error of law on the part of the First-tier Tribunal is sufficient to give the Upper Tribunal jurisdiction to re-make the decision and deal with all live issues. The court in that case held that the Upper Tribunal had a *discretion* to consider an article 8 claim, even though it might not have been properly raised before

the First-tier Tribunal. It did not decide, however, that the Upper Tribunal, having refused permission to appeal on a particular ground, is obliged to consider that ground if it decides to re-make the decision."

38. In TA (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 260, the Court of Appeal articulated the circumstances in which the Upper Tribunal, when re-making a decision pursuant to section 12, should do so by reference to findings of fact made by the First-tier Tribunal, notwithstanding that the latter's decision was being disturbed:-

> "7. Where the Upper Tribunal finds an error of law then it may (but need not) set aside the decision of the First-tier Tribunal. If it does set aside the decision of the First-tier Tribunal then it must either remit the case to the First-tier Tribunal with directions for its reconsideration or re-make the decision: see s.12 of the Tribunals, Courts and Enforcement Act 2007. When permission to appeal to the Upper Tribunal has been granted, the parties should assume that the Upper Tribunal will, if it identifies an error on a point of law and is satisfied that the original decision should be set aside, proceed to remake the decision. In that event, the Upper Tribunal will consider whether to remake the decision by reference to the First-tier Tribunal's findings of fact, and it will generally do so save and in so far as those findings have been infected by any identified error or errors of law." (Kitchin LJ)

39. Also of relevance is the judgment of the Inner House of the Court of Session (Lord Glennie) in MS and YZ v Secretary of State for the Home Department [2017] CSIH 41:-

> "42. Mr Webster accepted before us that the UT was only entitled to interfere with findings in fact made by the FTT if those findings were infected by some error of law or where the FTT made an error of law in reaching those findings in fact. He was correct to make this concession. An appeal from the FTT to the UT lies on a point of law: section 11(1) of the 2007 Act. There is no appeal against the FTT's findings in fact. It is important to understand this point. Of course, it may not always be possible to identify where the line is to be drawn between findings of "pure" fact, where the appellate body cannot usually intervene, and findings which are in truth findings of mixed fact and law or are what is sometimes called "evaluative" findings, where the approach to the fact finding task is determined by the legal framework within which factual assessments have to be made. Thus, there will be cases where, before making its findings in fact, the FTT has first to identify the legal test it is seeking to apply. It may, for example, be required to make a finding as to whether certain conduct is reasonable or proportionate, a question which may depend on the context in which or the purposes for which such an assessment is relevant or necessary; and in approaching these questions it may have to identify what, as a matter of law, requires to be taken into account. In such cases an error of law in identifying what factors are or are not relevant may open up the whole of its decision for reconsideration, including what appear to be findings of "pure" fact, though it will not always do so. If the FTT has erred in law by failing to take relevant matters into

account in reaching its decision on the facts, or in taking into account irrelevant matters, or has reached a decision which no reasonable tribunal presented with the evidence and correctly applying the law could have arrived at, that too may entitle the UT to interfere. Another situation, perhaps closer to this case, is where the FTT has erred in law, and the UT takes it upon itself to re-make the decision, as it is entitled to do under section 12(2)(b)(ii) of the 2007 Act. It may in so doing "make such findings of fact as it considers appropriate": section 12(4)(b). But while in that situation the UT has the power to make additional supplementary findings, it does not have the power to overturn findings of "pure" fact made by the FTT which are not undermined or otherwise infected by that or any other error of law. Nothing in the cases cited to us, in particular *Kizhakudan* and *EK*, suggests otherwise. Our conclusion on this point is, in our opinion, consistent with the remarks of Lord Carnwath in *HMRC* v *Pendragon plc* [2015] 1 WLR 2838 at paragraphs 49-51."

40. In HMRC v Pendragon plc [2015] UKSC 37; [2015] 1 WLR 2838, Lord Carnwath said this:-

"49. In *R (Jones) v First Tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48 (in a judgment agreed by the majority of the court), I spoke of the role of the Upper Tribunal in the new system:

> "Where, as here, the interpretation and application of a specialised statutory scheme has been entrusted by Parliament to the new tribunal system, an important function of the Upper Tribunal is to develop structured guidance on the use of expressions which are central to the scheme, and so as to reduce the risk of inconsistent results by different panels at the First Tier level." (para 41)

This was consistent with the approach of the preceding White Paper (paras 7.14-21), which had spoken of the intended role of the new appellate tier in achieving consistency in the application of the law, "law" for this purpose being widely interpreted to include issues of general principle affecting the jurisdiction in question. Such a flexible approach was supported also by recent statements in the House of Lords, in cases such as *Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929 and *Lawson v Serco* [2006] ICR 250. In the latter case (para 34), Lord Hoffmann had contrasted findings of primary facts with the "an evaluation of those facts" to decide a question posed by the interpretation of the legislation in question:

> "Whether one characterises this as a question of fact depends ... upon whether as a matter of policy one thinks that it is a decision which an appellate body with jurisdiction limited to errors of law should be able to review."

50. The difficult concept of "abuse of law" as developed by the European court, though not strictly one of statutory

> construction, is a general principle of central importance to the operation of the VAT scheme. It matters little whether it is described as involving an issue of mixed law and fact, or of the evaluation of facts in accordance with legal principle. However it is described, it was clearly one which was particularly well suited to detailed consideration by the Upper Tribunal, with a view to giving guidance for future cases. Having found errors of approach in the consideration by the First Tier Tribunal, it was appropriate for them to exercise their power to remake the decision, making such factual and legal judgments as were necessary for the purpose, thereby giving full scope for detailed discussion of the principle and its practical application. Although no doubt paying respect to the factual findings of the First Tier Tribunal, they were not bound by them. They had all the documentation before the First Tier Tribunal, including witness statements, and transcripts of the evidence and submissions, and detailed written and oral submissions. It is clear that they undertook a thorough exercise involving a hearing lasting six days.
>
> 51. Against this background, it was unhelpful, in my view for the Court of Appeal to identify the main issue as to whether the Upper Tribunal went beyond its proper appellate role. The appeal to the Court of Appeal (under section 13) was from the decision of the Upper Tribunal, not from the First Tier, and their function was to determine whether the Upper Tribunal had erred in law. That was best approached by looking primarily at the merits of the Upper Tribunal's reasoning in its own terms, rather than by reference to their evaluation of the First Tier's decision. True it is that the Upper Tribunal's jurisdiction to intervene had to begin from a finding of an error of "law". But that was not the main issue in the appeal, which was one of more general principle. Indeed, given the difficulties of drawing a clear division between fact and law, discussed by Lord Hoffmann, it may not be productive for the higher courts to spend time inquiring whether a difference between the two tribunals was one of law or fact, or a mixture of the two. There may in theory be a case, where it can be shown that the sole disagreement between the two tribunals related to an issue of pure fact, but such a case is likely to be exceptional. In the present case, as Lord Sumption has shown, there were no significant issues of primary fact. The differences between the two tribunals related to the understanding of the "abuse of law" principle, and their evaluation of the facts in the light of that understanding. The Upper Tribunal reached a carefully reasoned conclusion on law and fact. The task of the Court of Appeal was to determine whether that conclusion disclosed any error of law."

110. Then, at [41], the UT reached the following conclusion:

> "41. What the case law demonstrates is that, whilst it is relatively easy to articulate the principle that the findings of fact made by the First-tier Tribunal should be preserved, so far as those findings have not been "undermined" or "infected" by any "error or errors of law", there is no hard-edged answer to what that means in practice, in any particular case. At one end of the spectrum lies the protection and human rights appeal, where a fact-finding failure by the First-tier Tribunal in respect of risk of serious harm on return to

> an individual's country of nationality may have nothing to do with the Tribunal's fact-finding in respect of the individual's Article 8 ECHR private and family life in the United Kingdom (or vice versa). By contrast, a legal error in the task of assessing an individual's overall credibility is, in general, likely to infect the conclusions as to credibility reached by the First-tier Tribunal."

111. In this appeal, the circumstances fall within the "one end of the spectrum" identified by the UT where the legal error had nothing whatsoever to do with the First-tier Tribunal's fact-finding in respect of the appellant's Art 8 claim.

112. In principle, the Upper Tribunal in remaking a decision under s.12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 is essentially concerned with replacing the decision of the First-tier Tribunal to the extent that its decision was legally flawed (Sarkar and TA). It is not an opportunity to reopen the whole of an individual's case which was made before the First-tier Tribunal but rejected by it without legal error (TA). The case law, in my judgment, reflects that position although it can never be said that the UT cannot reopen fact-findings made by the First-tier Tribunal, including in an area of the claim which has not been challenged, in exceptional circumstances where there is good reason to do so. In cases of this sort, an individual can, of course, make a 'fresh claim' if the circumstances have significantly changed since the initial decision of the First-tier Tribunal whose findings have been preserved. I accept, however, that the Upper Tribunal is entitled (and has a discretion) to reach its own conclusions in relation to an unchallenged area of the decision made by the First-tier Tribunal if there are good reasons to so, for example where there are significant changes in the individual circumstances that would make it unjust not to reconsider the Art 8 claim.

113. In this appeal, there have been *some* changes in the appellant's circumstances but none that significantly advance his claim under Art 8. His claim based upon his relationship with his (then) partner, I, was rejected by Judge Boyes on the basis that it would not be "unduly harsh" for her to remain in the UK without the appellant. On the circumstances now relied upon by the appellant, that relationship no longer exists and so that basis of his claim has, in no way, been advanced by a change of circumstances: quite the contrary. Likewise, the judge's findings that the appellant could not establish it would be "unduly harsh" for either of his children (J and A) to remain in the UK without him, has also not been significantly advanced by any new evidence. He remains without contact with J. As regards 'A', the appellant no longer lives with his daughter because he is no longer in a relationship with her mother. His evidence shows that contact continues but that contact is no greater (indeed in practical terms it is less) than when he lived with her. There is no basis in the evidence to reach any other conclusion than did Judge Boyes that it is not established that it would be "unduly harsh" on the appellant's children if he were deported.

114. There is, of course, the fact that the appellant has not reoffended over a longer period of time given the time that has passed since the First-tier

Tribunal's decision. There is also some up-dating (not unsupportive) evidence from his probation officers (see para 104 above)

115. The appellant's evidence about his mental health is, however, not supported by any medical evidence (see para 105 above).

116. Likewise, there is no evidence other than the appellant's statement that he is in a new relationship. No supporting evidence was presented from his claimed new partner and there was no evidence as to the nature of their relationship sufficient to bring the appellant within Exception 2 in s.117C(5).

117. In truth, the appellant's claim under Art 8 has not advanced in any significant way in his favour since Judge Boyes' conclusion that he could not succeed either under Exception 2 or on the basis of "very compelling circumstances" under s.117C(6).

118. I have concluded that there is not sufficient material to justify the Upper Tribunal revisiting Judge Boyes' adverse Art 8 finding given that it was not challenged previously.

119. In any event, I should add that the evidence plainly does not establish, in my judgment, that the appellant can succeed under Exception 2 or on the basis of "very compelling circumstances" sufficient to outweigh the public interest under s.117C(6).

Decision

120. The First-tier tribunal's decision was set aside by UTJ Kebede's decision of 24 November 2020.

121. The First-tier Tribunal's decision to dismiss the appellant's appeal on asylum and humanitarian protection grounds and under Art 8 of the ECHR stands.

122. For the above reasons, I remake the decision dismissing the appellant's appeal under Art 3 of the ECHR.

Signed

Andrew Grubb

Judge of the Upper Tribunal
8 April 2022

TO THE RESPONDENT
FEE AWARD

Judge Boyes' decision not to make a fee award was not challenged and also stands.

Signed

Andrew Grubb

Judge of the Upper Tribunal
8 April 2022