IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004915

First-tier Tribunal No: PA/54627/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 13th of March 2024

Before

UPPER TRIBUNAL JUDGE BEN KEITH

Between

AG
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Azmi, Counsel
For the Respondent: Ms Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 29 January 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal against the decision of First-Tier Tribunal Judge Richards ("the Judge") promulgated on 11 October 2023. By that decision the Judge rejected the Appellant's appeal on asylum and human rights grounds.

2. The Secretary of State for the Home Department ("SSHD") rejected the Appellant's asylum claim on 20 October 2022.

3. The Appellant is an Iranian national of Kurdish Ethnicity, born in 2004. He entered the UK on 2 March 2021 and claimed asylum on arrival.

Grounds of Appeal

4. The grounds of appeal are not clearly particularised but are best summarised by the grant of permission. In short, the Appellant argues that the judge failed to properly assess the evidence and to assess it in light of the Country Guidance cases.

5. In granting permission on 19 December 2023 UTJ Sheridan said the following:

> "1. The judge found that it was "inherently unlikely" that the appellant would flee Iran just because his friend had been arrested and might have given his name to the authorities. Given the "hair-trigger approach" of the authorities, as described in HB (Kurds) (illegal exit: failed asylum seeker) CG [2018] UKUT 430 (IAC), this was arguably an irrational finding and/or a finding that was inconsistent with Country Guidance and objective evidence about the level of risk faced by those suspected by the authorities of Kurdish political activities.
>
> 2. I do not restrict the grounds that can be pursued."

The Hearing

6. At the hearing I asked for submissions in relation to paragraph 4 of the judgment which states (my emphasis):

> **"Burden and Standard of Proof**
>
> 4. The burden of proof is on the Appellant. To establish the first ground of appeal, he must show that he has a well-founded fear of persecution to a reasonable degree of likelihood; to establish the second, it is the balance of probabilities."

7. The second ground of appeal before the First Tier was Article 3 of the European Convention on Human Rights. The parties had not pleaded any issues relating to this paragraph however, the case of R v Secretary of State for the Home Department, ex p Robinson [1997] 3 WLR 1162 provides that there remains the power to consider any other point arising from the decision if the interests of justice require. This is such a case.

8. The SSHD accepted that given there was no Article 8 appeal in this case and the Judge was only dealing with Article 3 the correct test is that of "real risk" see R(Ullah) v Special Immigration Adjudicator [2004] 2 AC 323,

para 24; Saadi v Italy (2009) 49 EHRR 30, para. 140, Soering v UK 11 EHRR 439.

9. Reading the judgement as a whole to try a discern if in fact the correct test was applied only compounds the issue. The judge in conclusion states at §19 (my emphasis):

> "19. Consequently, I do not find that the Appellant's account is credible or that any sur place activity is genuine and would put him at risk on return. The Appellant has also failed to demonstrate to the requisite standard that he would be at any risk on his return to Iran."

10. As a result, I find a material error of law as the judge applied the wrong test in relation to Article 3 ECHR.

11. In relation to the asylum claim there is only passing reference to the Country Guidance in the judgement, the judge states:

> "18. The evidence of the Appellant's continued interest within the UK in the KDPI and involvement in their activities is also unpersuasive. Nine screenshots over a 4 month period of postings drawn from other channels, posted in a name that could not be associated with the Appellant, seems to me to be wholly inadequate to show that he would be of interest on his return to Iran, even taking account of HB (Kurds) Iran CG [2018] UKUT 430 and XX (PJAK –sur place activities – Facebook) Iran CG."

12. In the judgment there is no analysis of how the evidence of the Appellant fits (or does not fit) within the Country Guidance. In HB (Kurds) (illegal exit: failed asylum seeker) CG [2018] UKUT 430 (IAC) the Upper Tribunal gave detailed Guidance the head note sets out 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.

13. Of particular relevance to this case are (7) to (10) above. The Appellant's case is that he handed out leaflets on behalf of the KDPI (Kurdish Democratic Party of Iran), attended demonstrations and it was as a result of that activity that his friend was detained. The judge dismissed the whole of the evidence as not credible on the basis of the likelihood that the friend was detained and passing on the Appellant's name was inherently unlikely, the judge stated:

> "17. I have considered all of the evidence of the Appellant, both within his witness statements as well as his oral evidence, in determining whether his account is credible. Even taking account of the Appellant's limited education and his young age, his account of his activities in Iran is extremely vague. His evidence about he came across demonstrations by chance seems inherently unlikely. There is no evidence of what happened to Mikheal following his arrest, but it also seems inherently unlikely that the simple fact of his arrest, albeit with the possibility that he had passed the Appellant's name to the authorities, would be a sufficient cause for the Appellant to leave Iran I also find it highly relevant that, in his asylum interview, the Appellant displayed a very limited ability to recount any meaningful details of the KDPI."

14. In my judgement the judge has failed to analyse the evidence within the Country Guidance matrix and has not examined the risk of the distribution

of leaflets as being enough potentially on its own nor the "hair-trigger" approach of the Iranian Authorities. The judge has arguably conflated the issue of risk in Iran when leaving (or returning) with the lack of credibility in relation to the *sur place* activities. The Country Guidance shows that is inherently likely that the Appellant's friend was detained (subject to credibility findings). Finally, the lack of knowledge of KDPI activities at interview needs to be viewed in the round in combination with the Country Guidance, the Appellant's age and the evidence provided in his witness statements.

15. As a result of the failure to properly analyse the case within the Country Guidance matrix, I find there is a material error of law and set aside the judgment. I preserve no findings of fact.

Disposal

16. At the hearing I indicated that I considered there had been an error of law. The Appellant submitted that the case should return to the First Tier tribunal for rehearing. The SSHD also made the same submission on the basis that the evidence would have to be reheard. The Appellant submitted that he wanted to provide further evidence in relation to his Facebook posts and as a result needed more time.

17. I considered the submissions from both parties and the request for more evidence. The Appellant provides the only evidence in his case, in my judgment he was capable of providing evidence about his *sur place* activities in oral evidence. Considering the Presidential Guidance and the interests of justice I ruled that the case could proceed to rehearing before me in the afternoon. In particular I noted that this is a one witness case but also that the Appellant is a young man who claimed asylum in 2021 and in my judgment, it was possible to deal with the matter without delaying the case further.

18. I therefore proceeded to rehear the case.

Rehearing

19. The Appellant gave evidence through an interpreter. The interpreter noted that the Appellant's dialect varied a little, however, the interpreter was content to continue as he explained that he spoke both dialects. I established with counsel and the interpreter that the quality was sufficient to proceed.

20. The Appellant gave evidence over about 90 minutes and adopted both his witness statements as true.

21. In examination-in-chief he was asked about his Facebook posts. At page 30 of the hearing bundle was his Facebook profile. He had previously used a generic name that denoted freedom for Kurdistan but had now changed that to his real name. He had changed this about 3 months ago. He was therefore now identifiable.

22. He had attended a demonstration at the Iranian Embassy on 21 January 2024 to protest against the Iranian regime "Because still the government are killing people" his role was that of a protestor and not an organiser. He posted pictures on Facebook that everyone can see.

23. He was then cross-examined.

24. Ms Isherwood asked him about his Facebook account. He explained that he had set it up in the UK when he was about 18. He had received help from a friend.

25. When asked about the changing of his name on Facebook he said *"The guys who are working with KDPI they told me that I better use my own name. These guys during the protest are organising and supporting people during the protest."*

26. He accepted that the people from the KDPI were not friends although he called them friends. They were just there to help him. He had not asked them for any supporting statements or evidence to support his political activity.

27. He accepted that he is just a supporter of the KDPI in the UK and not an organiser and holds no official position. He had not provided information to the Home Office in relation to the protest in January 2024 but had posted the details on Facebook. He was challenged about why he had not provided any evidence of this. He stated that he had posted the pictures on Facebook.

28. In relation to his circumstances in Iran he accepted that he had said in his interview that he contacted his family about once a month. He stated that he now only contacted them every 3-4 months because he was afraid to put his family in danger. He was challenged about this change in his evidence. He explained that his family had been visited by the authorities who had taken his ID and asked his family where he was. He stated that the authorities had been to his house several times to ask about him and as a result his contact was minimal and often through a friend.

29. He was challenged that his parents would never have let him go out in the evening at 14 and certainly not to distribute leaflets. He said that he didn't tell them. He also gave the full name of his friend who was detained.

30. There was no re-examination.

31. At the conclusion of the evidence, I asked whether he had his phone with him and had the Facebook posts of the protests on it. He did and showed me and the advocates.

32. I was shown Facebook posts of photos of the protest in which the Appellant is clearly visible protesting in front the Iranian embassy the post has 67 comments and 319 likes and dated 21 January 2024. One was a short video showing the Appellant outside the Iranian embassy protesting.

Submissions

33. In closing it was submitted that the Appellant was credible. That his evidence was plausible about what occurred in Iran and that his subsequent *sur place* activities including his Facebook posts place him at risk on return.

34. In response the SSHD submitted that his evidence was not credible. That he had embellished his evidence. It was submitted that at its highest the Facebook posts were in a different name and so posed no risks. It was submitted that his evidence had changed about his family contact and that undermined his credibility. It was submitted that he was evasive in answers and that overall, he was not a credible witness and was not at risk on return.

Discussion

35. I have examined in detail the Country Guidance case of HB as well as the case of XX (PJAK - sur place activities - Facebook) Iran CG [2022] UKUT 23 (IAC), the headnote reads:

> *"The cases of BA (Demonstrators in Britain - risk on return) Iran CG [2011] UKUT 36 (IAC); SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 308 (IAC); and HB (Kurds) Iran CG [2018] UKUT 430 continue accurately to reflect the situation for returnees to Iran. That guidance is hereby supplemented on the issue of risk on return arising from a person's social media use (in particular, Facebook) and surveillance of that person by the authorities in Iran.*
>
> *Surveillance*
>
> *1) There is a disparity between, on the one hand, the Iranian state's claims as to what it has been, or is, able to do to control or access the electronic data of its citizens who are in Iran or outside it; and on the other, its actual capabilities and extent of its actions. There is a stark gap in the evidence, beyond assertions by the Iranian government that Facebook accounts have been hacked and are being monitored. The evidence fails to show it is reasonably likely that the Iranian authorities are able to monitor, on a large scale, Facebook accounts. More focussed, ad hoc searches will necessarily be more labour-intensive and are therefore confined to individuals who are of significant adverse interest. The risk that an individual is targeted will be a nuanced one. Whose Facebook accounts will be targeted, before they are deleted, will depend on a person's existing profile and where they fit onto a "social graph;" and the extent to which they or their social network may have their Facebook material accessed.*
>
> *2) The likelihood of Facebook material being available to the Iranian authorities is affected by whether the person is or has been at any material time a person of significant interest, because if so, they are, in general, reasonably likely to have been the subject of targeted Facebook surveillance. In the case of such a person, this would mean that any additional risks that have arisen by creating a Facebook account containing material critical of, or otherwise*

inimical to, the Iranian authorities would not be mitigated by the closure of that account, as there is a real risk that the person would already have been the subject of targeted on-line surveillance, which is likely to have made the material known.

3) *Where an Iranian national of any age returns to Iran, the fact of them not having a Facebook account, or having deleted an account, will not as such raise suspicions or concerns on the part of Iranian authorities.*

4) *A returnee from the UK to Iran who requires a laissez-passer or an emergency travel document (ETD) needs to complete an application form and submit it to the Iranian embassy in London. They are required to provide their address and telephone number, but not an email address or details of a social media account. While social media details are not asked for, the point of applying for an ETD is likely to be the first potential "pinch point, " referred to in AB and Others (internet activity - state of evidence) Iran [2015] UKUT 257 (IAC). It is not realistic to assume that internet searches will not be carried out until a person's arrival in Iran. Those applicants for ETDs provide an obvious pool of people, in respect of whom basic searches (such as open internet searches) are likely to be carried out.*

Guidance on Facebook more generally

5) *There are several barriers to monitoring, as opposed to ad hoc searches of someone's Facebook material. There is no evidence before us that the Facebook website itself has been "hacked," whether by the Iranian or any other government. The effectiveness of website "crawler" software, such as Google, is limited, when interacting with Facebook. Someone's name and some details may crop up on a Google search, if they still have a live Facebook account, or one that has only very recently been closed; and provided that their Facebook settings or those of their friends or groups with whom they have interactions, have public settings. Without the person's password, those seeking to monitor Facebook accounts cannot "scrape" them in the same unautomated way as other websites allow automated data extraction. A person's email account or computer may be compromised, but it does not necessarily follow that their Facebook password account has been accessed.*

6) *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.*

Guidance on social media evidence generally

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.

9) 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 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. It is difficult to see circumstances in which the deletion of a Facebook account could equate to persecution, as 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. Whether such an inquiry is too speculative needs to be considered on a case-by-case basis."

36. I therefore must assess the *sur place* activity in light of all the Country Guidance cases cited in XX as well as the evidence before me. I must assess the *sur place* activity in two aspects. Firstly, whether the Appellant's political activity is such as to draw him to the attention of the Iranian authorities such that he is placed at risk on return. In combination with that I must assess whether his activity on Facebook creates a risk on return either separately or in combination with his protesting. The Country Guidance case of BA was given as long ago as 2011 and states in the headnote:

> *"1. Given the large numbers of those who demonstrate here and the publicity which demonstrators receive, for example on Facebook, combined with the inability of the Iranian Government to monitor all returnees who have been involved in demonstrations here, regard must be had to the level of involvement of the individual here as well as any political activity which the individual might have been involved in Iran before seeking asylum in Britain."*

37. This must be read in combination with XX.

Assessment of the evidence

38. I have considered all the written evidence provided in the bundle, including the witness statements and the oral evidence of the Appellant.

39. In my judgment the Appellant's protesting outside of the Iranian Embassy is of low significance. He is on his own account not an organiser of the protests, he holds no position of authority. Whilst I have seen his Facebooks posts showing that he was protesting in front of the Iranian embassy in 2024 I do not consider that creates a real risk on return to Iran. The Country Guidance is clear that Iran does not have the capacity to

monitor everyone who protests. I find that he is not at risk as a result of his protesting in the UK.

40. However, I must also examine whether his posting of the protests and other proclamations against the Iranian Government on Facebook place him at risk on return. He has recently posted on Facebook the content of the protests. However, applying XX this is not decisive as he can delete his Facebook account if returned.

41. That is however, not the end of the matter. I must examine whether the Appellant's political opinions place him at risk on return and whether they are genuinely held even if the activities are at a low level. See RT (Zimbabwe) and others v Secretary of State for the Home Department; KM (Zimbabwe) v Secretary of State for the Home Department [2013] 1 AC. To do that I must assess the evidence.

42. The Appellant in this case is a young man who on the evidence finished his schooling at 14 when he left Iran. I remind myself that the events in Iran were when he was a child and take that into account when assessing his evidence. He was nervous, giving evidence through an interpreter did not assist the fluidity of his answers in spite of the interpreter's obvious skill. The Appellant often appeared to smile at inappropriate moments and found the process difficult especially being subject to strong cross examination. I take into account that he was only 14 when he joined protests in Iran and his friend was arrested. The proposition put to him that his parents would not have allowed him to go out in the evening and certainly not to protest – his answer which I accept as honest was that he did not tell them.

43. I find that his description of what happened to him in Iran plausible. His description of the protests, leafletting and the detention of his friend are in my judgment plausible. So is his account of the authorities attending his family and asking of his whereabouts and seizing his travel document. In my judgment his narrative is entirely plausible. The suggestions that he has fabricated evidence are not made out. In my judgment his friends/acquaintances in the KDPI may have encouraged him to make his Facebook public to bolster his claim for asylum but the posts are real and in my judgment his political opinion that the Iranian regime is repressive and arbitrarily kills people are genuinely held.

44. In my judgment his *sur place* activities including the Facebook posts do not in and of themselves place him at risk on return. However, they do lend support to his political beliefs.

45. Assessing the evidence in the round my judgment is that the Appellant is a credible witness who holds a genuine political opinion in opposition to the Iranian authorities. The persecution of his friend and the visits by the authorities to his family in my judgment are enough to execute the "hair-trigger" response by the Iranian authorities.

46. In BA the Upper Tribunal explained that one of the factors is identification on return (see headnote 4(iii)) in my judgment he will be identified by the authorities on return as someone who left Iran without explanation, perhaps not at the airport but on return home. That in my judgment and following the examples of the case law will lead to questions including issues surrounding why he left, which I have found is as a result of fear about what might happen to him as a result of the detention of his friend.

47. This will also lead to an examination of his political opinions which as I have found are genuinely held, even if his protesting is at a low level. In my judgment there is therefore a real risk of the hair trigger response amounting to persecution by the Iranian authorities if the Appellant is returned to Iran.

48. As a result, I allow his appeal on Asylum grounds.

Notice of Decision

1. There is material error of law and as a result I set aside the decision of the First Tier Tribunal.

2. On rehearing the appeal, I allow the Appellant's appeal on asylum grounds.

Ben Keith

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 March 2024