



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal Number: IA/00676/2020**

**(PA/51136/2020)**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On the 31 January 2022**

**Decision and reasons promulgated  
On the 21 March 2022**

**Before**

**UPPER TRIBUNAL JUDGE FRANCES  
DEPUTY UPPER TRIBUNAL JUDGE SAFFER**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**D M P  
(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr Symes, instructed by Darjunnal Solicitors

For the Respondent: Mr Tufan, a Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Background**

1. For ease of reference and consistency with the decision of the First-tier Tribunal, we shall refer to the Secretary of State whose appeal this is as the Respondent and DMP as the Appellant.
2. The Respondent refused the Appellant's protection claim on 3 August 2020. His appeal against that was heard by Judge Hawden-Beale ("the

judge”) on 11 May 2021. The judge dismissed the asylum appeal, but allowed the appeal under Humanitarian Protection grounds with particular reference to Article 2 and 3 of the European Convention on Human Rights, and paragraph 276ADE of the Statement of Changes in Immigration Rules (HC395) (“the rules”). There is no cross-appeal in relation to the dismissal of the asylum appeal which therefore stands.

3. Permission to appeal was granted by Judge Davidge on 18 June 2021 on the basis that;

“it is arguable that the judge in concluding that the Appellant met the burden of showing real risk in the context of paragraph 10 of the headnote in HB (Kurds) Iran CG [2018] UKUT 00430 (IAC) treated the country guidance as authority for asserting that failed Kurdish asylum seekers who had made a claim based on their ethnicity would be at risk on return. The grounds argue that the headnote must be read in the context of the substance of the case which makes clear that failed asylum seekers including those who have relied on matters of ethnicity would not be able to establish that they are at risk without more.”

### **Country Guidance**

4. The headnotes of relevant country guidance are set out below.
5. SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 308 (IAC) states that;
  - (1) An Iranian male whom it is sought to return to Iran, who does not possess a passport, will be returnable on a laissez passer, which he can obtain from the Iranian Embassy on proof of identity and nationality.
  - (2) An Iranian male in respect of whom no adverse interest has previously been manifested by the Iranian State does not face a real risk of persecution/breach of his Article 3 rights on return to Iran on account of having left Iran illegally and/or being a failed asylum seeker. No such risk exists at the time of questioning on return to Iran nor after the facts (i.e. of illegal exit and being a failed asylum seeker) have been established. In particular, there is not a real risk of prosecution leading to imprisonment.
6. BA (demonstrators in Britain- risk on return) Iran CG [2011] UKUT 36 (IAC) states that;
  - (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.

- (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.
  - (b) There is not a real risk of persecution for those who have exited Iran illegally or are merely returning from Britain...
  - (c) There is no evidence of the use of facial recognition technology at the Imam Khomeini International airport, but there are a number of officials who may be able to recognize up to 200 faces at any one time. The procedures used by security at the airport are haphazard. It is therefore possible that those whom the regime might wish to question would not come to the attention of the regime on arrival. If, however, information is known about their activities abroad, they might well be picked up for questioning and/or transferred to a special court near the airport in Tehran after they have returned home.
- (3) It is important to consider the level of political involvement before considering the likelihood of the individual coming to the attention of the authorities and the priority that the Iranian regime would give to tracing him. It is only after considering those factors that the issue of whether or not there is a real risk of his facing persecution on return can be assessed.

7. HB states that;

- (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.

## **The Respondent's submissions**

8. In the grounds seeking permission to appeal it was asserted that the judge has misconstrued HB. There has to be something more than being of Kurdish ethnicity and returning after an illegal departure to found an Article 3 risk. Given the complete lack of profile or an absence of previous adverse interactions with the Iranian authorities, the Appellant is completely unknown to them.
9. While PS (Christianity – risk) Iran CG [2020] UKUT 0046 refers to asylum seekers having to disclose the reason for claiming asylum, that related to Christian converts and does not provide insight beyond what is stated in HB as to the likely process for Kurdish returnees. As was found in PS, the Iranian authorities are fully aware that their citizens make asylum claims abroad and it was considered by the tribunal that, without more, a person would not be at risk.
10. The judge found that the Appellant has no political profile or any political beliefs. The judge found he was not previously known to the Iranian authorities and he would not be required to lie regarding his Facebook account which can be deleted. The judge found he had never genuinely engaged in any political activity. The Appellant would not therefore be required to deny any inherent aspect of his freedom of thought. He would not be required to lie or conceal any protected characteristic in order to avoid persecution. While the Appellant may be required to sign a document to “recant” his political views, this would not be a breach of the convention as he holds no political views.
11. The conclusion by the judge that the Appellant would be at risk when he has no risk factors beyond being a failed Kurdish asylum seeker are findings which were not open to the judge on the evidence.
12. Mr Tufan added orally that the factual matrix is very different to XX (PJAK - sur place activities - Facebook) Iran CG [2022] UKUT 00023 (IAC). The judge found against the Appellant on all points, but allowed the appeal on the basis of what would happen at the ‘pinch point’ of return. Mr Tufan submitted that this cannot be correct as, while having Kurdish ethnicity may be an extra factor, there is nothing in XX which says that a Kurd returning on an Emergency Travel Document will be at risk per se. That was the only basis on which the appeal was allowed. It amounts to an error of law. There will be heightened scrutiny due to his ethnicity. There were many factual differences with those in XX, as the Appellant in XX attended events and was photographed standing next to a prominent person. The Appellant can close his Facebook account as explained in XX.

## **The Appellant's submissions**

13. At the hearing before us Mr Symes submitted a document headed “Rule 24 Response” dated 31 January 2022. This had not been served in accordance with the procedure laid down in Rule 24 of the Tribunal Procedure (Upper

Tribunal) Rules 2008. That is because it had not been delivered to the Upper Tribunal no later than one month after the date on which the Appellant was sent notice that permission to appeal had been granted. We do not know what that date was, but it was no later than 7 December 2021 when the Appellant was served with the Standard Directions regarding the application for permission to appeal. Mr Symes did not apply for that time limit to be extended. Accordingly we do not treat the document he filed as a Rule 24 Response, but as his written submissions.

14. Mr Symes submitted that the judge did not make a material error of law. The judge found that the Appellant would be at risk of serious harm for these reasons. He would be returning with an emergency travel document. He is Kurdish and would attract the hair trigger approach of the interrogators. Notwithstanding the contrived nature of the posts, he would not be expected to lie about the content of his asylum claim.

15. These are the reasons the judge came to the decision she did, it was not simply due to the Appellant's Kurdish ethnicity. Whilst XX had not been promulgated at the date of the judge's decision and her failure to follow it cannot therefore be a material error of law, it supports the Appellant's claim because the court stated;

“118. 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.”

16. Mr Symes added orally that XX does not change the guidance in HB. In XX, as here, the Appellant's claim was found to have been contrived. The appeal in XX was not allowed just because that Appellant was a Kurd. The problems the Appellant would face at the “pinch point” were not just due to his ethnicity. He will be questioned on return as explained in SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 308 (IAC). The application for the Emergency Travel Document was the first “pinch point” which had nothing to do with his ethnicity. The judge referred to the pinch point. The judge explained that the hair trigger approach referred to in HB is more severe than for non-Kurds. The judge said that the Appellant should not be expected to lie. The judge said that the Appellant would be imputed to have political beliefs. Even if he deleted the anti-government Facebook posts, he would still be at risk as he would not be expected to lie about the basis of his claim. There is no cross appeal. It is not required to have imputed political belief to succeed on Article 3 grounds. Even if the Iranian authorities find it contrived, he is still at risk. The threshold for establishing a risk of ill-treatment is low. The reaction of the Iranian authorities is likely to be extreme. The findings were open to the judge on the evidence and in line with the authorities.

17. In any event there is no material error of law in not following country guidance that was not in existence at the date of the judge's decision.

## **The judge's decision**

18. The judge made the following relevant findings;

“39. ...the appellant has not taken part in any protests against the government in Iran, he is not a dissident known to the authorities and nor was he a member, sympathiser or friend of the KDPI whilst in Iran, he is not a dissident known to the authorities and nor was he a member, sympathiser or friend of the KDPI whilst in Iran. In fact, other than delivering leaflets which he did not know appertained to the KDPI until after he stopped delivering them, the appellant has done nothing to bring himself to the attention of the authorities in Iran which could be considered anti-regime...”.

...

“42. I am satisfied that he is not at risk solely on the basis of his Kurdish ethnicity or because he left Iran illegally as per SSH (supra) and also HB (supra) and I am satisfied that he is not at risk because of his claimed activities for the KDPI in Iran because I do not accept that he knew anything about the KDPI in Iran as per his answers in his asylum interview at questions 106-116. For someone who professed to support the KDPI in his heart and to want to help the party when he got to the UK, he knows very little about the party. I am not satisfied that the authorities know of his activities for his uncle in Iran and I am satisfied that he is not being sought in Iran”.

...

“48. The appellant has provided no evidence at all to show that the Iranian authorities are able to access his account given that it is being operated from the UK, or that the authorities are even aware of him. If he deletes his account then he will, in all honesty, in accordance with HJ, be able to say to the Iranian authorities upon his return, that he does not have one and, according to the experts, the Iranian authorities are very unlikely to be able to find out if he did have one once it has been deleted. Given that he has no profile, is illiterate in Farsi and Kurdish Sorani and I do not accept that his posts have been accessed by the Iranian authorities, I am not satisfied that, even if he is brought into direct contact with the authorities, he will definitely be asked about his internet activity.

49. It is clear from paragraphs 470 and 471 of AB that, in some of those who are returned to Iran on a special passport, such as the appellant, who claims never to have had a passport, there will be an enhanced interest, especially at the pinch point of return and he may be asked if he has a Facebook account and what the password was, which if it leads to an active account with anti-government posts on, then there is a real risk of persecution. But in the appellant's case, I am satisfied that he could delete it prior to his return because I do

not accept that it was set up for the purposes of his genuine political beliefs. If it has been deleted, I am not satisfied that the authorities will be able to access it.

50. Since I am not satisfied that the authorities are looking for him for delivering KDPI leaflets in Iran and I am satisfied that his activities in attending the demonstrations outside the Embassy and his Facebook posts are manufactured solely for the purpose of enhancing his asylum claim and will not have attracted the attention of the authorities in Iran, given his lack of political profile, I find that the appellant has not discharged the burden of having a well-founded fear of persecution for any convention reason.

51. ... I do accept that he would be subjected to enhanced interest upon return as per AB because he will be returned on a special passport and heightened security as per headnote 3 of HB because of his Kurdish ethnicity and will be questioned upon arrival as to the basis of his asylum claim in the UK as per PB (CG [2020] UKUT 46 (IAC)) (sic PS (Christianity – risk) Iran CG [2020] UKUT 0046). I accept that he cannot be expected to lie about the basis of his asylum claim to avoid persecution as per HJ ([2010] UKUT UKSC 31) (sic HJ (Iran) v Secretary of State for the Home Department) [2010] UKSC 31) and so therefore, given that headnote 10 of HB makes it clear that the threshold of suspicion is low and any reaction by the authorities is likely to be extreme, irrespective of the fact that I do not accept that he was involved with the KDPI or held any genuine political belief, I accept that, as per headnote 10 of HB, the authorities reaction to him is reasonably likely to result in his arrest, detention, and ill-treatment contrary to article 3.

52. I am therefore satisfied that, although he has not discharged the burden of having a well-founded fear of persecution, he is at real risk of serious harm if returned to Iran for the reasons given above and I find that he qualifies for Humanitarian Protection under paragraph 339C. As a result of those findings, his claim under articles 2 and 3 also succeeds as does his claim, in the alternative, under paragraph 276 ADE “.

19. We set out in full the extract from XX (our emphasis in bold).

**“118. Given his attendance at events; and the prominence of the person he has secured a photograph with, we conclude that there is a real risk that he has been the subject of targeted (as opposed to general) surveillance by the Iranian state already. There is no need for the Iranian authorities to have “hacked” his account or “scraped” his “DYI”.** His carefully curated (albeit contrived) social graph is, in this particular case, just sufficient in our judgment to establish a risk that he has been subject to surveillance in the past that would have resulted in the downloading and storing of material held against his name. Put



another way, **he has drawn enough attention to himself by the extent of his “real world” activities, to have become the subject of targeted social media surveillance. Deletion of his Facebook material and closure of his account before he applied for an ETD would serve no purpose, as his profile is such that there is a real risk that he had already been targeted before the ETD “pinch point.” 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.”

### **Conclusions and reasons**

20. Headnote 4 of HB notes that 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. 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.
21. It was open to the judge to find that the Appellant:
  - (1) had no profile or Kurdish beliefs,
  - (2) was not known to the authorities,
  - (3) was able to delete his Facebook account,
  - (4) had never genuinely engaged in any activity,
  - (5) would not be required to lie on his return to Iran, and
  - (6) would have to say he is a Kurd who claimed asylum and expressed anti-government views even if they were not genuinely held.
22. The facts in XX are different as the Appellant in XX drew enough attention to himself by the extent of his “real world” activities, to have become the subject of targeted social media surveillance. Deletion of his Facebook material and closure of his account before he applied for an ETD would have served no purpose, as his profile was such that there was a real risk that he had already been targeted before the ETD “pinch point.” On return to Iran, there was a real risk that he would be presented with that material, of a highly provocative and incendiary nature.
23. Notwithstanding the different factual matrix in XX, it was open to the judge to find the Appellant was at real risk of harm on return to Iran from the Iranian authorities as he would need to complete an EDT application form

and submit it to the Iranian embassy in London. He would therefore fall with the pool of people, in respect of whom basic searches, such as open internet searches, are likely to be carried out. Upon arrival in Iran he would have to say he is a Kurd who claimed asylum and expressed anti-government views even if they were not genuinely held.

24. We are not satisfied that the judge erred because of the subsequent guidance given in XX for the following reasons. Despite the evidence regarding the technical side of Facebook considered in XX not being before the judge, she reached the same conclusions in [48] of her decision on the Iranian authorities inability to access that information. The judge's conclusions were based on the real risk of what the Iranian authorities reaction would be to what the Appellant said he had posted rather than his belief in the posts. The country guidance case is declaratory of the factual position at the time the judge heard the appeal.
25. We find there was no material error of law in allowing the appeal on humanitarian protection grounds. The Respondent's appeal is dismissed.

## **Decision**

### **Appeal dismissed**

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to Contempt of Court proceedings.

*Laurence Saffer*

Deputy Upper Tribunal Judge Saffer  
8 March 2022

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### **NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the

Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).**

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

**5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**

**6. The date when the decision is “sent” is that appearing on the covering letter or covering email.**