



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00922/2020**

THE IMMIGRATION ACTS

**Heard at Bradford
On 8 March 2022**

**Decision & Reasons Promulgated
On the 19 April 2022**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ER

(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hingora instructed by Halliday Reeves Solicitors

For the Respondent: Mrs Aboni, a Senior Home Office Presenting Officer

DECISION AND REASONS

Background

- 1.** The appellant appeals with permission a decision of First-tier Tribunal Judge Gribble promulgated on 15 October 2020 in which the Judge dismissed the appellant's appeal on all grounds.
- 2.** The appellant is a citizen of Iran of Kurdish ethnicity who arrived in the UK in September 2015 and claimed asylum. That application was refused although the refusal subsequently withdrawn and on 20

January 2020 a fresh decision made to refuse the asylum claim against which the appellant appealed to the First-tier Tribunal.

3. The appellant's nationality and ethnicity are not disputed.
4. Having considered the written and oral evidence the Judge sets out findings of fact from [41] of the decision. The Judge refers to the obligation upon an individual to substantiate their asylum claim or to establish an entitlement to humanitarian protection or for leave to remain on human rights grounds. The Judge considers the provisions of paragraph 399 L of the Immigration Rules and for the reasons set out at [45 - 51] did not find the criteria set out in 399L(i-iv) had been satisfied.
5. The Judge considers 339L(v), which refers to the general credibility established by the claimant, at [52] of the decision in which the Judge refers to inconsistencies in the appellant's evidence relating to his account. It has not been established that the findings of inconsistency are outside the range of those reasonably available to the Judge on the evidence.
6. The appellant relied upon postings on a Facebook account. The Judge notes that the appellant claimed he did not tell his solicitors in October 2019 that he had been posting from July 2018 which led the Judge to find that he did not believe that the appellant who claimed to have been involved with his account since July 2018 with other Kurdish Iranian people who oppose the regime, would not be aware of the significance of Facebook activities and the impact it could have on asylum claims.
7. The Judge notes at [53] that the appellant had claimed he was illiterate and could not read Kurdish and had asked an unnamed friend to set up the account. That friend did not give evidence before the Judge. The Judge makes the specific finding in this paragraph *"No evidence of the Facebook account itself in terms of the mechanics was provided. For example, the email address of the person setting up the account and the date the account is opened is generally visible to the person who set up the account and it is possible to print this out. This was not provided. Nor was the appellant's profile page. Although on the date the bundle was printed the globe suggested that the profile was a public one, there is force in the submission that posts can be backdated and posts made public then private. I was not invited to check the account in the hearing and I remind myself that the burden is on the appellant to prove his case"*.
8. The Judge noted that whilst the tone of the Facebook posts is anti regime and in the appellant's name, he was not satisfied they were created when the appellant claims or indeed by the appellant. The Judge finds even if they were created as long ago as 2018, he was not satisfied the appellant is an anti-regime protester at all and that he had asked friends to create this for him to try and create a political profile [55].
9. As the appellant could not meet the requirements of paragraph 339 L the Judge did not accept that the appellant had made out his case and was not satisfied that the appellant had helped alcohol smugglers in

Iran or that he had had to leave that country as a result of an ambush, and found that he was faking interest in Kurdish politics to bolster an otherwise fabricated claim [57].

10. The Judge considers the appellant's sur place activities but does not find that the Facebook posts are genuine and had been created to show the appellant will be at risk on return from imputed political opinion when the Judge was satisfied he did not hold such an opinion [58]. The Judge considered whether it is likely that the posts would have come to the attention of the authorities in Iran but in any event noted at their highest they were only ever liked by a maximum of eight people although most posts were liked by three or five people with no evidence of who those people are or where they are. There was no evidence before the Judge that the posts are being shared by activists or those with a high profile in the UK Kurdish Community [59].
11. The Judge finds that on the basis the appellant has no commitment he could seek the help of his friends to delete the account before he reached Iran and that he would not be compromising a core fundamental belief by doing so. The Judge finds a deleted account could not be reopened by the Iranian authorities and that even if there was greater suspicion of Kurdish political activities within the Iranian regime the appellant did not have an adverse profile as he was not somebody who had been or is currently involved in political activity and therefore did not fall into the group of returnees who would be subject to enhanced suspicion from the Iranian authorities; by reference paragraph 94 - 97 of the country guidance case of HB(Kurds) Iran CG [2018] UKUT 00430.
12. The appellant sought permission to appeal on two grounds. Ground one asserting material error of law by failing to properly consider or apply the relevant country guidance cases of the Upper Tribunal and secondly for failing to take into account relevant factors and failure to conduct a fact sensitive assessment of credibility, for the reasons more fully set out in the grounds of 23 October 2020.
13. Permission to appeal to the Upper Tribunal was refused by another judge of the First-tier Tribunal but granted on a renewed application by the Upper Tribunal directly on 11 December 2020, the operative part of the grant reading:
 2. Given the judge's acceptance that the appellant's Facebook posts were anti-regime, identified him and were public, it is arguable that she erred in concluding that the appellant could avoid persecution by the Iranian authorities by simply deleting them. It is further arguable that there was a failure, when assessing risk on return, to take into consideration the appellant's anti-regime views, as expressed in his asylum interview or his attendance at demonstrations outside the Iranian Embassy in London.
14. The Secretary of State has filed a Rule 24 response dated 11 January 2021, the operative part of which is in the following terms:
 2. The respondent opposes the appellant's appeal. In summary, the respondent will submit *inter alia* that the judge of the First-tier Tribunal

directed himself appropriately. The judge has undertaken a fair and balanced assessment of the appellant's claim. The judge weighs evidence both in favour and against the appellant and notes where he has not taken a point against him. The findings by the judge were reasonably open to him on the evidence presented. The judge in assessing the evidence noted that there was a globe on the documents showing the appellant's purported Facebook posts "suggesting" that the profile was public. However, the judge noted a number of concerns which led him to reject the Facebook account was genuinely created; that the appellant has any personal involvement with the account and importantly concluded that the account was not in the public (determination 53; 55; 57; 58).

3. Although the judge rejected the appellant's account, the judge nonetheless conducted a belt and braces approach and considered the account in the alternative (determination 59 - 62). The judge found that the appellant did not have any genuine belief and that he did not have a profile that would warrant interest. Given the judge has found that the appellant is illiterate and has no knowledge of the Facebook account details used to login, the grounds fail to show how the appellant will be at risk if he does not even know his own Facebook account details. Given the judge has determined that the appellant's account was not credible and the appellant has no political profile, it will be argued that his ethnicity alone would be insufficient to warrant interest of the Iranian authorities.

Error of law

15. This case was stayed to await the publication of the Upper Tribunal reported determination dealing with Facebook and other social media which has been handed down and reported as XX (PJAK - sur place activities - Facebook) Iran CG [2022] UKUT 00023 (IAC). The headnote, which accurately reflects the findings made in the body of the judgement, 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 00308 (IAC); and HB (Kurds) Iran CG [2018] UKUT 00430 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 00257 (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.

- 16.** The two important findings by the Judge are that there was no evidence that the content of the appellant's Facebook account will have come to the attention of the authorities in Iran and that he does not have a genuine anti-regime political opinion/profile.
- 17.** It is said that in assessing the risk to the appellant the Judge failed to take into account the fact the appellant attended a demonstration in London which it was argued could give rise to a real risk on return as a result of imputed adverse opinion, whether the same was generally held or not, a Danian point.
- 18.** In BA (Demonstrators in Britain –risk on return) Iran CG [2011] UKUT 36 (IAC) the Tribunal held that:
 - (i) 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;
 - (ii) (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. The conclusions of the Tribunal in the country guidance case of SB(risk on return-illegal exit) Iran CG [2009] UKAIT 00053 are followed and endorsed.
 (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.
- (iii) 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.
- (iv) The following are relevant factors to be considered when assessing risk on return having regard to sur place activities
- (a) Nature of sur place activity. Theme of demonstrations -what do the demonstrators want (e.g. reform of the regime through to its violent overthrow); how will they be characterised by the regime? Role in demonstrations and political profile -can the person be described as a leader; mobiliser (e.g. addressing the crowd), organiser (e.g. leading the chanting); or simply a member of the crowd; if the latter is he active or passive (e.g. does he carry a banner); what is his motive, and is this relevant to the profile he will have in the eyes of the regime. Extent of participation -has the person attended one or two demonstrations or is he a regular participant? Publicity attracted -has a demonstration attracted media coverage in the United Kingdom or the home country; nature of that publicity (quality of images; outlets where stories appear etc)?
 - (b) Identification risk. Surveillance of demonstrators -assuming the regime aims to identify demonstrators against it how does it do so, through, filming them, having agents who mingle in the crowd, reviewing images/recordings of demonstrations etc? Regime's capacity to identify individuals -does the regime have advanced technology (e.g. for facial recognition); does it allocate human resources to fit names to faces in the crowd?
 - (c) Factors triggering inquiry/action on return. Profile -is the person known as a committed opponent or someone with a significant political profile; does he fall within a category which the regime regards as especially objectionable? Immigration history -how did the person leave the country (illegally; type of visa); where has the person been when abroad; is the timing and method of return more likely to lead to inquiry and/or being detained for more than a short period and ill-treated (overstayer; forced return)?
 - (d) Consequences of identification. Is there differentiation between demonstrators depending on the level of their political profile adverse to the regime?
 - (e) Identification risk on return. Matching identification to person - if a person is identified is that information systematically stored and used; are border posts geared to the task?

- 19.** The Judge's core finding is that the appellant does not have an adverse profile that will be known to the authorities and give rise to real risk on return. The nature of the appellant's activities in attending demonstrations do not establish that he is likely to be perceived as a person who will be of particular interest to the authorities either in the UK or in Iran.
- 20.** The Judge finds that the attendance at the demonstration and other activities were not genuine therefore the appellant will not breach the HJ (Iran) principle if he denies the same.
- 21.** The country guidance case of XX does not undermine the Judge's findings in relation to the ability of a person who has a Facebook account to delete that account and the effect of posts 'held' in that individual's Facebook account. They will, as the Judge found, be deleted and it was not made out before me that they could be recovered by a third party who may wish to examine such content at a later date.
- 22.** The relevance of the Judge's observation concerning the Facebook privacy settings shows there was insufficient evidence to show they will be genuinely accessible to third parties.
- 23.** It is not made out there is anything the appellant will be required to say to the authorities on return that would give rise to a real risk. In that respect the Judge has not been shown to have erred in law.
- 24.** There was no evidence of the possibility that the appellant's posts/likes would have already come to the attention of the Iranian authorities because of other people in his 'social graph'. The Judge's findings in relation to the small number of likes and lack of evidence proving the alternative relative is relevant to this issue.
- 25.** Mr Hingora submitted, quite correctly, that even though the Judge had found the appellant's postings on Facebook and attendance at demonstrations were disingenuous, as they did not represent a genuinely held political view adverse to the Iranian regime, it did not mean he would not be at risk on return per se.
- 26.** Individuals taking part in sur place activities "in bad faith", has been considered in several authorities - in particular YB (Eritrea) v Secretary of the State for the Home Department [2008] EWCA Civ 360; TL and Others (Sur Place Activities: Risk) Burma CG v Secretary of State for the Home Department [2009] UKAIT 00017; KS (Burma) v Secretary of State for the Home Department [2013] EWCA Civ 67; and TS (Burma) v Secretary of State for the Home Department [2013] UKUT 000281 IAC. Those cases establish that it is a question of fact whether a particular government is likely to try to distinguish between the sincere and the insincere activist in order to be able to persecute the former but not the latter, and that if it is likely to make no such distinction an asylum-seeker may, however unpalatable this may be, be able to succeed in a claim based on sur place activities even where those activities have been undertaken in bad faith.
- 27.** BA (Demonstrations in Britain - risk on return) Iran CG [2011] UKUT 36 (IAC) which sets out a number of factors to be considered when

assessing risk on return in relation to sur place activities. These include the nature of the activity, identification risk, factors triggering enquiry/action of return, consequences of identification, and identification risk on return. It is a fact specific assessment of such factors that should lead to the conclusion of whether an individual will face a real risk on account of their sur place activities from the Iranian authorities or not. The fact that such a conditional assessment is required supports a finding that in relation to those undertaking sur place activities, such as those relied on by the appellant in this appeal, there is a need to distinguish between those that may be viewed as having a sincere or genuine antiregime view in the eyes of the potential persecutors and those who do not.

- 28.** There was evidence before the Judge at page 22 of the appellant supplementary bundle of his attendance at demonstrations before the Iranian embassy in London. Whilst photographs of his attendance may have been published on his Facebook account it was not found that the authorities would have any access to that material. It is also the case that before the Judge there was no evidence the appellants activities would lead him to being described as a leader, a mobiliser, or an organiser. He was clearly, at its highest, simply a member of the crowd who, in light of the adverse credibility findings in relation to events in Iran and lack of sincere belief in what he was allegedly purporting to show, can be classed as an “opportunistic hanger-on”.
- 29.** It was not made out that even though the appellant attended demonstrations he was a regular participant such that his regular attendance created a degree of familiarity and heightened his adverse profile.
- 30.** It was not made out on the evidence before the Judge that the demonstration has attracted media coverage in the United Kingdom or Iran.
- 31.** In BA there is reference to surveillance of demonstrations through filming or having agents mingling in the crowd or reviewing images, but there was nothing in the public domain that was brought before the Judge to show there are any images of the demonstration identifying the appellant. I accept that the appellant would not know if the authorities in Iran have photographic evidence of him; but his role within the demonstration was clearly very low-key.
- 32.** There was no evidence before the Judge that the appellant is a known committed opponent or someone with a significant political profile viewed as by the Iranian authorities as being especially objectionable. Whilst it is accepted the appellant left Iran illegally that on its own does not create a real risk.
- 33.** The Judge dealt with the “pinch point” on return when finding the appellant had not established any real risk of harm at that point. That is a finding within the range of those open to the Judge on the facts of this appeal.
- 34.** There is clearly a differentiation between the risk to demonstrators depending on the level of their profile as it is only those deemed to be

a risk to the regime in Iran as a result of their actual or imputed political opinion who will face adverse consequences.

- 35.** The submission by Mr Hingora that it was not appropriate to expect a further application to be made if the guidance in XX warranted such an approach based on material that was not previously available as there was the risk the Secretary of State may certify such a claim is noted, but a claim can only be certified if it is a claim that satisfies the certification requirements in that it is a claim that is clearly unfounded. That is a question of fact depending upon the evidence that is made available.
- 36.** The Judge clearly considered the evidence with the required degree of anxious scrutiny, has made findings within the range of those available to the Judge on the evidence, which are supported by adequate reasons. I find the appellant has failed to establish legal error material in the decision of the Judge sufficient to warrant the Upper Tribunal interfering any further in this matter.

Decision

- 37. There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

- 38.** The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated 18 March 2022