



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00941/2020**

THE IMMIGRATION ACTS

**Heard at Cardiff Civil Justice Centre
On 3 February 2022
Remotely by Microsoft Teams**

**Decision & Reasons Promulgated
On 18 March 2022**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

**MK
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Schwenk instructed by Freedom Solicitors
For the Respondent: Mr C Bates, 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. The appellant is a citizen of Iran. He is of Kurdish ethnicity. Following an age assessment in 2017, the appellant was found to be over the age of 18.
3. The appellant came to the UK on 1 May 2017 clandestinely. He claimed asylum on 2 May 2017.
4. The basis of the appellant's claim was that his father and uncle worked as Kolbars, namely cross-border smugglers between Iran and Iraq. When he was a child, his father was shot and killed in his work and the appellant went to live with his uncle. He claimed that in 2017, the Iranian regime killed a Kolbar from his village. As a consequence, a demonstration took place which the appellant took part in. There was some disruption including damage to windows. The appellant claimed that he had been identified from CCTV taken at the demonstration and his uncle had been visited by security forces looking for him. As a consequence, the appellant left Iran, with the aid of an agent arranged by his uncle, arriving in the UK on 2 May 2017. The appellant claimed that if he returned to Iran he would be seriously ill-treated or killed by the Iranian authorities.
5. On 21 January 2020, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR. The Secretary of State rejected the appellant's account of what he claimed had happened to him in Iran. Further, the Secretary of State rejected the appellant's *sur place* claim based upon attendance at demonstrations in the UK and Facebook posts since the appellant has been in the UK.

The Appeal to the First-tier Tribunal

6. The appellant appealed to the First-tier Tribunal. In a decision sent on 30 December 2020, Judge Parkes dismissed the appellant's appeal on all grounds.
7. First, the judge made an adverse credibility finding and rejected the appellant's account of the events he claimed had occurred in Iran and had led him to leave for fear that he would be subject to serious ill-treatment or would be killed by the Iranian authorities. Secondly, the judge found that the appellant's *sur place* activities were not based upon genuinely held political views but were undertaken in order to bolster his claim to remain in the UK. The judge concluded that the appellant had not established that he would be at risk on return to Iran as a result of those activities. Finally, he would not be at risk simply on the basis that he had illegally exited Iran.
8. As a consequence, the judge dismissed the appellant's international protection claim and went on also to dismiss his claim under Arts 3 and 8 of the ECHR.

The Appeal to the Upper Tribunal

9. The appellant sought permission to appeal to the Upper Tribunal on two grounds. Ground 1 related to the dismissal of the appellant's international

protection claim. Ground 2 related to the judge's decision to dismiss the appellant's Art 8 claim.

10. As regards ground 1, the grounds identify three points.

Ground 1(a): the judge erred in law by failing to give adequate reasons for reaching his adverse credibility finding.

Ground 1(b): the judge erred in law by failing to give adequate reasons for finding that the appellant had not established that he had a genuine political opinion and that his *sur place* activities were disingenuous or opportunistic.

Ground 1(c): the judge erred in law, in any event if the appellant's political activity was disingenuous or opportunistic, by failing to give adequate reasons why he would nevertheless not be at risk on return following the country guidance decision in HB (Kurds) Iran CG [2018] UKUT 00430 (IAC) ("HB").

11. On 11 February 2021, the First-tier Tribunal (RJ Zucker) refused the appellant's application for permission to appeal. However, on renewed application to the Upper Tribunal, UTJ Sheridan granted the appellant permission to appeal on 24 June 2021. In particular, in granting permission UTJ Sheridan considered it was arguable that the judge had failed to consider whether, if his *sur place* activities were known to the Iranian authorities, the appellant would nevertheless be at real risk on return to Iran even if the *sur place* activities were undertaken solely to bolster his asylum claim.
12. The appeal was listed for a remote hearing at the Cardiff Civil Justice Centre on 3 February 2022. I was based in court. Mr Schwenk, who represented the appellant, and Mr Bates, who represented the respondent, joined the hearing remotely by Microsoft Teams.
13. I heard oral submissions from both Mr Schwenk and Mr Bates.

The Judge's Decision

14. I begin with the judge's decision.
15. At paras 11-27, the judge considered the appellant's evidence concerning the claimed events in Iran, namely that his family were Kolbars and that following the death of a Kolbar in his village the appellant had taken part in a demonstration which had attracted the interest of the Iranian authorities, and in para 28 reached the following conclusion:

"28. Taking all the above into consideration I find that the appellant's account of events in Iran is not credible and I reject the claim that the appellant was involved in demonstrations, that he was identified and then sought out as claimed. I do not believe that the appellant's departure from Iran was arranged at short-notice or that he has lost contact with his relatives in Iran".
16. I need say no more about this section of the judge's decision and his findings in para 28 because, although ground 1(a) asserted that the judge

had failed to give adequate reasons for the finding, Mr Schwenk did not rely upon this ground in his oral submissions. No doubt that reflects the brevity and vagueness of ground 1(a) and the detail of the judge's reasons at paras 11-27 leading to his adverse credibility finding in para 28. It suffices to say that I see no basis upon which it can be said that the judge's detailed reasons - based upon inconsistencies in the appellant's evidence and aspects of his account which were considered to be implausible - were other than cogent, adequate and rational reasons for the adverse credibility finding.

17. Having reached that finding, the judge went on to consider whether the appellant would be at risk on return as a result of his *sur place* activities in the UK. These included attendance at demonstration(s) outside the Iranian Embassy in London and also posts on his Facebook account. The judge related the relevant evidence at paras 21-23 as follows:

"21. That there is a Facebook account in the appellant's bundle is clear. There is a limitation with regards to screenshots because the status of a page can be changed immediately before and after a screenshot has been taken and posts can be put up for very short periods of time before being taken down or access to the relevant page is limited.

22. The Home Office question whether the Facebook page is in reality the appellant's own or that he is using someone else's having had the page set up, on his account, by someone else, [N], on his behalf. In evidence the appellant said that they had met in the park in West Bromwich, [N] knew the appellant's circumstances but the appellant did not know his. [N] said that with his own account the appellant could publish freely things you could not express in Iran. Apparently the appellant copies and pastes posts but does not write what appears on them.

23. There are photographs of the appellant in a high visibility vest outside the Iranian Embassy in London. It was not clear how he had come to be involved in what was taking place. The person he had spoken to had simply said he was involved with 'democrat', no specific party was named and there is no evidence from any organisation that the appellant had any role in the organisation or the events that were taking place. The photographs show that the appellant was present at some demonstrations and placed himself in a position where he could be photographed by someone else but they do not show that the appellant actually had any role in the organisation or marshalling the events".

18. The judge then turned to consider at paras 29-31 whether these activities put the appellant at real risk of persecution or serious harm on return as follows:

"29. So far as the appellant's *sur place* activities are concerned I find that they are not a reflection of any genuinely held political views and are simply undertaken by the appellant to bolster his desire to remain in the UK. The circumstances strongly suggest that the appellant is not known to the authorities. There is no evidence that the Facebook posts, aside from the lack of genuine belief, are in place long enough to be monitored or they are known to the authorities.

30. This is on the assumption that the account is the appellant's but the evidence for that is not strong and I do not exclude the idea that the appellant may simply have used someone else's account for this appeal. If the account is the appellant's account given that the posts are not a

reflection of any views that he holds he can reasonably be expected to delete anything that might be offensive to the regime before he returns to Iran.

31. The appellant would not be at risk on return to Iran on account of his time there or his activities in the UK. The appellant is not known to the authorities and the only feature of his case would be his illegal exit from Iran and that would not place him in need of international protection on any basis".
19. As a consequence, the judge dismissed the appellant's international protection claim and also went on to dismiss his claims under Arts 3 and 8 of the ECHR.

The Appellant's Submissions

20. On behalf of the appellant, Mr Schwenk relied upon what I have characterised as grounds 1(b) and 1(c).
21. As regards ground 1(b), Mr Schwenk submitted that it was not sufficient for the judge to rely upon the fact that the appellant's account had not been found to be credible to reach his finding in para 29 that the appellant did not genuinely hold political views when he undertook his *sur place* activities. The judge had to assess the Appellant's evidence about his political beliefs. Mr Schwenk pointed out that the appellant was Kurdish and that following HB, it was clear that Kurds suffered discrimination. Mr Schwenk relied upon the appellant's evidence set out in his witness statement, which had been before the First-tier Tribunal, dated 17 March 2020, where at para 15 the appellant had said:

"15. I would like to reaffirm that all Kurdish person is aware of how the Iranian government treat those who carry out anti-government activities, including me. It is, therefore, our moral responsibility to do something for the sake of Kurdish people in Iran. This is regardless of the level of risk and danger by the Iranian authority. I can thus, confirm that I am still politically active in the UK as I attend demonstrations against the Iranian Regime. I also publish anti-government activities on my Facebook page for the sake of the people in Iran".
22. Mr Schwenk also drew attention to questions 27-31 in the appellant's asylum interview on 12 November 2019 in which, in particular in answer to question 28, the appellant had stated that he started his Facebook page since he came to the UK as: "I want to use it to channel some anger at the Iranian regime - anything that I was able to express in Iran I wanted to do here via Facebook or at demonstrations".
23. Mr Schwenk submitted that the judge's finding in relation to whether the appellant's *sur place* activities were genuine was relevant to the claim on two bases. First, it was relevant to whether the judge was entitled to find that the appellant could, consistently with HJ (Iran) v SSHD [2010] UKSC 31, be reasonably expected to delete his Facebook account so that it could not be seen by the Iranian authorities. Secondly, Mr Schwenk submitted it was relevant to ground 1(c), namely that the appellant could be at risk on return because of his *sur place* political activity in the UK if it was genuine or because he was perceived to be involved in political activity despite it

not being genuine. In that regard, Mr Schwenk drew attention to the decision in HB and, in particular, paras (7) and (9) of the headnote as well as BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 36 (IAC) (“BA”) at [65] which identified that the Iranian authorities were not interested in the motivation behind political activity.

24. In addition, Mr Schwenk submitted that the appellant could be at risk on return, applying HJ (Iran), because he could not be expected actively to lie about his activities in the UK. As part of this submission, Mr Schwenk submitted that, on the judge’s findings, the appellant was not a good liar and it was likely that the Iranian authorities would not believe him that his political activity was, in any event, disingenuous.
25. Mr Schwenk invited me to find that there was a material error of law in the judge’s decision and to set it aside such that it should be re-made on remittal to the First-tier Tribunal, including fact-finding in relation to the relevant matters relating to risk on return as a result of *sur place* activities following the recent CG decision in XX (PJAK – *sur place* activities – Facebook) Iran CG [2022] UKUT 23 (IAC) (“XX”) which had been published after the First-tier Tribunal’s decision in this appeal.
26. Finally Mr Schwenk placed no reliance on ground 2 and the challenge to the judge’s decision under Art 8.

The Secretary of State’s Submissions

27. On behalf of the Secretary of State, Mr Bates submitted that the judge had made a sustainable finding that the appellant did not have a genuine political belief and that his *sur place* activities were opportunistic. That finding was based first, on the judge’s adverse credibility finding in relation to his activities in Iran, secondly on the inadequacy of the Facebook evidence and thirdly, on the photographic evidence of demonstrations but in the absence of evidence why the appellant was present. Mr Bates submitted that the judge was entitled to come to the conclusion that the evidence was contrived and that the claim was embellished.
28. Secondly, Mr Bates accepted that if the appellant was a genuine activist his claim probably should succeed under a combination of HB and HJ (Iran). However, Mr Bates did not accept that the case law demonstrated that an individual, disingenuous in his *sur place* activities, could establish a real risk of persecution on return to Iran. He submitted that the decision in HB concerned *sur place* political activity by a person who was genuinely politically motivated.
29. Thirdly, as regards the HJ (Iran) point, Mr Bates submitted that the appellant could not succeed as he was not entitled to claim that he could speak the truth, namely that he had been involved in political activity. Mr Bates referred me to [98]–[102] in XX where, dealing with the application of HJ (Iran), the Upper Tribunal had recognised that a disingenuous *sur place* activist could not only be expected to delete his Facebook account but also avoid doing anything other than truthfully describing his fabricated protection claim.

30. Mr Bates submitted that the judge was entitled to find that the appellant was not at risk on return to Iran, including that his activities in the UK would not be known to the Iranian authorities.
31. Mr Bates invited me to dismiss the appellant's appeal but, if I accepted Mr Schwenk's submissions, to preserve the judge's adverse credibility finding in relation to the appellant's claimed activities in Iran and to re-make the decision in the Upper Tribunal.

Discussion

32. As will be clear from the submissions that I have set out above, since the First-tier Tribunal's decision in this appeal the Upper Tribunal has published a country guidance decision in XX which deals specifically with the risk on return to Iran arising from *sur place* activities in the UK, in particular Facebook activity. So far as that decision provides country guidance, it could not have been taken into account by the judge and is not relevant to whether the judge erred in law in dismissing the appellant's appeal.
33. It is, however, relevant on one issue raised in the submissions. That concerns the proper legal approach to HJ (Iran) in the case of a person who has engaged disingenuously in *sur place* activities. That discussion is at [98]–[102] of the UT's decision. In setting out the legal approach based upon HJ (Iran), the UT's decision represents the law not only at the time its decision was published but also at the time the First-tier Tribunal Judge reached his decision. To that extent, therefore, it is relevant to issues arising in this appeal. I will return to it below.
34. As regards country guidance, the First-tier Tribunal was required to consider the relevant country guidance, in effect, at the time of the hearing. That consisted principally of three decisions: HB; BA; and SSH and HR (illegal exit: failed asylum seeker) Iran (CG) [2016] UKUT 308 (IAC). In fact, the judge only made brief reference to HB in para 26.
35. Before turning to the country guidance and its application in this appeal, I will deal first with ground 1(b).
Ground 1(b)
36. This ground contends that the judge failed to give adequate reasons in para 29 for his conclusion that the appellant did not genuinely hold political views in carrying out the *sur place* activity in the UK.
37. The judge's finding is in para 29 of his decision which I set out above. That finding was, as Mr Bates submitted, reached in the light of the adverse credibility finding concerning the appellant's claimed activities in Iran before coming to the UK. Of course, the mere fact that the appellant had not undertaken any political activity in Iran, was not necessarily determinative that any activity he had engaged in in the UK, which on the face of it looked 'political', was in fact not politically motivated.

38. Mr Bates sought to argue that the judge's finding was also based on the inadequacy of the Facebook evidence (that is at para 22 of the decision which I set out above) and the limited evidence of why the appellant was demonstrating outside the Iranian Embassy in London (that is at para 23 set out above). Whilst I accept that the judge refers to both of these issues in paras 22 and 23, it is not entirely clear to me how that reasoning factors into the judge's finding in para 29 that the appellant's *sur place* activities in the UK were disingenuous.
39. Mr Schwenk took me to the appellant's evidence in his witness statement (which although unsigned was in evidence before the judge) in which he explained his pro-Kurdish sympathies and why he wished to engage in protest in the UK. There was also his answer in interview concerning his Facebook activity in the UK.
40. In Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC) Haddon-Cave J and UTJ Coker reiterated the general approach to the giving of reasons in the context of immigration appeals set out in the headnote as follows:

"It is generally unnecessary and unhelpful for the First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments being overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons so that the parties can understand why they have won or lost".

41. In this appeal, I am not satisfied that the judge has not given sufficient or adequate reasons in the sense set out in Budhathoki. Para 29 simply states a conclusion. If it was, in truth, based upon the judge's adverse credibility finding in relation to the appellant's activities in Iran, the judge needed at least to grapple with the appellant's evidence concerning his motivation in the UK for carrying out these activities. After all, unlike his claimed activities in Iran, it was not seriously contended that he had not engaged in demonstrations outside the Iranian Embassy, nor that he had not placed relevant adverse regime material on Facebook.
42. As a consequence, I accept Mr Schwenk's submissions in relation to ground 1(b) that the judge's finding in relation to the appellant's motivation cannot be sustained in law.

Ground 1(c)

43. In the absence of a sustainable finding in relation to the appellant's motivation, it is difficult to sustain the judge's decision to dismiss the appeal based upon the appellant's *sur place* activity. On the basis of Mr Bates' submissions (if correct), in determining whether the appellant would be at real risk on return to Iran, it is crucial to know whether his activities in the UK were genuine. I do not, however, accept Mr Bates' submission that an individual necessarily cannot establish an international protection claim based upon disingenuous *sur place* activity in the UK on return to Iran. That underlying submission appears to be the basis upon which the judge concluded that the appellant could not succeed.

44. A useful starting point is the country guidance in HB, particularly in relation to the risk to returning Kurds who are suspected *or perceived* to be politically active. The relevant parts of the judicial headnote are as follows:

- “(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.”

45. In relation to the country guidance, it is plain that even “low-level” political activity by a Kurd can give rise to a real risk of persecution or serious ill-treatment contrary to Art 3 (para (9)). In this case, the appellant has

engaged in some, at least apparently, anti-regime political activity of a pro-Kurdish nature in his attendance at demonstrations outside the Iranian Embassy and in Facebook posts. If this activity were genuine, the judge should have enquired: first, whether this activity would be known to the authorities; and secondly, if it were whether it was sufficient (even if 'low-level') to engage the interest of the Iranian authorities. As I have said, Mr Bates was inclined to accept that such activity would, indeed, expose a person to a real risk of persecution on return to Iran if known to the authorities.

46. The risk to an individual is not, in my judgment, excluded by the case law simply because he or she does not hold a genuine political belief but has nevertheless engaged in *sur place* activity, such as attending demonstrations and engaging in anti-regime Facebook activity. In HB "political activity" is considered by the UT as being genuine political activity or "activity that is *perceived* to be political" (para (9) my emphasis). This is supported by what the UT says at para (10) of the headnote, namely the 'hair-trigger' approach to those "suspected of *or perceived* to be involved in Kurdish activities or support for Kurdish rights" (my emphasis). The threshold of suspicion is low and the response of the Iranian authorities is reasonably likely to be extreme.

47. Further, in BA, the UT said this at [65]:

"... of especial relevance is identification risk. We are persuaded that the Iranian authorities attempt to identify persons participating in demonstrations outside the Iranian Embassy in London. The practice of filming demonstrations supports that. The evidence suggests that there may well have been persons in the crowd to assist in the process. There is insufficient evidence to establish that the regime has facial recognition technology in use in the UK, but it seems clear that the Iranian security apparatus attempts to match names to faces of demonstrators from photographs. We believe that the information gathered here is available in Iran. While it may well be that an appellant's participation in demonstrations is opportunistic, the evidence suggests that this is not likely to be a major influence on the perception of the regime. Although, expressing dissent itself will be sufficient to result in a person having in the eyes of the regime a significant political profile, we consider that the nature of the level of the *sur place* activity will clearly heighten the determination of the Iranian authorities to identify the demonstrator while in Britain and to identify him on return. That, combined with the factors which might trigger enquiry would lead to an increased likelihood of questioning and of ill treatment on return."

48. As that makes clear, monitoring by the Iranian authorities occurs, in particular in respect of demonstrations. But, also, as in HB, the Upper Tribunal recognised, in effect, the importance of 'perception' by the Iranian authorities of activities as being political. At [65] the UT notes that the fact that a person's participation in demonstrations is opportunistic is "not likely to be a major influence on the perception of the regime".

49. It follows, in my judgment, that political activity which is not genuine may nevertheless be perceived as political activity giving rise to a real risk of persecution or serious ill-treatment on return to Iran. The judge failed to consider this aspect of the substance of the appellant's claim even if the

judge's finding stood that the appellant did not genuinely have political beliefs.

50. The appellant could only be at risk if his activities were known. Paragraph [65] of BA refers to monitoring of demonstrations. There is also material, even in the case law predating XX, concerning the monitoring of social media, including Facebook (see AB and Others (internet activity – state of evidence) Iran [2015] UKUT 257 (IAC)). This was clearly a live issue before the judge, or would have been, if the genuineness of the appellant's activity had been accepted. The judge does not really engage with that issue other than to conclude that his Facebook posts were not “in place long enough to be monitored or that they are known to the authorities”. It is not entirely clear how the judge came to that conclusion given that the Facebook posts remain in place. Even if, and I will return to this issue below, the appellant could be expected to delete those posts prior to returning to Iran if he had no genuine political belief, that would only suggest that his Facebook posts would not be discovered at the point of return and would say nothing about whether those Facebook posts were already being monitored and had already been seen. That is not an issue which the judge resolved in this case.
51. There is a further possibility, posited on a different basis, that the appellant's activity in the UK could be discovered on return, namely when he is screened and interviewed at the airport. That returnees are screened and interviewed was not, as I understand it, in dispute between the parties. It is referred to by the UT in BA at para (2(a)) of the judicial headnote and also in PS (Christianity – risk) Iran CG [2020] UKUT 46 (IAC) at para (4) of the judicial headnote where it is described as a “pinch point” on arrival. Again, it was not a matter in dispute between the parties, that if the appellant held genuine political beliefs he could not be required to dissemble or lie about his activity if questioned and, if he chose to do so in order to avoid the persecution that would follow, in itself that would be sufficient to establish his asylum claim following HJ (Iran).
52. If the appellant was not genuinely politically active, I accept Mr Bates' submission that HJ (Iran) does not assist the appellant at the “pinch point” of screening/interview at the airport. In that situation, the first issue would be what the appellant might tell the Iranian officials when questioned. Would he disclose his political activity in the UK, if so, would he truthfully inform them that he had fabricated his asylum claim including basing it upon disingenuous political activity?
53. It will be relevant to consider the appellant's history of telling the truth and of lying in order to seek to avoid harm to himself having fabricated to the UK authorities his account. It would also be relevant to consider, and take into account, whether an appellant who claimed that he would say to the Iranian authorities something that would create a real risk to him and whether he is to be believed that he would put himself ‘in harm's way’. It is a factual issue which a judge would need to resolve but was not considered by the judge in this appeal.

54. However, if an individual would not disclose what had happened to him, I do not accept Mr Schwenk's submission that his claim could nevertheless succeed applying the principle in HJ (Iran) because he cannot be required to lie and is entitled to tell the truth. The HJ (Iran) protection applies to an individual who "must conceal his race, religion, nationality, membership of a social group or political opinion [because otherwise] he is being required to surrender the very protection that the Convention is intended to secure for him" (per Sir John Dyson JSC at [110]). So, for example, a person cannot be expected or required to hide or lie about their sexual orientation or not disclose their political views (or in some instances their neutrality as in RT (Zimbabwe) v SSHD [2012] UKSC 38, but in each of those cases the individual would otherwise have been required to act so as to avoid the very protection from persecution given by the Refugee Convention. In the case of a person who is disingenuous about their political activity or their political beliefs, they have no protected Convention right (political opinion) which entitles them to espouse those (false) political views or carry out those (false) political activities such that they cannot be reasonably expected to avoid persecution by not doing so.
55. In XX, as part of the legal analysis (and not country guidance), the UT dealt with this issue primarily (but not exclusively), in the context of whether a person could be expected to volunteer to the Iranian authorities that he had previously lied to the UK authorities in relation to his asylum claim which he had fabricated and/or could be expected to delete his Facebook account. The UT said this at [98]-[102]:

"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 person’s social graph or social media activities are limited.”

56. The UT’s views in XX reflect the approach I have set out here in relation to the disingenuous political activist.
57. In the result, therefore, I accept both grounds 1(b) and 1(c) are made out. The judge materially erred in law in dismissing the appellant’s international protection claim.

Decision

58. The decision of the First-tier Tribunal to dismiss the appellant’s appeal involved the making of an error of law. That decision cannot stand and is set aside.
59. The decision must be re-made. The judge’s adverse credibility finding and rejection of the appellant’s account of what he claimed occurred to him in Iran stands and is preserved. None of the judge’s findings in relation to the appellant’s *sur place* claim at paras 29–31 are preserved. The outstanding issue in relation to the international protection claim is

whether the appellant's *sur place* activities give rise to a real risk of persecution or serious ill-treatment on return to Iran. That decision must be made in the light of the most recent country guidance in XX.

60. In addition, to the extent that the appellant continues to rely upon Art 8 of the ECHR, that decision should be re-made in the light of the evidence before the tribunal re-making the decision.
61. Given the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal to re-make the decision to the extent set out above. The appeal is, therefore, remitted to the First-tier Tribunal to be heard by a judge other than Judge Parkes.

Signed

Andrew Grubb

Judge of the Upper Tribunal
15 February 2022