Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/02251/2020**

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 17 March 2022	**On the 19 April 2022**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

KJY
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Samra of Harbans Singh & Co Solicitors.
For the Respondent: Mr Williams, a Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Parkes ('the Judge') promulgated on 1 March 2021 in which the Judge dismissed the appeal on all grounds.

2. The appellant is a citizen of Iran born on 9 October 1995 who claimed he faced a real risk on return as he delivered letters for the KDPI on six occasions, that his contact has been detained, that he is at risk as his activities will have become known to the Iranian authorities, and as a result of his sur place activities in the UK.

3. It was accepted in the Refusal Letter that the appellant is an Iranian national of Kurdish ethnicity who left Iran illegally.

4. The Judge sets out his findings of fact from [12] of the decision under challenge. The Judge notes the appellant did not become involved on behalf of the KDPI until 'relatively late' and was, at its highest, a low-level supporter not heavily engaged in the movement. Only one person in the KDPI knew his identity and any risk was correspondingly limited [14].

5. The Judge finds the appellant's accounts about why he became involved and where the letters he claimed to have delivered differed and that his reasons for taking the risks associated with undertaking work for the KDPI and how he knew where to take the letters to was limited and contradictory, which it was found undermined the credibility of the appellant's claim [15].

6. The Judge found the appellant remained in contact with his family, or could contact them if required, and for the reasons set out did not find the appellant's claim about events in Iran to be credible [26].

7. Thereafter the Judge dealt with the appellant's sur plus activities and assessed any risk arising from postings on the appellant's Facebook account. At [27 – 29] Judge writes:

> 27. I find that the Appellants sur place activities evidenced in the photographs of his attending the events outside the embassy and the Facebook posts (which in any event are subject to the limitations discussed above) have not been motivated by any desire to further a genuinely held belief but are to boost his asylum claim.
>
> 28. An absence of bona fides is not the test, the question is whether the posts and demonstrations, however motivated will put the Appellant or risk on return? The evidence strongly suggests that the Appellant's activities and posts are not known to the authorities and the Appellant knows this as he would not put his family at risk. In that sense they are not a source of danger.
>
> 29. A danger could arise on return if the Appellants Facebook posts were to become known during questioning on arrival. Given that the posts do not reflect any genuinely held views or form and expression of any motivation of his the Appellant can be expected to delete the offending posts from his Facebook account and present any interviewer on return with an anodyne and personal Facebook page that would reflect the reality of his situation.

8. The appellant sought permission to appeal which was initially refused by another judge of the First-tier Tribunal but renew directly to the Upper Tribunal where permission was granted on 20 May 2021; on the basis it was said to be arguable that the Judge's assessment of the appellant's sur place activities in the United Kingdom was inadequate for all the reasons set out in the grounds.

9. The application was opposed by the Secretary of State who in a Rule 24 of 17 June 2021 writes:

> 4. The appellant has not challenged the adverse findings regarding events in Iran.
>
> 5. In dismissing the appeal, the Judge did consider the country information and HB(Kurds) Iran CG [2018] UKUT 00430 (IAC) and acknowledges the 'hair trigger approach'. At paragraph 28 the Judge does consider whether his sur place activities will put the appellant at risk. Given the limited evidence and

the appellant's credibility the Judge reached findings open to be made. The grounds are a mere disagreement and arguing that more weight should be placed on the appellant's evidence. The issue of weight is a matter for the Judge in the Judge made sustainable findings.

6. For the above reasons the SSHD does not accept that the Judge erred in law and requests an oral hearing.

10. Since the grant of permission to appeal the Upper Tribunal has handed down the decision in XX (PJAK, sur place activities, Facebook) (CG) [2022] UKUT 00023 the headnote of which 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.*

Error of law

11. Although the Rule 24 response refers to a limited grant of permission to appeal the appellant was in fact granted permission on all grounds.

12. Mr Samra made reference to the content of the Facebook account and the photographs of the appellant attending demonstrations in the UK and speaking out against the Iranian regime on his Facebook, but the

key question which was considered by the Judge was whether any weight could be placed upon that evidence such that it established the appellant's claim.

13. It is not disputed that material posted on a social media platform perceived to be against the interests of the regime in Iran is likely to make the person who the authorities believe is responsible for such material of adverse interest to the authorities, leading to a real risk of harm or persecution if that person comes within the control of agents of the Iranian state.

14. It is not enough in this appeal for the appellant to claim that because the content of his Facebook account satisfies such definition, he will face a real risk. The Judge does not find that the authorities have access to such material or that the material produced for the purpose of the appeal was accessible per se. At [22] the Judge writes:

> 22. That there are photographs of the Appellant had demonstrations outside the Iranian embassy and evidence of anti-government pro-Kurdish posts on Facebook is clear from the evidence submitted. The Facebook evidence has to be approached with caution as settings can be easily and readily changed for the purpose of screenshot and then changed again. Similarly articles can be posted with the page made public, a screenshot taken, following which the article is removed and the page made private. The evidence provided shows the state when the screenshots were taken but are not necessarily of wider significance.

15. Even though the Judge did not have the benefit of XX what is written concerning the settings on Facebook accounts is factually correct. There was no evidence before the Judge of the Timeline or other relevant material to establish that the posts appearing on Facebook account were genuinely private or open, or whether they remained on the Facebook account after the screenshot had been taken. No legal error material to the decision is made out in the Judge's finding it had not been established that the entries on the appellant's Facebook account will have been viewed by the Iranian authorities.

16. The Judge clearly did not accept the appellant had any adverse profile in Iran nor that he had an adverse profile sufficient to bring him to the attention of the Iranian authorities in the UK. Accordingly, it was not made out that he was a person of interest to the authorities who may wish to direct resources to ascertain whether he had any social media profile. It was not made out before the Judge that any of the 'friends' or others who may have shared his posts had an adverse profile such that the appellant's postings may come to the attention of the Iranian authorities via that avenue.

17. The Judge's conclusion that the posting did not represent a view generally held by the appellant supports the Judge's findings that the appellant could delete the same from his Facebook account. Indeed, as there is no right to have a Facebook account, the appellant could delete the whole of the Facebook account at which point any postings appearing on the same will be lost and could not be traced by a third party. This is a far more secure approach than suggesting that the

Facebook account remained open with only individual postings being deleted.

18. On the basis of the law as it stood at the date of the decision, I find no error made out in the Judges treatment of the Facebook postings.

19. Mr Samra submitted that, in any event, even if the material on the Facebook account was not accessible the appellant still faced a real risk on return as a result of his attendance at demonstrations in Westminster near to the site of the Iranian embassy.

20. The photographs that Mr Samra referred to as evidence of the appellant's attendance are the photographs that appear on Facebook with no evidence of the appellant's attendance appearing in any national printed or digital media or evidence of it appearing in any publication originating from Iran. The question is therefore whether his physical presence at the demonstrations will have created a real risk for him on return.

21. Mr Samra 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.

22. 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.

23. The appellant's activities were considered in the Refusal Letter that [59] where there is reference to the decision of the Upper Tribunal in 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, 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.

24. In relation to the theme of the demonstrations Mr Samra submitted the appellant was holding up a KDPI flag and placard supporting the Kurdish cause in Iran but 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".

25. It was not made out that even though the appellant attended more than one demonstration he was a regular participant such that his regular attendance created a degree of familiarity and heightened his adverse profile.

26. It was not made out on the evidence before the Judge that the demonstration has attracted media coverage in the United Kingdom or Iran.

27. In BA, in relation to surveillance of demonstrations through filming or having agents mingling in the crowd or reviewing images, 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 Mr Samra's submission 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 and as Mr Williams submitted the photographs of him show him facing away from the direction of the crowd clearly adopting a very low profile.

28. 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.

29. The Judge dealt with the "pinch point" on return when finding and found 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.

30. 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.

31. In the Refusal Letter the decision-maker wrote the following:

> "It is noted that the purpose of these demonstrations and support their ideals which are opposed to the Iranian government and characterised by the regime as being a threat. However, although you have been a regular participant, your role in the demonstrations and events do not portray a leading role and there is no evidence to show that you have organised them. You appear to be a passive member of the crowd and it is considered that you are not a significant profile that would interest the regime in Iran.

> You have provided pictures from Facebook social media, but it is noted that these posts can be edited or deleted to evade unwanted attention from the authorities in Iran. Evidence of media coverage has not been provided and as a passive member of the crowd you are not a significant profile. Furthermore, these actions will not trigger attention on your return to Iran."

32. The Refusal Letter is dated 28 February 2020 and the appellant was therefore aware of the stance that was being taken in relation to his social media and other activities at that time, yet by the date of the hearing before the Judge on 17 February 2021 he had produced no additional credible evidence to show that his profile was one that will create a real risk for him on return.

33. Whilst the Judge is criticised by Mr Samra for not specifically dealing with the attendance at the demonstrations by reference to BA, the Judge's conclusion is clearly that the appellant does not have an adverse profile, as a result of his attendance at the demonstrations which the Judge clearly took into account, for example (see [27]), his Facebook postings, or for any other reason. Had the judge therefore set out a few extra paragraphs dealing specifically with the criteria in BA the decision will have been the same. Any error in not doing so is therefore not material to the decision to dismiss the appeal.

34. Mr Samra indicated his client had provided him with further material relating to the Facebook account. That was not material that was before the Judge. If as a result of the guidance in XX other issues arise based on the new evidence it is always open to the appellant to take advice as to whether he can make a fresh claim pursuant to paragraph 353 of the Immigration Rules.

35. In relation to this decision, I find the appellant has failed to establish the Judge's findings are outside the range of those reasonably open to the Judge on the evidence. As no legal error material to the decision to dismiss the appeal has been made out this appeal must be dismissed.

Decision

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

Anonymity.

37. 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