



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: PA/06431/2019

THE IMMIGRATION ACTS

**Heard at Bradford
On the 4 March 2022**

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

Before

UPPER TRIBUNAL JUDGE HANSON

Between

DAK

(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jagadesham instructed by Batley Law Ltd.

For the Respondent: Ms Z Young, a Senior Home Office Presenting Officer.

DECISION AND REASONS

- 1.** The appellant appeals with permission a decision of First-tier Tribunal Judge O'Hanlon ('the Judge') promulgated on 24 September 2020 in which the Judge dismissed the appellants appeal on all grounds.
- 2.** The appellant is a citizen of Iran born on 11 June 1992 who was served with an order for his deportation from the United Kingdom on 27 November 2014 on the basis his presence in the UK was not conducive to the public good. The appellant had been convicted before the Worcester Crown Court on 31 October 2014. The Sentencing Remarks of Mr Recorder Jackson are as follows:

DAK I have to sentence you for a number of offences to which you pleaded guilty. In the case of the matter of possession of the offensive weapon, the flick knife, because you pleaded guilty very late in the day on the day of the trial, the amount of credit, that is, the reduction in the sentence that I give you, will only be 10%. In the case of the dangerous driving and the disqualified driving, I do give you full credit for guilty pleas because they were entered at the first opportunity, namely the Magistrates Court, so there'll be a full one third for those.

DAK, you have an unenviable record of previous convictions. Your previous offences have included affray, possession of an offensive weapon in a public place and that is an offence which took place on 9 March 2011 and for which you were, ultimately, having breached a Community Order, given 60 days detention in a Young Offenders Institution. You have subsequently been convicted of assault occasioning actual bodily harm and you've also been convicted of quite a number of motor vehicle offences. Indeed they resulted in you being disqualified from driving for 2 years of the 14 October 2013.

On the 2 December of last year, an incident occurred down in Ross-on-Wye where you drove a vehicle, disqualified at the time; you haven't been charged with that, I accept, because it does seem to be something of an aggravating factor and ended up with having an argument of some sort with the person whom you had worked within the past.

You have, of course, not been convicted of any offence of assault upon that individual, but the fact is that in your vehicle, the vehicle that you were driving whilst disqualified, you had a flick knife. A flick knife is an offensive weapon in its own right; it is therefore something that is, as a starting point, illegal to have in a public place in this country.

The circumstances of the events of 2 December 2013, were such as to involve some elements of danger to others because you had clearly gone to the place where the victim in that case was working; you were clearly angry with him and it seems to me that there was every risk that the confrontation between you and him could have escalated in something worse so I consider, looking at the sentencing guidelines for offences of possession of an offensive weapon, that this was a matter where there were dangerous circumstances, albeit that it is not put to me that you actually did threaten the aggrieved in this case with the flick knife in his face, so to speak, but you nonetheless had it in your possession.

Matters were then compounded by the fact that on 1 August of this year, you came to this court and drove here in a vehicle that you were disqualified from driving again. You claimed that you had no choice but to drive to get here. Well, that is an allegation, or that is an argument that I reject because there must have been other ways to get here which would not have involve you committing an offence of disqualified driving.

When you were leaving the court, the police spotted you on the outskirts of Worcester and they put a sign up on the police car requiring you to follow them. You ignored that sign. It is said apparently that you didn't understand what the sign meant. Well, the reality is and I think you know this as well, that you understood perfectly well what that sign meant and you understood perfectly well who it was who put it up in the car in front of you because your reaction was to drive off, not following the police but to drive off seeking to escape by going along paving, alongside the road itself, and then driving through a red traffic light on a busy motorway junction and driving off in the direction of Evesham, crossing double white lines as you did so; those double white lines are there to indicate that there should be no overtaking and to some degree, although I accept not a great amount, exceeding the speed limit. Fortunately, you came to your senses and you then stopped for the police.

Those offences of dangerous driving and disqualified driving are aggravated by the fact that at the time you were on bail to this court for the matter of possession of the offensive weapon and also, of course, the dangerous driving involved trying to escape from the police and you are doing so at a time when you were a disqualified driver.

The pre-sentence report presents rather a stark choice but the reality of it is that of course you are currently subject to a Deportation Order, having been illegally in this country since 2008. I have no choice but to impose an immediate custodial sentences. I do take in account of your age and your personal circumstances and I mitigate those sentences as far as I can, but for the possession of the offensive weapon there will be a term of 9 months imprisonment; the dangerous driving there will be 1 months imprisonment consecutive. I've come to the conclusion that a sentence as low as that is justified because there are no other aggravating factors identified in the dangerous driving, such as you being under the influence of drink or drugs, and for the disqualified driving there will be 1 month imprisonment consecutive to that as well, so there is a total of 11 months imprisonment. You would ordinarily serve half of that in custody and be released at the halfway point but, of course, your immigration status means you're likely to be detained for deportation proceedings to take place.

3. The appellant's driving licence was endorsed as a result of the disqualification for 18 months.
4. The appellant made a number of representations to the Secretary of State as to why he should not be deported from the United Kingdom on protection and human rights grounds which were refused in a decision served on the appellant on 21 June 2019.
5. Having considered the written and oral evidence the Judge sets out findings of fact from [48] for the decision. The Judge notes that it was agreed at an earlier Case Management Review of 21 July 2020 that so far as the protection issues were concerned the key question was whether the appellant had a political profile in Iran, the effect of the appellant's sur-place activities in the UK, and the question of whether or not the appellant would be at risk in the event of return to Iran due to his Kurdish ethnicity and political activity.
6. The Judge makes reference to an earlier decision by First-tier Tribunal Judge Knowles of 9 March 2010 who heard an appeal against the refusal of the claim for asylum made by the appellant on arrival in the United Kingdom; in which it was found the appellant had not proved it was reasonably likely he was forced to flee Iran as a result of the activities of his father and elder brother and that the appellant's account was a fabrication. Judge Knowles did not believe that either the appellant or his family had an adverse political profile in Iran and did not find there was "any serious possibility" that the appellant was of interest to the Iranian authorities as a perceived supporter of the KDPI.
7. The appellant relied upon activities in the United Kingdom claiming that he has attended demonstrations outside the Iranian embassy in London and has submitted in his main bundle photographs and copies of Facebook entries which he claimed showed that he was politically active in the United Kingdom. At [55 and 56] the Judge writes:

55. I found the Appellant's oral and written evidence relating to the extent of his political activities in the UK to be vague. The only actual evidence put before me other than the Appellant's general evidence that he had been involved in

political activities were the Facebook snapshots. All of these appear to date from September to November 2019. In his evidence the Appellant vaguely referred to having attended demonstrations outside the Iranian Embassy. He did not give any dates of this. He stated that he had first attended the political demonstrations in 2013 but did not give any further details of dates or occasions of any demonstrations attended by him. No evidence was put before me on behalf of the Appellant of his membership of any political groups and there was no other evidence, whether written or oral, from any other witnesses detailing the Appellant's claim to political activity.

56. Having considered all of the evidence before me in the round, I was not satisfied even to the lower standard of proof that the Appellant had been involved in political activities in the United Kingdom. The onus is upon the Appellant to establish his claim and in this respect, I do not find that he has done so.
8. The Judge considers the position in the alternative between [57 - 58] but in light of the primary finding at [56] such comments are obiter.
9. The Judge at [59] having considered relevant case law and country information, and in light of the findings made, did not accept the appellant will be at risk of persecution on return to Iran as a result of his Kurdish ethnicity or claimed illegal exit and had not acquire such a profile as a result of his activities in the UK that he had come to the attention of the Iranian authorities.
10. Thereafter the Judge considered the human rights aspects of the appeal in considerable detail, both under the Immigration Rules and Part 5A of the 2002 Act before concluding that there were no significant obstacles to his reintegrating into Iran and that his return to Iran would not result in a disproportionate breach of rights protected by article 8 ECHR.
11. The appellant sought permission to appeal asserting the Judge had failed to assess risk upon return having regard to the UK based activities and failed to adopt a proper approach the assessment of reasonableness in assessing the article 8 claim and when assessing whether there was sufficient public interest to justify his deportation, for the reasons set out in the application seeking permission to appeal.
12. Permission was granted by another judge of the Upper Tribunal on the renewed application dated 20 November 2020 on the base it is said to be arguable that the judge's assessment of the risk to the appellant on return to Iran on account of his sur place activities was inadequate; although the grant of permission was not restricted.
13. The Secretary of State filed a Rule 24 response dated 9 January 2021 in which the application is opposed. At [4] of the Rule 24 response it is written *"The grounds have no merit, merely disagree with the adverse outcome of the appeal and is no more than an attempt to reargue the appeal. The Judge considered all the evidence that was available to him (including the findings of the previous judge) and came to a conclusion open to him based on that evidence and the rules. It is for the appellant to make out his case, which he clearly failed to do even on the lower standard of proof [56]"*.

Error of law

- 14.** The Upper Tribunal recently handed down its guidance in relation to Facebook and other social media in a decision reported as 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.

- 15.** The findings in XX supports the Judge’s finding that the appellants posting on his Facebook account not have come to the attention of the authorities in Iran, as there was nothing in the evidence before the Judge to support a finding that the appellant had an adverse profile such that the authorities may try to ascertain if he had a Facebook account and, therefore, its content. The finding that the appellant did not have a genuinely held political view in support of the KDPI or contrary to the Iranian regime means that deleting his Facebook account will not contravene the HJ(Iran) principles. It was not made before the Judge that there are any linked interests in relation to the Facebook account who are known or of adverse interest to the authorities in Iran
- 16.** Even if the content of the Facebook posts is critical to the regime, as submitted by Mr Jagadesham, the authorities have no access to the same and have not seen them, will not see them in the future if they

are deleted, and so will not create the real risk the appellant claims exist.

17. In relation to the submission that it was necessary in light of the guidance provided by the Upper Tribunal in BA (Iran) (see below) to look at what an individual had done, and that the Judge did not look in sufficient detail at the appellant's activities, I do not find this claim made out. The Judge is not required to set out each and every aspect of the evidence received and clearly considered that evidence with the required degree of anxious scrutiny before coming to the conclusions set out in the determination. I agree with Mr Jagadesham that the issue is the profile of the individual concerned but it was not made out on the evidence that the appellant had the required adverse profile, especially in light of aspects of the appellant's evidence having been found to be vague.
18. 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.
19. 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.
20. 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".

21. 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.
22. It was not made out on the evidence before the Judge that the demonstration has attracted media coverage in the United Kingdom or Iran.
23. 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.
24. 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.
25. 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.
26. 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. The appellant not proved he was such a person.
27. The Judge’s findings in relation to article 8 ECHR are also challenged. It is argued the Judge erred in law in failing to properly take into account the lapse of time since the last criminal offence was committed and the appellants conduct in a case where the appellant had not offended since 2014, which is claimed to be relevant to the proportionality assessment. The appellant argues that the test whether it is reasonable and proportionate to deport him required a balanced assessment of the points for and against the appellant including social and educational provision and the fact the appellant saw his children most days, claims to take an important role in nurturing and collecting the children from school, and it being accepted family life exists between the appellant and his children. It is also claimed the Judge erred when assessing proportionality as it is not made it clear whether section 55 best interests of the children need the appellant to be able to remain in the UK to continue their family life.
28. It is not made out the Judge failed to consider the evidence with the required degree of anxious scrutiny. The Judge clearly did so looking at the merits of the human rights claim from [60]. The Judge noted that the appellant’s article 8 claim was based entirely on his relationship with his children. It is not disputed there are three children, all British citizens. The Judge was aware of the chronology and appellants offending. The Judge specifically finds at [62] that “*Little evidence*

was put before me at the hearing as to the nature and quality of the Appellant's relationship with his three children".

29. Notwithstanding, having considered all the evidence made available at the hearing, it was accepted there is ongoing family life between the appellant and his children. The Judge notes it was accepted by the Secretary of State that it will be unduly harsh for the children to go to Iran making this a case in which the family will be split.

30. The Judge set out the correct legal self-direction at [68], in which the best interests of the children were considered, in the following terms:

68. In the light of the foregoing, the issue for my determination is whether the best interests of the Appellant's children outweigh the public interest in the removal of the Appellant and whether the effects of such a decision would be proportionate. The best interests of the children are to have stability and continuity of social and educational provision and the benefits of growing up in the cultural norms of the society in which they belong. The children in this case enjoy those rights with their mother. As previously indicated, there is no question of children leaving the United Kingdom in this case. It is generally accepted that it is in the best interests of children to have contact with both parents and it is the ongoing contact with the Appellant which would be lost in the event of the Appellant being returned to Iran. The ultimate issue for my determination is whether the decision of the Respondent strikes a fair balance between the competing interests of the Appellant and his children continuing to have contact with each other enjoying family life that currently exists and the public interest which according to the Respondent is the prevention of disorder and crime and the maintenance of effective immigration control. In doing so, it is necessary for me to consider whether or not the decision is proportionate.

31. Contrary to the claim in the grounds seeking permission to appeal, the Judge does consider what is in the children's best interests which are clearly for the status quo to be preserved. Whilst the Judge does not accept that that is the determinative factor the Judge clearly accepts it is an important factor when weighing up the competing interests. That is reinforced by the Judge's findings at [74] in which the Judge finds:

74. Having considered all of these factors together, I conclude that the best interests of the children are outweighed by the public interest in the prevention of disorder and crime and maintenance of effective immigration controls and accordingly, conclude that the appeal against the decision of the Respondent in relation to the Appellant's Article 8 human rights claim based on family life with his children is refused. I find that the weights that I must give to the public interest considerations outweighs the limited protected rights of the Appellant and the best interests of the Appellant's children.

32. It has not been made out that the outcome of that balancing exercise is infected by procedural unfairness or irregularity, or is in anyway perverse, irrational, or outside the range of findings available to the Judge.

33. 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

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

Anonymity.

- 35. 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