



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/01865/2017

THE IMMIGRATION ACTS

Heard at Field House
On 14 July 2017

Decision & Reasons Promulgated
On 09 August 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MR BHA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Palmer of Counsel, instructed by Barnes Harrild & Dyer
Solicitors

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

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to,

amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

2. The appellant is a citizen of Iran whose date of birth is [] 1991. He states that he arrived in the United Kingdom on 7 January 2009 and applied for asylum on the same day. His asylum application was refused by the respondent on 31 July 2009. The appellant appealed against that decision to the First-tier Tribunal. His appeal was dismissed on 11 November 2009. His appeal rights were exhausted on 20 November 2009.
3. On 31 January 2017 the appellant made further submissions to the respondent. The appellant's claim was that he would be at risk of persecution on return to Iran as a result of sur place activities that he had been involved in in the United Kingdom - protesting against the Iranian regime. The respondent refused the appellant's claim for asylum on this basis on 7 February 2017.

The appeal to the First-tier Tribunal

4. The appellant appealed against that decision to the First-tier Tribunal. In a decision promulgated on 24 April 2017 First-tier Tribunal Judge C A S O'Garro dismissed the appellant's appeal. The First-tier Tribunal found that the appellant would not face a real risk of persecution if he were to be returned to Iran. The Tribunal also dismissed the appellant's appeal under Article 8 of the European Convention on Human Rights.
5. The appellant applied for permission to appeal against the First-tier Tribunal's decision. On 24 May 2017 First-tier Tribunal Judge Osborne granted the appellant permission to appeal.

The appeal to the Upper Tribunal

6. The grounds of appeal assert that the First-tier Tribunal judge failed to take into account the case of **AB and Others (internet activity - state of evidence) Iran [2015] UKUT 00257** despite her attention being drawn to it. It is asserted that the judge applied too high a standard of proof by requiring that it must be shown that the Iranian authorities would be bound to find out about his sur place activities. This is setting a threshold at the criminal standard. It is asserted that the judge did not take into account the fact that if the Iranian authorities obtained the appellant's Facebook login and password then they would be privy to everything that he has put on his account whatever the settings. The judge therefore placed significant weight on an irrelevant factor, i.e. whether the Facebook account was set to public.
7. Ground 2 asserts that the judge failed to take into account relevant factors. Reference is made to paragraph 31 of the First-tier Tribunal's decision where the judge said that there was no evidence before her that the authorities in Iran monitor dissent in countries abroad. This is factually wrong. There was substantial evidence of this before the judge in the country guidance case law and in the four country expert reports from Dr Joffé and Dr Kahkki. It is asserted that the judge has failed to take

into consideration the appellant's ethnicity, i.e. that he is of Kurdish origin. It is irrational that the judge should refer and rely on case law on Eritrea and Zimbabwe to approach the appellant's case when there is specific case law that relates to Iran. It is asserted that at paragraph 32 the judge relies incorrectly on the case of **YB (Eritrea) [2008] EWCA Civ 360**. The more recent and country-specific case of **AB and Others** found that it is not relevant if a person had used the internet in an opportunistic way. The authorities are not concerned with a person's motivation. By departing from the case of **AB and Others** without any explanation as to why she has done so is an error. It is asserted that at no point in the determination does the judge consider any of the comprehensive country evidence before her that was in the appellant's bundle. The appellant relied on aspects of three different binding country guidance cases and authoritative reported Upper Tribunal decisions but the judge only considered one of these cases, at paragraph 39, and even then only considered an incomplete aspect of this case, failing to take into account the appellant's ethnicity.

8. Further and in the alternative the appellant distinguished his case from the country guidance case of **SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC)**. It was asserted that it was not argued in **SSH and HR** that a returnee would be at risk as an ethnic Kurd. However, this was argued in the appellant's case. The judge failed to make a finding on this point and did not engage with or consider any of the evidence on this point. The appellant relied on substantial up-to-date country evidence to show the deteriorating country situation for ethnic Kurds. Risk factors such as returning from the West, Kurdish ethnicity, illegal exit and the sur place activities would place the appellant at risk.
9. The appellant applied to admit unreported determinations which indicate the approach the Tribunal is taking to cases involving the return of ethnic Kurds. An application was made orally at the hearing and is set out in the skeleton argument before the First-tier Tribunal. The judge made no finding on this application. This is procedurally unfair in addition to a failure to consider material evidence or give reasons for refusing to do so.
10. In respect of Article 8 it is asserted that the judge has failed to consider the appellant's ethnicity and disability in the context of paragraph 276ADE. The appellant has only had any education in English which has taken many years due to his serious cognitive impairment. Reference is made to the case of **TG and others [2015] UKUT 595** where it was conceded by the respondent that there were very significant obstacles to reintegration for Afghan Sikhs even where discrimination was not accepted to reach the threshold of persecution. Similar arguments were advanced in respect of the appellant's case in respect of his ethnicity but the judge does not deal with these or make any findings on them. The judge's findings on Article 8 are cursory, generic and do not demonstrate that the requisite anxious scrutiny had been applied in a case where a disabled child arrived in the United Kingdom and eight years later there has been no attempt to remove him, reliance is placed on **EB (Kosovo) [2006] EWCA Civ 1713** in the context of the international law requirements to provide former asylum-seeking children with a durable solution.

11. In oral submissions Mr Palmer submitted that the failure of the judge to take into account the unreported determinations amounts to an error of law. These determinations show that both the Upper Tribunal and the First-tier Tribunal on similar facts find that an appellant with a similar profile to this appellant is at risk on return to Iran. He submitted that the question is - is that evidence relevant and does it have persuasive value. He submitted that an Upper Tribunal decision on an appellant with a similar profile is persuasive. The judge had failed to even mention the report of Dr Joffé and had made no findings or indicated why she had rejected that evidence. The skeleton argument made specific reference to the country evidence.
12. He submitted that the judge had simply failed to apply the case of **AB and Others** when looking at the Facebook evidence. In **AB and Others** the Upper Tribunal had found that on return a person will be investigated and will be asked for their Facebook password. It is made clear that it does not matter if the Facebook activity is pursued in an opportunistic way. The question is will it give rise to a risk on return. The judge has failed to consider this case when making findings on the Facebook evidence. He referred to the case of **SSH and HR**, at paragraph 39, where the court found that illegal exit, being a failed asylum seeker together with Kurdish ethnicity and a political profile puts a person at risk on return. There is no reason that the judge ought to have considered cases on Eritrea and Zimbabwe which were irrelevant when there were relevant cases on Iran. **BA (Iran) BA (Demonstrators in Britain - risk on return) Iran CG [2011] UKUT 36 (IAC)** finds that the Iranian authorities do monitor demonstrations outside of Iran to identify protesters.
13. Mr Whitwell referred to paragraph 23 of **SSH and HR**. He submitted that this case is the authoritative country guidance that ought to be followed in this case. He referred to **AB and Others** and submitted that this was not a country guidance case. He referred to the head note and submitted that it is clear that the basis on which this decision was reported is because the panel wanted the evidence that had been marshalled to be available in other cases. In response to the assertion that the judge erred with respect to the findings about the public profile of the appellant's Facebook page he submitted that there was no evidence as to how Facebook does or does not work. He referred to paragraph 27 where the judge found that social media profiles and pages can be created and also deleted and submitted that the information submitted in the new bundle by the appellant, at page 59, confirms that a person can change and delete their profiles on Facebook. With regard to the standard of proof he submitted that the appellant was cherry-picking from paragraphs to make the point. He referred to paragraph 13 and paragraph 26 and submitted that the judge was applying the correct standard of proof. With regard to ground 2 and the country guidance background evidence he submitted that in essence the judge was being asked to depart from the binding authority of **SSH and HR**. He submitted that **SSH and HR** had found that a failed Kurdish asylum seeker with a low political profile would not be at risk, which is what the appellant in this case is if the case is taken at its highest. He submitted that to depart from the country guidance case there have to be strong compelling reasons and evidence. He referred to the practice statement regarding unreported decisions at 11.2 and submitted that the appellant had not

identified any proposition not found in any reported determination of the Tribunal. The fourteen unreported determinations cannot be sufficient to depart from the country guidance case. He submitted that it would probably be possible to trawl unreported decisions and find an equal number where the appellant's claim had been dismissed on similar facts.

14. He submitted that the judge's consideration of the Eritrea and Zimbabwe cases relied on a point of principle, not because of the specific situation in either of those countries. The principle derived from the authorities was that they recognised that some asylum seekers make opportunistic attempts to raise a political profile. In any event he submitted that the judge found that the appellant did not have a significant profile and that the position of the appellant fits in with paragraph 33 of **SSH and HR**.
15. With regards to Article 8 he submitted that the judge found that the appellant could not meet the requirements of Appendix FM or paragraph 276ADE. The judge gave adequate reasons. With regard to Article 8 outside the Rules when taking into consideration Section 117B of the Nationality, Immigration and Asylum Act 2002 there was nothing further that the judge could have added.
16. In reply Mr Palmer submitted that the respondent's submission that the **AB and Others case** is obiter is absurd. He submitted that this is a detailed decision which makes it clear on the basis of country evidence that a failed asylum seeker will be required to hand over his Facebook login details. With regard to the burden of proof he indicated that the judge had made findings on an unlawful basis and that the appellant is not merely cherry-picking as there are several paragraphs that are quite clearly wrong in terms of statements of law. The judge was not being asked to depart from **SSH**. Being of Kurdish ethnicity is a relevant factor not taken into account in **SSH**. He referred to the country guidance case of **BA (Demonstrators in Britain - risk on return) Iran CG [2011] UKUT 36 (IAC)** and the judgment of Lord Cranston at paragraph 65. He submitted that these findings negate the First-tier Tribunal's findings in this case.
17. At the end of the hearing I reserved my decision.

Discussion

18. With regard to the standard of proof the judge set out in the following paragraphs:

"18. I have borne in mind that the appellant's account has been given through interpreters and so meaning and intention can be lost even where no complaint is made about the standard of translation. I have reminded myself of the low standard of proof in asylum claims.

...

37. I am required to consider all the evidence in the round and in doing so I bear in mind that the appellant only has to prove his case to the low real risk standard...

38. ... I have reminded myself of the seriousness of my decision and the adverse consequences that are likely to follow if I am wrong but the burden is on the appellant to prove his case, albeit to a low standard ...”

The judge also set out at paragraph 13 that the standard of proof is a reasonable degree of likelihood. I do not consider that when the judge set out, at paragraph 28, that she was not persuaded that the authorities in Iran were bound to find out about the appellant’s Facebook postings that she was applying a higher standard of proof. That statement has to be read in light of the preceding paragraphs which deal with the evidence regarding the Facebook page.

19. With regard to the Facebook evidence the judge set out from paragraph 26 onwards:
- “26. Although the appellant has produced some evidence of his Facebook activities, that evidence does not satisfy that his Facebook page was set to public which means anyone can access his account to see all his postings and without clear evidence that his Facebook setting was set to ‘public’, I do not accept that the Iranian authorities would be aware of the appellant’s criticism of their regime.
27. Further, whilst it is accepted that the Facebook page shows the appellant’s interest in the Kurdish cause and may be critical of the Iranian authorities, I am aware that social media can be manipulated and Facebook pages can be easily created and deleted. Therefore without evidence as to when, if at all, the Facebook page became public, I will attach minimum weight to those postings.
28. In essence, I am not persuaded that the authorities in Iran is bound to find out about the appellant’s Facebook postings or that he has submitted any evidence that supports that proposition.
20. Where it has not been shown that entries on a Facebook account represent a fundamentally held view, the judgment of the Supreme Court in **HJ (Iran)** must be properly considered. Even if the Facebook entries are not genuine this does not prevent a potential persecutor imputing an adverse profile which may lead to ill-treatment or persecution. It was accepted in **HJ (Iran)** that an individual cannot be expected to lie to avoid persecution if what they are lying about is something that represents a fundamentally held belief or political opinion. It was recognised in **HJ (Iran)** that such a principle will only apply if the material in question does represent a credible genuine fundamentally held belief that forms part of a person's individual identity. If the material was created to enhance a bogus claim that has not been shown to represent a credibly held belief it is not afforded the same weight.
36. If the appellant holds deeply held political opinion, critical of the Iranian government then I accept that he could be at real risk of serious ill-treatment on return. The case depends entirely on whether or not I believe the appellant’s claim about his political convictions.
37. I am required to consider all the evidence in the round and in doing so I bear in mind that the appellant only has to prove his case to the low real risk standard. The appellant’s credibility is a factor I must take into account and I did not find the appellant to be a credible witness. The appellant had no political profile that

brought him to the interest of the authorities before he left Iran and he will be returning to Iran with no political profile that would bring him to the interest of the authorities.

38. To conclude, I find nothing in this appellant's personal circumstances which gives me any reason to believe his claim. ..

21. The judge clearly did not find the appellant to be credible. However, the finding that *"he will be returning to Iran with no political profile that would bring him to the attention of the authorities"* falls short of a finding on the issue as to whether or not he *"holds deeply held political opinion, critical of the Iranian government"* which was accepted by the judge to give rise potentially to a real risk of serious ill-treatment on return. If the views expressed do not form part of an expression of a fundamentally held belief there is potentially no restriction upon the appellant in denying the existence of any such entries or in expecting any entries that may potentially cause him difficulties from being deleted by him. The appellant had not provided any evidence to show the Iranian authorities had the ability to establish the nature of information deleted from a Facebook account in this way. However, as set out above the judge has not made a finding with regard to whether or not the appellant has deeply held political opinions.

22. There is a further issue upon which the judge failed to make a finding. As recorded at paragraph 25 by the judge:

"Ms Blair in her submissions said that the appellant's claim is mainly that on return he will be asked for his Facebook login details which would expose his political activities and place him at risk of persecution and that due to his disability (it is not in dispute that the appellant is learning disabled), he is at risk of incriminating himself."

23. As argued in the grounds of appeal the issue concerning risk on return in this particular appellant's case is not simply whether or not the Iranian authorities would find out about the postings on Facebook as a result of them being public because if the Iranian authorities obtained the appellant's Facebook login and password then they would be privy to everything that he has put on his account whatever the settings. The judge has not made any findings on whether or not the appellant is at risk of self-incrimination as a result of his learning disabilities which is to be considered in light of the likelihood of his being subject to any interest on return. The judge did consider the risk on return with regard to the monitoring of political activities in the UK in respect of the appellant's claim to have attended demonstrations:

35. The appellant before me has submitted no evidence of significant political activity in the United Kingdom which I find would bring him to the attention of the Iranian authorities if they were monitoring overseas political activities.

...

39. The most recent country guidance in **SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308** provides:-

‘An Iranian male in respect of whom no adverse interest has previously been manifested by the Iranian State does not face a real risk of persecution/breach of his Article 3 rights on return to Iran on account of having left Iran illegally and/or being a failed asylum seeker. No such risk exists at the time of questioning on return to Iran nor after the facts (i.e. of illegal exit and being a failed asylum seeker) have been established. In particular, there is not a real risk of prosecution leading to imprisonment

24. **SSH and HR** is the authoritative country guidance case and the judge was correct to take it into account and to follow it when assessing the risk on return. The finding set out above is one that was open to the judge in respect of the risk arising as a result of the monitoring of activities in the UK and in respect of the illegal exit/failed asylum seeker/Kurdish ethnicity claim but the judge has not considered the risk to the appellant specifically arising as a result of the likelihood of questioning on return and the impact of his learning disability on potential self-incrimination.
25. I do not accept Mr Whitwell’s submission that the guidance in the **AB and Others** case is to be considered as obiter. It is a reported decision of the Upper Tribunal. First-tier Tribunal judges are expected to follow the law set out in reported cases. It might be that this submission was overstated and a reference to the common law doctrine of judicial precedent not applying was intended. At the headnote (as referred to by Mr Whitwell) the Upper Tribunal stated:

“The material put before the tribunal did not disclose a sufficient evidential basis for giving country or other guidance upon what, reliably, can be expected in terms of the reception in Iran for those returning otherwise than with a “regular” passport in relation to whom interest may be excited from the authorities into internet activity as might be revealed by an examination of blogging activity or a Facebook account. However, this determination is reported so that the evidence considered by the Upper Tribunal is available in the public domain”

26. However, the Upper Tribunal also stated at paragraph 3:
3. As well as determining the three separate appeals that are before us we have endeavoured to give general guidance on a range of related issues.
27. **AB and Others** was considered, briefly, in **SSH and HR** at paragraph 11:

... In **AB & Others (internet activity – state of evidence) Iran [2015] UKUT 00257 (IAC)**, there is reference at paragraph 457 to the act of returning someone creating a “pinch point” so that returnees are brought into direct contact with the authorities in Iran who have both the time and inclination to interrogate them. That however was in the context of people who had engaged in internet activity, and it is relevant to note also that at paragraph 470 the Tribunal said that a person who is returning to Iran after a reasonably short period of time on an ordinary passport, having left illegally, would almost certainly not attract any particular attention at all. It went on to say at

paragraph 471 that where a person's leave to remain had lapsed and they might be travelling on a special passport there would be enhanced interest and the more active they had been the more likely the authorities' interest could lead to persecution. That is essentially a comment rather than evidence, and though it agrees with what is said by Dr Kakhki, it takes matters no further in our view as to the risk of ill-treatment on return during a period of questioning. In particular as it cites no evidence to support the view expressed, and also it is a remark made in the context of evaluating risk on account of blogging activities, and the reference to 'more active' would not be applicable to a person with no relevant profile.

28. In **AB and Others** the Upper Tribunal endeavoured to give general guidance. Under the heading "In Summary" the Upper Tribunal, inter alia, set out:

467. The mere fact of being in the United Kingdom for a prolonged period does not lead to persecution. However it may lead to scrutiny and there is clear evidence that some people are asked about their internet activity and particularly for their Facebook password. The act of returning someone creates a "pinch point" so that a person is brought into direct contact with the authorities in Iran who have both the time and inclination to interrogate them. We think it likely that they will be asked about their internet activity and likely if they have any internet activity for that to be exposed and if it is less than flattering of the government to lead to at the very least a real risk of persecution.

...

470 The main concern is the pinch point of return. A person who was returning to Iran after a reasonably short period of time on an ordinary passport having left Iran illegally would almost certainly not attract any particular attention at all and for the small number of people who would be returning on an ordinary passport having left lawfully we do not think that there would be any risk to them at all.

471 However, as might more frequently be the case, where a person's leave to remain had lapsed and who might be travelling on a special passport, there would be enhanced interest. The more active they had been the more likely the authorities' interest could lead to persecution.

472 The mere fact that a person, if extremely discrete, blogged in the United Kingdom would not mean they would necessarily come to the attention of the authorities in Iran. However, if there was a lapse of discretion they could face hostile interrogation on return which might expose them to risk. The more active a person had been on the internet the greater the risk. It is not relevant if a person had used the internet in an opportunistic way. The authorities are not concerned with a person's motivation. However in cases in which they have taken an interest claiming asylum is viewed negatively. This may not of itself be sufficient to lead to persecution but it may enhance the risk.

29. The First-tier Tribunal judge has not considered whether or not on return the appellant is likely to be questioned and if questioned about his internet activity would give his Facebook details and password and thereby reveal the entries he had made and the photographs posted. In this case the appellant would be returning to Iran after a lengthy absence (over 8 years). As indicated in **AB and Others** the main concern is the 'pinch point' of return. The medical reports indicate that the appellant has an IQ of 55 and meets the criteria of severe learning difficulties. The judge stated

that it was “accepted that the Facebook page shows the appellant’s interest in the Kurdish cause and may be critical of the Iranian authorities”. The respondent accepted that the appellant had used social media to air his political views.

30. The judge’s failure to consider appropriately the case of **AB and Others**, to make findings in respect of whether the appellant holds deeply held political opinions and the specific risk arising as a result of his learning disabilities that he would divulge his Facebook details and activity amount to material errors of law. I set the decision aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 (‘TCEA’).

Re-Making the Decision

31. I considered the evidence and decided that I can re-make the decision myself notwithstanding the fact that there is no fact finding as to whether or not the appellant actually holds any real political opinion critical of the Iranian authorities.
32. As set out as the main concern in respect of internet activity in **AB and Others** is that there is a pinch point on return. In **SSH and HR** the Upper Tribunal held:

22. ...We see force in what Mr Drabble says in this regard. The evidence overall does suggest that people are likely to be questioned rather than there being an entire absence of questioning. In this regard among other things Mr Drabble pointed to the Austrian Red Cross Iran COI compilation of September 2013 and in particular at pages 141 to 142 of the bundle prepared in support of HR’s case which contains the reference from the Swiss Refugee Council to which we have referred above the (retired Supreme Court) judge stating that returning asylum seekers are placed in detention for several days until the police had verified they had not engaged in any political activities, after which they are released.

23. This has to be seen, as with all these pieces of evidence, in the context of the evidence overall. In our view the evidence does not establish that a failed asylum seeker who had left Iran illegally would be subjected on return to a period of detention or questioning such that there is a real risk of Article 3 ill-treatment. The evidence in our view shows no more than that they will be questioned, and that if there are any particular concerns arising from their previous activities either in Iran or in the United Kingdom or whichever country they are returned from, then there would be a risk of further questioning, detention and potential ill-treatment...

33. It is highly likely that after an 8+ year absence the appellant will be questioned. He claims to have left Iran illegally and he has claimed asylum in the UK. He is of Kurdish ethnicity. None of these factors alone or combined would give rise to a real risk of persecution or ill treatment.
34. As described in **AB and Others** these factors may give rise to an enhanced risk of interest on return and in **SSH and HR** it was considered that an appellant’s Kurdish ethnicity might be an exacerbating factor if otherwise of interest (see paragraph 34).

35. As set out in **AB and Others** there is clear evidence that some people are asked about their internet activity and particularly for their Facebook password. *“We think it likely that they will be asked about their internet activity and likely if they have any internet activity for that to be exposed and if it is less than flattering of the government to lead to at the very least a real risk of persecution”* (paragraph 467).
36. The medical report indicates that the appellant will have problems understanding complex questions. Given the appellant’s severe learning difficulties (whether or not he in fact holds a political opinion critical of the Iranian authorities) it is highly likely that he would reveal his Facebook details and password under questioning. The activity on his Facebook page would be exposed. It is overtly critical of the authorities and therefore the appellant would be at a real risk of persecution. There is an aspect to the appellant’s account that is troubling. He has a severe learning disability and yet has managed to open a Facebook account and is able to use the social medium to post criticisms of the Iranian authorities. He also claimed to be illiterate. His learning disability has been accepted by the judge and has not been disputed by the respondent. It is possible that this activity has been engaged in purely to create a false claim either by the appellant or on his behalf. However, as set out in **AB and Others** it is not relevant if a person had used the internet in an opportunistic way because the authorities are not concerned with a person’s motivation.
37. Although I consider this case to be borderline there is a real risk that the appellant, because of his learning disabilities, will reveal his less than flattering Facebook activity when questioned on return to Iran. There is therefore a real risk of persecution if the appellant were to be returned to Iran.

Notice of Decision

The appeal is allowed on asylum grounds.

Signed P M Ramshaw

Date 8 August 2017

Deputy Upper Tribunal Judge Ramshaw