Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/10203/2019**

THE IMMIGRATION ACTS

Heard at Field House by Skype for Business	**Decision & Reasons Promulgated:**
On 7 April 2021	**On 9 April 2021**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

M A (IRAN)
[ANONYMITY ORDER MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms Mya James, solicitor with Alex James Law
For the respondent: Mr Tony Melvin, a Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity order

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) The Tribunal has ORDERED that no one shall publish or reveal the name or address of M A who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of him or of any member of his family in connection with these proceedings.

Any failure to comply with this direction could give rise to contempt of court proceedings.

Decision and reasons

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 27 September 2019 to refuse him refugee status under the 1951 Convention, humanitarian protection, or leave to remain in the United Kingdom on human rights grounds.

2. The respondent accepts that the appellant is a citizen of Iran of Kurdish ethnicity, and that he was born in June 2002.

Background

3. The appellant came to the United Kingdom as a unaccompanied asylum-seeking child, having left Iran illegally with a friend, travelling first to Iraq, where he stayed for two to three weeks, then on via Turkey and France, arriving in the United Kingdom by lorry. The appellant claimed asylum for the first time on 10 December 2018. He was 16 years old.

4. The basis of his account then was that he had been working as a smuggler to support his mother and younger brother, who were still in Iran, and that he was discovered by the Iranian authorities and fled to the United Kingdom via Iraq. The appellant said in a witness statement dated 8 March 2019 that his younger brother was 10 or 11 years old and his mother was rising 40. He had lost his father at a young age but did not wish to go into details as it was distressing for him.

5. The appellant said he had not gone to school in Iran as the family could not afford it. School cost money, which his mother did not have, so he went out to work to help support his mother and brother. He had been working since he was 14 or 15 years old.

6. In a refusal letter dated 27 September 2019, the appellant's account was rejected. However, as the appellant was a minor, discretionary leave was granted until 22 December 2019 because the respondent was not satisfied that there were adequate reception arrangements for him in Iran.

First-tier Tribunal decision

7. The appellant appealed to the First-tier Tribunal. His account was modified by the time the appeal was heard in the First-tier Tribunal. He now produced evidence that he had an anti-government Facebook page and had attended demonstrations in London against the Iranian authorities. He said his family had left Iran and that he was no longer in touch with his mother, having not spoken to her since he left Iran.

8. The First-tier Judge did not find the appellant's account credible and dismissed the appeal.

9. The appellant appealed to the Upper Tribunal.

Permission to appeal

10. On 6 July 2020, Upper Tribunal Judge Sheridan granted permission to appeal on the basis that:

> "2. It is arguable that the judge failed to consider whether the appellant would be at risk of persecution or Article 3 ill-treatment as a consequence of having on his Facebook page a photograph of people trampling on the Iranian flag. Arguably, in the light of the 'hair trigger' approach of the authorities (as described in *HB (Kurds) Iran CG* [2018] UKUT 00430 (IAC)), merely having posted a picture that might be perceived as disrespectful to Iran may give rise to a risk even if the appellant is not in (or identifiable in) the photograph and the only reason he posted the picture is to bolster and asylum claim."

Rule 24 Reply

11. On 23 February 2021, significantly out of time, Mr Melvin filed a Rule 24 Reply on the respondent's behalf. The respondent considered that there was no material error of law in the First-tier Judge's decision, given that the core claim had not been found credible. He relied on the First-tier Tribunal decision at [16], arguing that the judge had dealt with the Facebook evidence, finding that there was no picture of him and that she did not believe the appellant's evidence that there had been messages from the Iranian authorities, which he had deleted.

12. The judge had taken account of the appellant's lack of any political activity in Iran and applied correctly the country guidance in *SSH and HR (illegal exit: failed asylum seeker) Iran CG* [2016] UKUT 308 (IAC) and *HB (Iran).* Mr Melvin urged the Upper Tribunal to reject the grounds of appeal in their entirety.

13. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

14. At a hearing on 5 November 2020, I found an error of law, for the following reasons:

> "21. I proceed to consider the appellant's challenge to the First-tier Tribunal decision. The appellant does not now seek to assert that he has, or ever had, any anti-regime opinion against the Iranian government. He relies on his United Kingdom sur place activity, reflected at the hearing in a photograph on his Facebook page which showed unidentifiable feet standing on the Iranian flag, and on his claim to have attended three anti-government demonstrations in London, but the judge found that to be at best intended to support a fabricated asylum claim and that the appellant would not be at risk in Iran due to his actual political opinion.

22. It is right, however, that there is no finding as to the risk to the appellant at the airport, or from his perceived political opinion. That is an error of law and is plainly material. There is no alternative but to set this decision aside for remaking in the Upper Tribunal."

15. I gave directions for skeleton arguments, to be limited to 'the risk to the appellant on return from his perceived anti-regime opinion as evidenced by his sur place activity and Facebook pages' and directed the appellant to serve an updated bundle of documents and witness statement. I further directed that there should be no additional evidence save as directed by the Upper Tribunal.

16. On 24 February 2021, there was an abortive hearing. Ms James, who represents the appellant, had been in difficulty and had not filed the witness statement, skeleton argument or documents until the day of the hearing. Mr Melvin considered that he did not have sufficient time to prepare cross-examination.

17. The appeal came back before me today and I have heard and seen the appellant give oral evidence through an interpreter. I have examined the evidence which the parties placed before me.

Preliminary matters

18. For the respondent, Mr Melvin made a rule 15(2A) application to adduce what is described as a Generic Iran Facebook Bundle, which includes an unreported decision of Upper Tribunal Judge Hanson (*LKIK*, decided on 2 May 2018) and a copy of Facebook's Privacy Policy. The relevance of the Facebook policy is clear and I admit it.

19. Mr Melvin said, when I asked, that he was not seeking an adjournment of today's hearing. He was aware that the question of Facebook posts in Iranian cases was still before the Presidential panel for a decision. Mr Melvin said that *LKIK* was being cited around the country in such cases.

20. In relation to *LKIK,* Mr Melvin's application is to adduce an unreported decision of the Upper Tribunal, which is governed by the Joint Practice Direction of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal, (as amended on 18 December 2018) at [11]:

> **"11. Citation of unreported determinations**
>
> 11.1. A determination of the Tribunal which has not been reported may not be cited in proceedings before the Tribunal unless:
>
> (a) the person who is or was the appellant before the First-tier Tribunal, or a member of that person's family, was a party to the proceedings in which the previous determination was issued; or
> (b) the Tribunal gives permission.
>
> 11.2. An application for permission to cite a determination which has not been reported must:

(a) include a full transcript of the determination;
(b) identify the proposition for which the determination is to be cited; and
(c) certify that the proposition is not to be found in any reported determination of the Tribunal, the IAT or the AIT and had not been superseded by the decision of a higher authority.

11.3. Permission under paragraph 11.1 will be given *only where the Tribunal considers that it would be materially assisted by citation of the determination, as distinct from the adoption in argument of the reasoning to be found in the determination*. Such instances are likely to be rare; in particular, in the case of determinations which were unreportable (see Practice Statement 11 (reporting of determinations)). It should be emphasised that the Tribunal will not exclude good arguments from consideration but it will be rare for such an argument to be capable of being made only by reference to an unreported determination."

[*Emphasis added*]

21. *LKIK* is an unreported decision. More than that, Mr Melvin says that it is a decision which was considered for reporting as country guidance, but then not reported. Mr Melvin provided a full transcript, as required, but did not identify a proposition of law therein, still less one which is not the subject of any other authoritative decision. In his skeleton argument, Mr Melvin said this:

> "The respondent submits that this decision gives the reader an idea of how easily manipulated a Facebook account can become in order for it to appear to publicly display an opinion when in fact that opinion is only available to a small number of likeminded friends that are pursuing the same end. …
>
> The respondent is aware that [the] Upper Tribunal have finally listed the appeal that will consider the sur place activities of an Iranian national with special interest in 'Facebook'. This appeal is due to be heard by a Presidential panel [details given]. …The respondent is currently trying to ascertain whether the Upper Tribunal is deferring hearing appeals that raise the 'Facebook' issue, given that there appear to be so many."

22. That is not the type of decision which paragraph 11 contemplates. I do not consider that the respondent has identified any proposition for which the decision should be cited, nor am I satisfied that that the Tribunal will be materially assisted by citation of the determination, as distinct from the adoption in argument of the reasoning to be found in the determination. I decline to admit this decision.

Appellant's documents

23. The appellant's bundle for the remaking hearing contained Ms James' skeleton argument, the appellant's updated witness statement, and some Facebook pictures. The same group of pictures are repeated many times over.

24. The posts accompanying the pictures say things such as 'Death to Iranian regime', 'We will never give up protesting against Iranian regime, we only have stopped because of the virus, soon as this is over we will be back out there', and so on. Those are not the appellant's posts, but are the posts of a small number of other people. Mainly, the posts on his page are in Kurdish and are not accompanied by a translation.

25. In fact, as one would expect given his inability to read and write, there are few posts visible with the appellant's name at all. On 20 November 2019, the appellant posted as follows:

> "The Iran protests held the cities of eastern Kurdistan by death [illegible] their main roads. Control and they started to kick off the acams [sic] 20/11/2019. ..."

There follows a row of emojis: four of the Iranian flag, four thumbs down symbols, four more Iranian flags, four shoes, three Iranian flags and three defecation emojis.

26. Also on 20 November 2019, the appellant updated his Facebook cover photograph to show three different people's feet standing in dirty trainers on the Iranian flag. Earlier that day, he had updated his cover photograph to an drawing of the Iranian flag in the shape of a map of Iran, with 12 hooded men being hanged from the map edge. At the top is an image of a religious leader, with his face blood red.

27. There is another post dated 5 January 2020 by the appellant which says, in English:

> "Stop killing Kurdish people in Iran. Free all political prisoners in Iran. Death to the terrorist regime of Iran inshallah. On Sunday 5.1.2020 ..."

There follows several lines of texts in Kurdish and the Iranian flag emoji, repeated and interspersed with the same red X. This post is accompanied by an image of a man holding a photograph of a religious leader with a red X across his face.

28. The photographs show pictures of a religious leader with a red cross across his face, and the word 'Fashism [sic]', or of the same leader, with illegible words in red across the poster. One of the photographs shows a picture of a number of persons in uniform, with a red cross across it, which is being burned, but not by the appellant, though he is visible behind, holding a poster which he told me he could not read.

Appellant's oral evidence

29. The appellant gave oral evidence against his updated witness statement, which had been translated to him in Kurdish. In the course of his evidence, it emerged that he is functionally illiterate. He has been learning English at Northampton College, but does not read it easily and he can neither read nor write Kurdish.

30. The appellant has no political background in Iran, either personally or in his family. He said that he is against the Iranian authorities, who treat people badly, and that he intends to continue to post on his Facebook page and attend demonstrations. He had no knowledge of the political history of Kurds in Iran.

31. The appellant denied ever having instructed his solicitors to say that he has a blog. He did not know what blogging was, and even after several attempts by the interpreter, by me and by Mr Melvin, and then by his solicitor in re-examination, he clearly did not understand the concept. He is not a blogger. His evidence was that he posted the photographs and that was all he thought he needed to do.

32. The appellant was assisted by a friend in setting up a Facebook account after he received the September 2019 refusal letter. The appellant said he was too young to know about Facebook earlier. The friend is literate, and he reads the appellant's posts to him and also the responses. The posts with the appellant's name are drafted by this friend: the appellant then 'posts' them but really has no idea of the content. The page has over 1000 followers, but none of the followers had been asked to assist the appellant in tracing his family, nor had any of them provided evidence.

33. The appellant said that he had been told of London demonstrations at the Iranian embassy by a different friend, who knew which trains to catch. He went to four demonstrations, but during cross-examination, could not remember when they were. He was photographed at the demonstrations, and then he uploaded the photographs. At Ms James' request, the Tribunal rose between cross-examination and re-examination, after which the appellant remembered perfectly the dates of the four demonstrations.

34. The appellant's friend who assist him with his Facebook page did not provide a statement or give evidence, and nor did the different friend who told him when and where the demonstrations were, which trains to catch, and travelled with him to them.

35. Asked to explain why he had not had a Facebook account before the refusal letter, the appellant said he was very young and he did not know about Facebook. That seems unlikely: in September 2019 he was 17 years old. Even if it is true, it does not greatly assist his claim.

Respondent's submissions

36. Mr Melvin relied on his Rule 24 Reply and skeleton argument. He observed that there was no clarity in the Facebook photographs as to when and where they had been taken. After setting out the appellant's contention that his inflammatory posts and pictures on the Facebook page were sufficient to create the risk on return, and that he would be asked for his Facebook password which would disclose the existence of these posts, the rest of Mr Melvin's skeleton argument did not engage with the sur place element of the claim. Mr Melvin observed therein that the appellant did not

claim to have joined any political organisation in the United Kingdom or have any other political opinion save that he was seeking asylum here.

37. In oral submissions, Mr Melvin urged the Tribunal to find the claim to be fabricated and the appellant not to be a credible witness in relation to his core account. His latest witness statement was misleading: the appellant was not a blogger. It was unclear whether he could read his own posts and the group which posted on his Facebook page was a small group of 7 or 8 friends. Most of what they posted was emojis. There was nothing here which would interest the Iranian authorities on return: the appellant was no more than a face in the crowd at the demonstrations.

38. The Facebook account itself was easily manipulated: on the appellant's own evidence, it was his friend who wrote his entries. The appellant could take down his account at any time and could then truthfully say at the airport, if asked, that he had no social media account. It was not the case that every returnee was asked for their Facebook or social media details.

39. Illegal departure alone was insufficient to give rise to a risk on return. The respondent would rely on the Upper Tribunal's reported decision in *AB and Others (internet activity – state of evidence)* [2015] UKUT 257 (IAC) (30 April 2015), on the country guidance in *SSH and HR (illegal exit: failed asylum seeker) Iran (CG)* [2016] UKUT 308 (IAC) (29 June 2016*), HB (Kurds) Iran (illegal exit: failed asylum seeker) CG* [2018] UKUT 430 (IAC) (12 December 2018), and *PS (Christianity - risk) Iran CG* [2020] UKUT 46 (IAC) (20 February 2020).

40. Mr Melvin asked me to dismiss the appeal.

Appellant's submissions

41. For the appellant, Ms James relied on her skeleton argument. In particular, in *HB (Iran)* she relied on the country guidance at (3), (8), (9) and (10). If asked on return, the appellant would disclose why he had claimed asylum on return, including his false claim to have been a smuggler. He would be forced to disclose his Facebook password and the anti Iranian posts would put him at risk of Article 3 ECHR ill-treatment.

42. In *AB and others* at [472] the Upper Tribunal had found that:

> "472. The mere fact that a person, if extremely discrete [sic], 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*." [*Emphasis added*]

43. In oral submissions, Ms James argued that it was the Iranian authorities' perception of the appellant's political views which would put him at risk. He had left illegally and would be questioned on return about why he left, where he went, what he did, and the basis of his asylum claim. There was a strong possibility that the authorities would demand and get his Facebook password. Even if the account had been deleted, it could be revived by logging in again.

44. The appellant had been using Facebook for 18 months. The account was an open one and the Iranian authorities might already have accessed it. If so, he would be specifically targeted on return. The appellant would be in difficulty explaining himself as he did not know, apart from the content of the photographs, exactly what he had posted. The photographs themselves were inflammatory. The appellant fell into a risk category, whatever his real views or the lack of them, and whether or not his account was fabricated. If he told the truth on return, he would risk harsh consequences which would certainly breach Article 3 ECHR.

45. I reserved my decision, which I now give.

Analysis

46. The appellant was an unimpressive witness. I have no doubt at all that he created his Facebook page and posted the photographs which he did for the purposes of bolstering this appeal and that his claim is entirely fabricated. The question is whether by doing so, he has nevertheless made himself a refugee sur place.

47. The question of the Iranian authorities' perception, to the lower standard applicable in international protection claims, is crucial to the decision in this appeal. I am obliged to the respondent for the copy of the Facebook Privacy Guidelines, which make it perfectly clear that an account can be revived, long after it was thought to be deleted, and that some information survives on other people's posts, even if the source account has been deleted.

48. I have already set out above the relevant passage in *AB and Others (internet activity – state of evidence)* in 2015, in which the Upper Tribunal expressly declined to give country guidance on blogging and social media, due to the inadequacy of the evidence before it, but noted that the Iranian authorities were not concerned with a person's motivation and generally viewed having sought asylum in a negative light. More than that was required to create a risk on return, however.

49. In *SSH and HR (illegal exit: failed asylum seeker) Iran (CG)* in 2016, the Upper Tribunal held that merely having left Iran illegally, returning on a laissez passer, or being a failed asylum seeker, was not enough to create a real risk on return. However, in 2020 in *HB (Kurds) Iran (illegal exit: failed asylum seeker)* the Upper Tribunal restated its guidance. The judicial headnote in *HB* says this:

"*(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. …

(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."

50. In *PS (Iran),* decided in 2020, the Upper Tribunal at [4] said this:

"*4. … Decision-makers must nevertheless consider the possible risks arising at the 'pinch point' of arrival:*
i) All returning failed asylum seekers are subject to questioning on arrival, and this will include questions about why they claimed asylum; …"

51. Taking all of these authorities together, and even allowing for the totally fabricated nature of the present claim, the existence of the Facebook page and the posts thereon is sufficient to put this appellant at risk on return. The appellant is an ethnic Kurd whose Facebook page, if discovered, shows

him among people burning images of religious leaders in Iran, stamping on the Iranian flag, and abusing the Iranian authorities.

52. That would be more than sufficient to activate the 'hair trigger' approach, with its low threshold for suspicion and reasonable likelihood of an extreme reaction. Accordingly, despite his claim being opportunistic and fabricated, this appellant has created the risk he asserts, to the lower standard applicable in international protection claims, and is a refugee.

53. This appeal is allowed.

DECISION

54. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by allowing the appeal.

Signed Judith AJC Gleeson Date: 7 April 2021
Upper Tribunal Judge Gleeson