Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-000196
PA/52766/2021; IA/08504/2021

THE IMMIGRATION ACTS

Heard at Field House, London	**Decisions & Reasons Promulgated**
On Wednesday 27 July 2022	**On Tuesday 13 September 2022**

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

KD
[ANONYMITY DIRECTIONS MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, we continue that order. Unless and until a Tribunal or court directs otherwise, the Appellant [KD] is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the Appellant: Mr M Sowerby, Counsel instructed by Freedom Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 8 June 2022, Upper Tribunal Judge Smith found an error of law in the decision of First-tier Tribunal Judge J K Thapar dated 6 January 2022 itself allowing the Appellant's appeal against the Respondent's decision dated 6 May 2021 refusing his protection and human rights claims. That decision is annexed hereto for ease of reference.

2. In the error of law decision, the Tribunal directed that the Appellant file and serve any additional evidence on which he wished to rely. He duly did so filing an additional witness statement dated 21 June 2022 which added an exhibit to the statement previously filed. That exhibit produced additional evidence showing the groups of which the Appellant is a member on Facebook. The Appellant also filed a supplementary skeleton argument dated 7 July 2022, setting out the relevant case-law, including the Tribunal's recent guidance in XX (PJAK – sur place activities – Facebook) Iran CG [2022] UKUT 00023 (IAC) which is highly relevant to this appeal.

3. At the outset of the hearing, Ms Everett indicated that she did not feel able to continue to contest the appeal. Following discussions with Mr Sowerby, she did not concede that the Appellant's anti-regime views as expressed on Facebook were genuinely held. Nonetheless, as she accepted and as outlined at [14] of Judge Smith's earlier decision, that issue is largely irrelevant to the central question whether the Appellant would be put at risk by the views he had expressed and his activities. In other words, would those publicly expressed views and activities come to the attention of the Iranian authorities even if the Appellant had no prior profile (as is this case)?

4. In that regard, Ms Everett also indicated that she would not offer a concession of this appeal if the only evidence were of views expressed on Facebook. Her concerns about this case arose from the Appellant's attendance at demonstrations. Again, she indicated that she would not offer a concession in every case where an individual had attended demonstrations against the Iranian regime. However, in this case, she was satisfied on the evidence that the Appellant was not simply a bystander and that this attendance created a real risk that the Iranian authorities would become aware of the Appellant and would have reason to monitor his Facebook activity. Irrespective of the genuineness or otherwise of the views expressed on Facebook, the evidence showed anti-regime views being forcefully expressed. Ms Everett accepted that, taken as a whole, the evidence showed that the Appellant was at real risk of coming to the attention of the Iranian authorities and of facing ill-treatment amounting to persecution for the voicing of the views expressed on social media.

5. Deletion of the Appellant's Facebook account prior to return to Iran (which was the factor overlooked by Judge Athwal) would make no

difference if the Appellant had already been identified as a person of interest by the Iranian authorities. He would face a real risk of ill-treatment amounting to persecution at the "pinch-point" of return, particularly since he would be travelling back to Iran without a passport.

6. For those reasons, adopting the lower standard of proof, Ms Everett indicated that the Respondent conceded the appeal.

7. We accepted that concession which we considered to be rightly made on the preponderance of the evidence. We therefore indicated that we would allow the appeal and would set out the basis of the concession and the allowing of the appeal in writing as we have done above.

DECISION

The Appellant's appeal is allowed on protection grounds.

Signed L K Smith Dated: 29 July 2022

Upper Tribunal Judge Smith

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-000196
PA/52766/2021; IA/08504/2021

THE IMMIGRATION ACTS

Heard at Field House, London **Determination Promulgated**
On Friday 20 May 2022

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Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KD
[ANONYMITY DIRECTION MADE]

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, I continue that order. Unless and until a Tribunal or court directs otherwise, the Appellant [KD] is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the Appellant: Mr J McGirr, Senior Home Office Presenting Officer

For the Respondent: Ms F Allen, Counsel instructed by Freedom Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge J K Thapar dated 6 January 2022 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 6 May 2021 refusing his protection and human rights claims.

2. The Appellant is an Iranian national of Kurdish ethnicity. He claimed to work as a Kolbar, smuggling goods across the border with Iraq. The Appellant claims to be at risk as a result of helping his uncle who was a member of the Democratic Party of Iranian Kurdistan ("KDPI"). He does not himself claim to be a member. The Appellant's claim in this regard was found by the Judge not to be credible.

3. The Appellant also claimed to be at risk on return due to his activities in the UK and his views as expressed on Facebook (the "sur place" claim). He has attended demonstrations outside the Iranian embassy. The Judge found at [17] of the Decision that the Appellant "being a Kurdish national and returning to Iran without a passport" would likely be questioned. She also there found that the authorities would then uncover the Appellant's Facebook account and "given the contents of his posts" the Appellant would face a reasonable likelihood of risk of persecution. The Judge relied in that regard on the country guidance case of HB (Kurds) Iran (illegal exit: failed asylum seeker) CG [2018] UKUT 430 ("HB").

4. Since the Decision, this Tribunal has provided further guidance in relation to evidence of Facebook accounts in XX (PJAK – sur place activities – Facebook) Iran CG [2022] UKUT 00023 (IAC) ("XX"). It is though common ground that this cannot be relevant to whether there is an error of law in the Decision although might be relevant to the materiality of any error. The Appellant also relied on the guidance given previously in relation to internet activity (AB and Others (internet activity – state of evidence) Iran [2015] UKUT 257 – "AB"). I do not need to refer to that guidance and nor did the Judge do so as the Tribunal made clear in that case that the material it had did not enable it to provide guidance. The decision in AB is therefore only relevant to the extent that it provides some evidence about the capability of the Iranian authorities to monitor sur place activities. Again, that decision is not relevant at this stage as the Judge did not refer to it in the Decision.

5. The Respondent appeals the Decision on the ground that the Judge has failed to take into account and/or resolve a conflict of fact or opinion on material matters. Specifically, it is said that the Judge failed to take into account and resolve the issue whether the Appellant could be expected to delete his Facebook account, in particular based on the Judge's

rejection of the Appellant's case that he genuinely held anti-Iranian, pro-Kurdish beliefs. It is said that the Presenting Officer had submitted to the Judge that the Appellant could therefore be expected to delete his Facebook account, but the Judge failed to make any finding on that submission.

6. Permission to appeal was granted by First-tier Tribunal Judge Seelhoff on 1 March 2022 for the following reasons so far as relevant:

> "… 2. The judge made adverse credibility findings but found that the Appellant was at risk on return due to social media activity primarily on Facebook which he asserts could have come to the attention of the authorities.
>
> 3. The grounds argue that it can be inferred from the Judge's findings that the Appellant's political beliefs reflected in the sur place activities were not genuine and that he ought to have considered whether or not the Appellant would have deleted those Facebook posts prior to being removed and accordingly remove such risk.
>
> 4. Whilst it might be a step to [sic] far to infer that the Appellant was acting in bad faith while posting on Facebook, there is no clear finding on the issues and the grounds are arguable."

7. The matter comes before me to determine whether there is an error of law in the Decision and if I so conclude whether I should set it aside. If I set it aside, I then need to determine whether the appeal should be remitted for the purpose of re-making or whether the decision can be re-made in this Tribunal.

8. I had before me a core bundle of documents relating to the appeal to this Tribunal as well as the Respondent's bundle before the First-tier Tribunal and the Appellant's bundle also before the First-tier Tribunal. The Appellant has not filed a Rule 24 Reply.

DISCUSSION

9. As the Appellant has not filed a Rule 24 Reply, there is no challenge to the Judge's finding that the Appellant's core claim based on what he said had occurred in Iran was not credible ([12] and [13] of the Decision). Ms Allen confirmed that there was no challenge to the Judge's findings in that regard. The Judge's findings in relation to risk on return at [14] of the Decision begin therefore with a conclusion that the Appellant's claimed account of risk on return based on his assistance to his uncle as a member of KDPI was not accepted and did not therefore create any risk.

10. The Judge continued her analysis of the risk on return as follows:

> "15. In assessing the risk upon return, I have also considered the Appellant's political activities in the UK and the guidance set out in **HB**. The Upper Tribunal found that Kurds in Iran do face discrimination, however this alone was insufficient to amount to persecution. However, the Iranian authorities are sensitive

to Kurdish political activity and those of Kurdish ethnicity are regarded with even greater suspicion and are reasonable [sic] likely to be subjected to heightened security on return.

16. The Appellant states that he does not have a passport. He is of Kurdish ethnicity and the Facebook posts and photographs show that he has in public expressed anti-government and pro-Kurdish views. The Respondent states the Appellant's activities in the UK have solely been undertaken to bolster his asylum claim. I find the motive behind the Appellant doing so may be of little relevance to the Iranian authorities. The Upper Tribunal in **HB** found involvement with any organised activity on behalf of or in support of Kurds can be perceived as political along with even low-level political activity which involves the same risk of persecution or Article 3 ill-treatment. Furthermore, the Iranian authorities have demonstrated a hair trigger approach to those suspected of or perceived to be involved in Kurdish political activities or support for Kurdish rights.

17. I have before me photographs of the Appellant attending demonstrations outside of the Iranian embassy in the UK. The Appellant is wearing a mask in some of the photographs and in others his full face can be seen. The Appellant can also be seen holding a flag in one and a poster in another. The Appellant provided copies together with the translation of several articles posted on his Facebook account. The Appellant has expressed support for the Kurdish political cause and opposition to the Iranian regime. The Appellant states that his Facebook account is visible to the public. Consequently, I find the Appellant being a Kurdish national and returning to Iran without a passport is likely to be questioned. An investigation into the Appellant's background will most likely uncover the contents of the Appellant's Facebook account as accepted in **HB** and given the contents of his posts I find there is a reasonable likelihood that he would for these factors be at risk of persecution on return.

18. I therefore find the Appellant has established to the required lower standard that he has a well-founded fear of persecution for a Convention reason, namely his political opinion. I find that the Appellant's removal would cause the UK to be in breach of its obligations under the 1951 Convention. Consequently, the Appellant's rights under Articles 2 and 3 also succeed since they stand or fall with the Appellant's asylum claim…."

11. Mr McGirr explained at the outset of his submissions that there might be an issue regarding what had occurred at the First-tier Tribunal hearing and whether the Presenting Officer had raised the possibility of deletion of the Facebook account. For that reason, he read out the note of the hearing. Although there was no witness statement attesting to that note (probably since the Appellant did not take issue with this in any Rule 24 response), Ms Allen did not thereafter take any point about whether this was in fact raised. I accept therefore that it was.

12. Mr McGirr thereafter relied on the grounds of appeal. He submitted that the Judge had failed to make any finding whether the Appellant would be at risk if he were to delete his Facebook account as he could do. In relation to attendance at demonstrations, Mr McGirr submitted that the Judge had failed to make any finding whether the Iranian authorities would have evidence from those demonstrations and if so whether that would place the Appellant at risk separately. As he pointed out, the fact of the Appellant's core claim being disbelieved is that he would not have a profile otherwise which would draw the attention of the authorities to him on return.

13. Ms Allen relied on what was said by the Judge about the Appellant's attendance at demonstrations. She submitted that the risk did not arise simply from the Facebook posts and photographs but also from that attendance.

14. In response to the grounds as pleaded, Ms Allen also submitted that the Judge had not found that the Appellant's political opinions were not genuinely held. That was not a point pressed by Mr McGirr. I accept that the Judge's findings in that regard are unclear. It might be said to be inferred from what is said at [16] of the Decision that the Judge did not accept that the Appellant's motivation was genuine. However, as there pointed out, it is not a matter of whether the political views are genuine but whether those views as expressed would put the Appellant at risk.

15. However, whatever the position in relation to the Appellant's motivation, I am persuaded that the Judge has failed to make a finding in relation to whether such risk as might otherwise exist could be avoided by the Appellant deleting his Facebook account prior to return to Iran. The genuineness of the Appellant's political beliefs might be relevant to whether he could be expected to take that course. However, the Judge has not made any finding whether, if he did so, the risk would be avoided.

16. Whilst I accept as Ms Allen pointed out that the Judge has referred to the Appellant's participation in political demonstrations in the UK and has made some comment about what that involved, the Judge has failed to make any finding that attendance at demonstrations would of itself give rise to a risk. The Judge's focus at [17] of the Decision is the "pinch-point" of arrival in Iran and what the authorities would discover from examination of the Facebook account. It is not there said that the authorities would already be aware of the Appellant's activities due to any record of his participation in protests nor that such awareness would be a reason for any interest by the authorities.

17. In summary, the Judge's findings are that the Appellant would be questioned because he would be returning to Iran without a passport and is of Kurdish ethnicity. Those factors would lead to questioning which would lead to discovery of the Facebook account which would in turn uncover the Appellant's participation in sur place activities. Those

findings fail to consider whether the Appellant could (and could be expected) to avoid that risk by deleting his Facebook account before arrival in Iran.

18. For completeness, I also deal with Ms Allen's submission that the Judge's reference to HB overcomes any difficulties with the Judge's findings. The guidance in HB does not assist. It supports the Judge's findings that the Appellant is at risk of being questioned because he is a Kurd returning to Iran without a passport (see [1] to [5] of the headnote). It also provides support for the finding that if the Appellant's political activities and support for the Kurdish cause whilst in the UK were to be discovered that would put him at risk (see [7] to [9] of the headnote). The guidance does not however deal with how discovery of sur place activities would occur and does not therefore assist with the issue which arises in this appeal. As is said at [9] of the guidance, each case is fact sensitive and will depend on what material is possessed. In this case, the issue is whether any material would be "possessed" if the Appellant were to delete his Facebook account.

19. For the foregoing reasons, I am satisfied that the Respondent's grounds disclose an error of law in the Decision. I am also satisfied that the error is material in relation to the sur place aspect of the claim. I therefore set aside the Decision in that regard. However, since there is no challenge by the Appellant in relation to the finding that his core claim is not credible, I preserve the findings at [12] and [13] of the Decision dismissing that aspect of the case. As the issue which remains in this appeal is now relatively narrow (confined to sur place activities), both parties agreed that the appeal could remain in this Tribunal.

20. As I have pointed out above, the question of risk arising from Facebook posts and photographs and how that is to be dealt with evidentially is now the subject of extensive guidance in XX. As Ms Allen indicated, it is therefore likely that the Appellant will wish to adduce further evidence in relation to his Facebook account. I have given a direction below to permit him to do so.

CONCLUSION

21. In conclusion therefore, I find that there is an error of law disclosed by the Respondent's grounds. The error is material and I therefore set aside the Decision. However, since the Appellant has not challenged the Judge's rejection of his core claim, I preserve the findings at [12] and [13] of the Decision. The appeal can remain in this Tribunal for re-making in relation to the issue of sur place activities. I have given a direction below for further evidence.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge J K Thapar dated 6 January 2022 is set aside. However, I preserve the findings at [12] and [13] of the Decision. I give the following directions for the re-making of the decision.

DIRECTIONS

1. **Within 28 days from the date when this decision is sent, the Appellant shall file with the Tribunal and serve on the Respondent any further evidence on which he wishes to rely (relating to the protection claim in relation to sur place activities)**

2. **The appeal will be relisted for a resumed hearing before me on a face-to-face basis on the first available date after 6 weeks from the date when this decision is sent. Time estimate ½ day. A Kurdish Sorani interpreter is to be booked for the hearing.**

Signed L K Smith Dated: 23 May 2022

Upper Tribunal Judge Smith