Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/00211/2020**

THE IMMIGRATION ACTS

Heard at: Manchester	**Decision & Reasons Promulgated**
On the 26th April 2022	**On the 25th August 2022**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

MM
(anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

For the Appellant: Ms Patel, Counsel instructed by Hallmark Legal Solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Iran born in 1998. He seeks protection on the basis that he has a well-founded fear of persecution in Iran for reasons of his political opinion.

2. The Respondent refused the Appellant's claim by way of letter dated 22nd December 2019. The Appellant had claimed to be at risk in Iran because he had become involved with banned Kurdish group the

KDPI, but this was disbelieved by the Respondent. On appeal to the First-tier Tribunal, Judge Shergill by his decision dated the 11th March 2020 did not believe it either. The Appellant was found to have no political opinion one way or the other. The appeal, insofar as it relates to this historical narrative, was brought to an end on the 10th November 2020 when Upper Tribunal Judge Sheridan rejected all of Ms Patel's ground attacking those negative credibility findings.

3. There was however another plank to the Appellant's case as it was put before the First-tier Tribunal. The Appellant had asserted a present risk of persecution in Iran arising from his *sur place* political activities in the UK. These activities consisted of online social media posts about Iran, and attending protests against the Iranian government outside its embassy in London. Judge Shergill had found no risk to arise from these matters: he would be no more than a 'face in the crowd' outside the embassy, and could avoid any problems upon return to Iran by deleting his Facebook page. On appeal to the Upper Tribunal the Appellant argued that this was an incomplete assessment. In particular, he argued that there had been a failure to factor in the Iranian security services' "hair trigger" approach towards Kurdish activists as explained in HB (Iran) [2018] UKUT 00430.

4. In his decision Judge Sheridan found no error in Judge Shergill's conclusion that the Appellant could simply delete the offending Facebook posts – since he held no genuine political opinion this could not offend the principle in HJ (Iran) [2010] UKSC 31. But, he continued:

> "19. However the judge erred by failing to consider whether, in light of HB (Iran), the Appellant would face a risk of persecution on return even if he deletes his Facebook account beforehand. Paragraph 114 of HB Iran indicates that it is reasonably likely that the appellant will be questioned on his return and that one of the questions he will be asked is whether he has a Facebook account. It may be that the appellant would be able (and could reasonably be expected) to confine his answer to stating that he does not have an account, particularly as he is illiterate and would not be known or to be of prior interest to the authorities. But it cannot be excluded as a possibility that the appellant, upon saying that he does not have a Facebook account, will be asked whether he ever had one, in which case the honest answer would be that he previously had (and has now deleted) a Facebook profile in which postings critical to the Iranian regime were made, but that the account's sole purpose was to bolster an asylum claim.
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> 20. The judge erred, in my view, by failing to consider (a) whether it is reasonably likely that the appellant would be

> asked by the Iranian authorities whether he previously had a Facebook account and, if so, whether that account contained any postings critical of the regime; (b) whether, if asked those questions, the appellant can be expected not to tell the truth in order to avoid persecution given that the Facebook account did not reflect a genuine political (or other) belief; and (c) whether it is reasonably likely that the appellant would face a risk of persecution or ill-treatment breaching Article 3 ECHR if he revealed to the Iranian authorities that he had posted material critical of the Iranian regime on Facebook but only in order to be granted asylum in the UK and not because of any genuinely held belief".

5. Judge Sheridan directed that the decision, insofar as it relates to the Appellant's sur place activities, be re-made. It was on this basis that the matter came, with regrettable delay, before me.

The Evidence

6. The Appellant, by his own admission, only started his political activity in the UK after he had been interviewed in connection with his asylum claim. By the date of the First-tier Tribunal decision the Appellant had been on two demonstrations and had attended the KDPI meeting featured in some of his Facebook posts. In his most recent statement he explains that he has not been on any more since then first because of lockdown, and then because he contracted Covid-19 and now has what he regards as 'long Covid'.

7. In respect of the Appellant's Facebook page I was provided with colour screenshots of an account with 3,309 friends. I am told that the depicted icon indicates that the page is 'public'. Posts included a mocked up picture of various icons of the Iranian revolution being urinated on (at one time at least, this was his cover photograph), the same leaders with their faces crossed out and words like 'facist' posted across them. There are a number of photographs of the Appellant at a memorial event/meeting for Qazi Mohammad: he is standing in front of a large portrait of the founder of the Mahabad Republic and a stage backed with the KDPI flag. There is a picture of him at a protest holding a KDPI placard, and although the location that it was taken cannot be discerned, there are other pictures of him, with different placards, clearly outside the Iranian embassy. In one he appears to be burning a picture of the Ayatollah. Other posts depict rioting in Iran, and a photograph of a young man who has been hanged: the message accompanying this picture is 'Stop Killing Kurdish People in Iran…Free All Prisoners, Death to the Terrorist Regime in Iran".

Applicable Guidance

8. Four decisions of the Upper Tribunal are of particular relevance to this appeal. 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 308 (IAC); HB (Kurds) Iran CG [2018] UKUT 430 and XX (PJAK – Sur Place Activities – Facebook) Iran CG: UTIAC 20 Jan 2022.

The Submissions

9. Mr McVeety asked me to note that this is an appellant who has been found to have no political opinions and no profile in Iran. His claim has been found to be wholly cynical; he is illiterate so he has no idea what he is putting on Facebook. In those circumstances there is no real risk that this is a person who the Iranian authorities will already have an interest in, and as the Tribunal found in XX (PJAK), the Iranian state lacks the capacity to conduct wide-ranging online surveillance of the diaspora. Similarly they do not have the facial recognition software that they would need to be able to identify everyone who stands outside the embassy with a placard. There is no evidence that he has taken a leading role at any of these protests, or otherwise done anything that might mark him out as a leader. If he is asked any questions on arrival he can tell the truth: he fabricated an asylum claim in order to remain in the UK, and generated false evidence to support it.

10. Ms Patel took me to several passages in XX which she says reveal the source of the risk for the Appellant. First, he will need to apply for an emergency travel document (ETD). It is likely that the embassy will search for him online at that stage. He has an open profile and over 3000 ‘friends’. In XX the panel found that it can take up to 30 days for an active profile to be deleted: if the page is not wiped before the search is conducted, the obviously anti state propaganda on his page would put him at risk. The Appellant has been active on Facebook since November 2019 but Ms Patel was unable to say whether any of the 3000+ individual ‘friends’ in the Appellant’s social graph might have led the Iranian authorities to him during that time, although he is obviously connected to the KDPI. He will be questioned on arrival in Iran and, as Judge Sheridan points out in his ‘error of law’ decision, he cannot be expected to lie. If he tells the truth about what he posted this, in conjunction with his Kurdish ethnicity, would be sufficient for him to be transferred for further questioning, and the persecution that would inevitably follow.

My Findings

11. My starting point is the decision in SSH and HR. In that country guidance case the panel heard and accepted evidence from country expert Dr Kakhki that an undocumented migrant would need to apply for a *laissez passer* at the embassy in London. He or she would need to provide proof of identity, and the embassy would be aware that the removal was following a failed asylum claim. In XX the evidence indicated that although an applicant for a travel document would not be asked to provide any details in respect of any social media accounts, it would be unrealistic to assume that that internet searches would not be conducted against their names: "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" [104].

12. I accept and find as fact that the content of the Appellant's Facebook page is highly inflammatory and likely to be viewed with great hostility by the Iranian regime. If there is a real risk that this material has or will come to the regime's attention, there is unquestionably a real risk of persecution when the Appellant goes back to Iran.

13. The question is whether that material could possibly come to their attention. XX identifies two ways in which that could happen.

14. The first is that the Iranian authorities might find out about his Facebook page when he applies (or rather the Home Office applies on his behalf) for a *laissez passer.* In XX the Tribunal explain that it is perfectly possible to delete all critical material, as long as this is done 30 days before it is anticipated that checks might be made. As Mr McVeety points out, there would be no infringement of the Appellant's protected rights to expect him to do this, since the Convention does not protect specific forms of political speech (there is no right to have social media) and moreover the views expressed by the Appellant are, the First-tier Tribunal has found, not genuinely held. There remains the question of whether the Appellant would in fact delete his page. In all honesty I have no idea. Although he does have family members back in Iran, who might be endangered by his actions should he leave the page open, on the other hand the present authorities would tend to suggest that a refusal to do delete the material prior to the ETD application would secure him asylum. Luckily I need not engage in speculation about whether he would or would not close down his Facebook account.

15. That is because there is a real risk that the Iranian authorities already know about him. As the Tribunal heard in XX, the claims made by the Iranians about their ability to monitor the diaspora, and indeed the domestic population, are not matched by reality. Although they have certainly made efforts to do so, the Iranians presently lack the capacity to conduct wide ranging surveillance. Their efforts must, by

necessity as well as logic, be targeted towards specific groups. Those groups could be the web of individuals – the 'social graph' - around a person of specific interest. I can make no finding about whether the Appellant might have been captured in such an investigation since Ms Patel was without instructions about whether there were any obviously prominent people amongst the Appellant's 'friends'. There is however an alternative way in which he could have come to their attention. In XX the Tribunal recognise that certain groups are more likely that others to have become the focus of inquiry [at 85]:

> The Iranian hackers discussed in the evidence have demonstrated increasing proficiency in their methods, honed over many years. We also accept that the Iranian state targets dissident groups, including religious and ethnic minorities, such as those of Kurdish ethnic origin. We note the substantial resources dedicated by the Iranian state generally in relation to cyber-security and surveillance, ranging from the NIN to the establishment of FATA.

16. The KDPI are, in my view, an obvious target. It would make very little sense if the Iranians were not monitoring the organisation's Facebook page, and following those who connected with it. The Appellant has actively posting KDPI material since 2019. There are pictures of him on his own open site holding KDPI placards and standing in front of the KDPI flag, and portraits of martyred Kurdish leaders. There are pictures of him stamping on portraits of the Iranian leadership outside the Iranian embassy, and in one he appears to be setting such a portrait on fire. I am satisfied that the connection to the KDPI would have led the Iranian surveillance officers to the Appellant, and that they would view this material as extremely hostile.

17. Upon return to Imam Khomeini International Airport the Appellant would therefore be immediately flagged as a person of interest. He can be expected to tell the truth and tell the officer in the initial line of questioning that all his Facebook content, and indeed his attendance at the meeting and protests, was contrived to gain him asylum. All of the authorities to which I have been referred allude to the fact that the Iranians are well aware that people make false asylum claims. I am not however satisfied that in a case such as this, where a citizen has publicly denigrated the most revered of Iranian leaders and asserted his support for a banned separatist group, would be brushed aside. The whole point of the 'second line' questioning described in SSH and HR is to investigate individuals who have given rise to particular concerns. The Facebook content, and the attendance at Kurdish protests that this content portrays is, I am satisfied, particularly concerning. As the Tribunal put it in HB, the authorities are extremely sensitive about Kurdish opposition groups, taking a

"hair trigger" approach to whether further investigation is warranted. Given the manifestly poor record of Iran when it comes to the ill treatment of suspects in detention I am driven to find that there is a real risk that the Appellant would be ill treated during such second line questioning.

18. This appeal concerns a claim for protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, and paragraph 28 of the Guidance Note 2022 No 2: Anonymity Orders and Hearings in Private[1], I therefore consider it appropriate to make an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decisions

19. The determination of the First-tier Tribunal contains material error of law and it is set aside to the extent identified above.

8. The decision in the appeal is remade: the appeal is allowed on protection (refugee) grounds.

9. There is an order for anonymity.

Upper Tribunal Judge Bruce
10th August 2022

[1] Paragraph 28 of the Guidance Note 2022 No 2: Anonymity Orders and Hearings in Private reads: In deciding whether to make an anonymity order where there has been an asylum claim, a judge should bear in mind that the information and documents in such a claim were supplied to the Home Office on a confidential basis. Whether or not information should be disclosed, requires a balancing exercise in which the confidential nature of the material submitted in support of an asylum claim, and the public interest in maintaining public confidence in the asylum system by ensuring vulnerable people are willing to provide candid and complete information in support of their applications, will attract significant weight. Feared harm to an applicant or third parties and "harm to the public interest in the operational integrity of the asylum system more widely as the result of the disclosure of material that is confidential to that system, such confidentiality being the very foundation of the system's efficacy" are factors which militate against disclosure. See R v G [2019] EWHC Fam 3147 as approved by the Court of Appeal in SSHD & G v R & Anor [2020] EWCA Civ 1001