IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-002543
(PA/51824/2021)

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 15 August 2023

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

AS
(anonymity ordered)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr C. Holmes, Counsel instructed by Barnes Harrild Dyer Solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 30 May 2023

DECISION AND REASONS

1. The Appellant is a national of the Islamic Republic of Iran born in 1998. He appeals with permission against the decision of the First-tier Tribunal (Judge Alis) to dismiss his appeal on protection and human rights grounds.

2. The basis of the Appellant's claim was straightforward. He is a Kurd who had worked for a number of years in the illicit smuggling trade between northern Iran and Iraq. He had in the main been concerned with the transportation of alcohol, cigarettes and electrical goods. He had however on occasion also brought into Iran sealed packages given to him by an Iranian Kurdish man named Soran, whom he knew to be a member of the banned Komala party living in exile in Iraq. What prompted the Appellant to flee Iran was a series of events in late 2019. The country was a that time in the grip of protests over the rising cost of fuel, and the Appellant had attended two such protests. Shortly thereafter the police and the

Ettelaat raided his uncle's house, where the Appellant had stashed some of Soran's packages. The Appellant's uncle was arrested but was released after he explained that the packages belonged to his nephew. The Appellant fled Iran. Since his arrival in the UK the Appellant has attended demonstrations and posted materials on Facebook openly critical of the Iranian regime and in support of Komala, which he avers he supports.

3. Before Judge Alis it was argued that the Appellant could succeed in demonstrating that he is entitled to protection in two ways. He could prove his account of adverse interest by the Iranian authorities was true; further and in the alternative he could show that he was a genuine supporter of Komala whose personal profile was such that the "hair trigger" approach taken by the Iranian authorities to returning Kurds would result in a real risk of Article 3 ill treatment on arrival.

4. Judge Alis did not accept that the historical account was proven, even to the lower standard. Although the Respondent had agreed that the Appellant was a smuggler who had attended two fuel protests, Judge Alis concluded that she had been correct to reject the account given of contact with Komala, and police raids on family property.

5. As for the current political views expressed by the Appellant, the Judge accepted that he may have attended five protests outside the embassy in London, but there was no evidence to suggest that he was an organiser. It was accepted that the Appellant's open Facebook posts "were supportive of Kurdish political activity". Of this the judge says [at 54(i)]:

> "It is arguable that if he did not delete the account and then on return if he disclosed the existence of his account and password to the authorities this could create an actual or implied adverse profile especially as he is of Kurdish ethnicity".

6. The decision however goes on:

> 57. The Tribunal in BA (Demonstrators in Britain-risk on return) Iran CG [2011] UKUT 36 (IAC) made clear that the Iranian Government is unable to monitor all returnees who have been involved in demonstrations and regard must be had to the level of his involvement as well as any political activity he had in Iran. Simply holding a few banners and taking part in crowd control also does not make him a political activist.
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> 58. It is not sufficient for the appellant to claim that because he has a Facebook account and has attended five demonstrations he would be at risk on return. The Tribunal in XX made it clear how the courts should approach social media accounts. The Iranian authorities cannot monitor every single account and there is no fundamental right protected by the Refugee Convention to have access to Facebook. It follows there is no reason why the Appellant cannot be asked to delete his account.
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> 59. Each case should be viewed on its merits and the Appellant must establish a risk to him personally to the lower standard of

proof. His overall use of Facebook must be considered alongside his attendance at the five demonstrations outside the Embassy.
60. Since 2016 the Iranian authorities have become increasingly suspicious of, and sensitive to, Kurdish political activity and those of Kurdish ethnicity are regarded with even greater suspicion than hitherto and are reasonably likely to be subjected to heightened scrutiny on return to Iran. Kurdish ethnicity is therefore a risk factor which, when combined with other factors, may create a real risk of persecution or Article 3 ill-treatment. Such other factors could include presence on social media and attendance at demonstrations.

61. The Tribunal in HB has previously found that Kurds involved in Kurdish political groups or activity are at risk of arrest, prolonged detention and physical abuse by the Iranian authorities. Headnote 10 reads, "The Iranian authorities demonstrate what could be described as a 'hairtrigger' 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."

62. Headnote 9 reads, "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."

63. The Tribunal in PS reiterated the following: a. All returning failed asylum seekers are subject to questioning on arrival, and this will include questions about why they claimed asylum. b. If he is detained and his detention becomes prolonged, the risk of ill-treatment will correspondingly rise. Factors that could result in prolonged detention must be determined on a case by case basis. They could include but are not limited to:

i. Previous adverse contact with the Iranian security services;
ii. Connection to persons of interest to the Iranian authorities;
iii. Overt social media content indicating that the individual concerned has actively promoted his activities.

64. Ultimately, having rejected his activities in Iran I have to assess whether his activities in this country are genuine.

65. In short, if his attendances at demonstrations and his posts on his Facebook account were made because of his genuine support to advance the Kurdish cause, then applying the principles established in HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31, which were applied in the context of political opinion in RT (Zimbabwe) v SSHD [2012] UKSC, [2013] 1 AC 152, and having regard to the assessment made in AB and

> Others relating to inquiries the Iranian authorities may make into a returnees internet activities (applied in HB specifically in respect of Facebook), I would have to find that the appellant would be at real risk of persecution if removed to Iran based on his sur place activities.
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> 66. Having carefully considered all the evidence I find there was nothing significant about the demonstrations he attended that would distinguish him from any other demonstrator. The evidence adduced does not persuade me that his attendance outside the Embassy would bring him to the attention of the Iranian authorities given his role at the demonstrations.
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> 67. I further find that he attended these demonstrations to bolster his claim before this Tribunal and whilst that does not mean I should ignore such attendances it does not mean he is genuine in his beliefs.

7. The appeal is then dismissed.

The Grounds of Appeal

8. Before this Tribunal Mr Holmes for the Appellant advanced four interconnected grounds of appeal.

9. The thrust of the first ground of appeal is that having directed itself to relevant country guidance cases including PS (Christianity - risk) Iran CG [2020] UKUT 00046 (IAC) and HB (Kurds) Iran (illegal exit: failed asylum seeker) CG [2018] UKUT 430 (IAC), the First-tier Tribunal failed to have adequate regard to, or to properly apply, the guidance therein.

10. Mr Holmes submits that on the accepted facts, the binding country guidance set out in these decisions means that the appeal should have been allowed. The Tribunal accepted that the Appellant had worked as a smuggler in Iran for about seven years; that is in itself is a criminal offence in that country. The Judge further accepts that he attended anti-government demonstrations in the United Kingdom, and appears to accept that he also attended two such demonstrations in Iran. The Appellant is a returning Kurd, and in light of the 'hair trigger' approach taken towards Kurdish returnees as found in HB (Kurds), it is at least reasonably likely that when questioned about the basis of his asylum claim in the UK matters would come to light which would lead to 'second line' questioning and 'prolonged' detention, such as to amount to real risk of harm. It is submitted that the Judge engages in no assessment of whether these matters might come to light upon return, and appears to assess only whether the Iranian authorities are already aware of them; see for example §70. It is respectfully submitted therefore that the Judge's assessment only answers half the question, and that he has failed to consider the likely attitude of the authorities at the point of return, as required by the country guidance.

11. The second ground is related to the first, in that it is submitted that the Tribunal failed to apply the binding principles set out by the Supreme Court in HJ (Iran) [2010] UKSC 31 to is own findings. At §51 of his decision, the Judge says this: "I accept as a young Kurd [the Appellant] may have an interest in Kurdish rights" .

As to the Appellant expressing this interest through posts made on his Facebook account, the Judge appears to accept at his §51 that these posts do reflect a genuinely held belief. Mr Holmes submits that it follows from this that the Judge is in error at §58, where he lays out this self-direction: "there is no fundamental right protected by the Refugee Convention to have access to Facebook. It follows there is no reason why the Appellant cannot be asked to delete his account." The matter at issue is not the entitlement to hold a social media account, but rather the entitlement to express views about Kurdish rights. That is an entitlement that is undoubtedly protected by the Refugee Convention. This was the principle which should have been at the heart of the Judge's risk analysis in respect of the 'second line' questioning featured in ground one.

12. Mr Holmes next submits that the Judge below has erred in appearing to reach contradictory findings on material matters. At §51 of his decision, the Judge says this: "I accept as a young Kurd [the Appellant] may have an interest in Kurdish rights". Despite this acceptance, the Judge at §67 goes on to say: "I further find that he attended these demonstrations to bolster his claim before this Tribunal and whilst that does not mean I should ignore such attendances it does not mean he is genuine in his beliefs". The effect of this passage, he submits, is not entirely clear. The Judge does not appear to reach a clear conclusion that the Appellant's beliefs are not genuine, but rather only observes that his attendance "does not mean" that they are. The Judge does not appear to reach any comparable finding on the Appellant's motivations for his Facebook activity. The conclusion at §67, if said to be adverse to the Appellant, is difficult to reconcile with the acceptance at §51 of the Appellant having a genuine interest in the Kurdish cause. Accordingly, Mr Holmes submits that these conclusions are both lacking in clarity, and on at least one view, incompatible.

13. Fourthly and finally, it is submitted that the Judge below has erred in failing to give adequate reasons as to why the Appellant's narrative of events in Iran and his coming to the authorities' attention, is to be rejected. The Judge appears to accept that the Appellant attended a demonstration in Iran; no indication is given that this aspect of the Appellant's narrative falls to be rejected. The Judge does however reject at §46 the Appellant's account to have come to the authorities' attention because (a) he was not approached at the demonstration and (b) there were lots of other people there. No other reasoning is offered. His account of support for the Komala party generally is rejected at §47 solely on account of an alleged discrepancy in the Appellant's screening interview. No other reasoning is offered. Mr Holmes submits that in light of the lower standard of proof, this is unsustainable.

Discussion and Findings

14. I am satisfied that the grounds are made out to the extent that the decision must be set aside.

15. The first difficulty is that having rehearsed the multiplicity of risk factors identified in the very many country guidance cases on Iran, the Tribunal has found itself sidetracked by issues that were not in fact determinative in this case. Referring to BA (Iran) the Tribunal quite properly concludes that attending a demonstration does not make you an activist; XX confirms that there is no right to have a Facebook page; disingenuous political activity does not in itself make

you a refugee. All of that is true, but it was here allowed to obscure what should have been the focus: what will happen at the 'pinch point' of return?

16. The Appellant is going to go back to Iran on a *laissez passer*. We know from SSH and HR (Illegal Exit: failed asylum seeker) that on arrival he will be questioned. We know from PS (Christianity-risk) that this initial questioning will include the Appellant being asked what the basis of his asylum claim in the UK was. He cannot be expected to lie.

17. Assuming that the Respondent is correct about the truth of the matter, the Appellant will disclose that he was working as a smuggler on the Iran/Iraq border, and that he decided to go to Europe to see if he could get a better life there. The country background material on Iran has long indicated that the Iranian regime has no interest in persecuting economic migrants who advance false asylum claims. The difficulty here is that the Appellant will be admitting to being a *kolbar.* Being a smuggler is subject to prosecution in Iran and reports indicate that detentions are numerous with one report suggesting that "thousands each year" are arrested: CPIN *Iran: Smugglers* (February 2022) [2.4.3]. That same report continues:

> "2.4.7 Persons who have been involved solely in smuggling are likely to face prosecution. It is lawful for the authorities to prosecute those engaged in smuggling illegal items, or goods which would be subject to import tariffs. However, those prosecuted for such crimes may face a trial which does not meet international standards of fairness. Smuggling can incur a range of penalties, from fines to flogging, or the death penalty".

18. That being the case, it is reasonably likely, applying SSH and HR, that the Appellant will be transferred for further questioning where there may be a risk of ill-treatment being inflicted. As to the degree of that risk, the following factors are relevant. The First-tier Tribunal did not accept that the Iranian authorities would know about the Appellant's attendance at the fuel protests, and did not appear to think that his mere presence at protests in London would have come to their attention. The Appellant is however Kurdish: we know from HB (Kurds) that the Iranian authorities have in recent years become increasingly sensitive to Kurds and Kurdish asylum claims abroad. Given that, it is reasonably likely that questioning about the Appellant's asylum claim will include asking him about whether he claimed any involvement in Kurdish politics. He cannot be expected to lie. We then have a Kurd, in second line questioning, who has admitted to being a smuggler who has attended protests against the Iranian regime in both Iran and London. Applying the 'hair-trigger' analysis set out in HB to those circumstances it is reasonably likely that ill treatment will be inflicted: this is the conclusion that the accepted facts, and the relevant country guidance, inexorably leads to.

19. It follows that I need not resolve Mr Holmes' subsidiary complaint that there was ambiguity in the First-tier Tribunal's *HJ (Iran*) findings. Had I done so, however, I would have dismissed the appeal on that ground. Although the Tribunal does not expressly answer its own question at §64, it is implicit in its findings at §67 that it rejected the Appellant's claim to be a Komala supporter. The fact that he had attended fuel protests in Iran did not make him a government opponent *per se*, and on my reading of the First-tier Tribunal's decision, it rejected the Appellant's claim to genuinely hold the political beliefs that his attendance at an embassy protest might suggest.

Notice of Decision

20. The decision of the First-tier Tribunal is set aside.

21. The decision is appeal is remade as follows: the appeal is allowed on protection grounds.

22. There is an order for anonymity.

Upper Tribunal Judge Bruce
2nd August 2023