Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/08169/2015

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 30th April 2018	**On 08th May 2018**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

AM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E. Rutherford, Counsel instructed on behalf of the Appellant
For the Respondent: Ms H. Aboni, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Iran.

Direction Regarding Anonymity – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

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. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

2. The Appellant, with permission, appeals against the decision of the First-tier Tribunal, who, in a determination promulgated on the 11th December 2017, dismissed his claim for protection.

3. The basis of the Appellant's claim is set out within the determination at paragraphs 10-20, and in the papers before the Tribunal, namely that he had been involved with an organisation [xxxx] and attended classes run by them which subsequently had been raided which had led to his arrest, detention an ill-treatment. After release he returned to the same organisation and began to recruit others. His home was raided by the authorities but as the applicant was not there, his brother was arrested and remains in detention having been sentenced to 5 years imprisonment. His sister had been executed some years earlier.

4. The Appellant left Iran illegally on the 2 February 2015 and arrived in April 2015. Whilst in the United Kingdom he had been attending church and had been involved in various face book postings which were critical of the regime.

5. He made a claim for asylum and attended a substantive interview on the 6th May 2015. A decision was made refusing that application on the 12th May 2015 and the Appellant appealed to the First-tier Tribunal. In a determination promulgated on the 5th October 2015 the appeal was allowed. An appeal to the Upper Tribunal was lodged. The Upper Tribunal found the First-tier Tribunal had made an error of law and remitted the appeal.

6. He appeal came before the FTT for a second time on the 7th November 2017 and in a decision promulgated on the 11th December 2017 his appeal was dismissed. The Appellant sought permission to appeal that decision and permission was granted by the First-tier Tribunal (Judge Adio) on the 9th January 2018.

7. At the hearing before the Tribunal, Ms Rutherford relied upon the grounds and supplemented them with her oral submissions. The Respondent had provided a Rule 24 reply on the 20th February 2018 which Ms Aboni placed reliance upon and she therefore also made oral submissions.

8. After having taken into account the respective submissions by the parties, I reached the conclusion that the decision of the First-tier Tribunal involved the making of an error on a point of law and gave my reasons for reaching that decision. I shall set out below my reasons by reference to the parties' respective submissions.

9. The grounds assert that the judge erred in reaching an adverse finding of credibility at paragraph [38]. I have reached the conclusion that contrary

to the grounds at paragraph 4(d), that the judge's findings of fact made at [38] that it was not credible he had rekindled his interest in the [xxxx] organisation, were open to the judge to make and were entirely sustainable as submitted by Ms Aboni. Ms Rutherford submitted that the judge had failed to take into account his explanation and evidence that he had received significant comfort and support from the organisation following the execution of his sister and that this was a material matter alongside the explanation provided at paragraph 36 of his statement. However those submissions can be properly characterised as a disagreement with the findings made by the judge at [38]. The judge was entitled to consider his claim of having rekindled his interest in the context of his account of the previous circumstances in Iran, which included having been the subject of severe physical and mental abuse. The judge took into account when assessing the credibility of this issue, that his life had now become more stable having remarried and lived quietly with his wife daughter and parents and that it would not be plausible that he would place himself at risk of further arrest and detention at this time. Furthermore, the judge was entitled to consider his account of his claimed activities which the judge found to be inconsistent with his concern for the safety of his family including his younger daughter. This was in fact supported by material in the bundle (see page 69; paragraph 27) where the Appellant gave details about how he had reacted when in detention and had been thinking of his family members. Consequently I am satisfied that those findings of fact were open to the judge.

10. The grounds also challenged the finding at [40] on the basis that the judge made a misdirection in law in requiring corroboration in the form of documentary evidence. Whilst there is no requirement for someone seeking protection or asylum to provide corroboration in the form of documentary evidence, the judge did not reach the conclusion at [40] in isolation. In the preceding paragraphs, the judge rejected his claim to have rekindled his interest in the [xxxx] organisation and at [39] did not find it reasonably likely that the authorities would suddenly raid his house, more than two years after his release from detention. The judge also made the point that he had provided documentation to support his claim relating to his sister. Consequently I am satisfied that the findings when read together were open to the judge to make.

11. The grounds also do not challenge the findings of fact that were made at paragraphs 46 – 48 relating to his claimed conversion to Christianity.

12. The grounds at paragraph 4(a) relate to the findings made by the judge at [49] which relate to the tattoo on his forearm. The grounds assert that the judge fell into error by failing to put into context how and why the tattoo had been put on his arm and that as it was a clear outward manifestation of faith, the judge failed to consider this in the light of *HJ (Iran) v SSHD [2010] UKSC 31* and that he should not be expected to have his tattoo removed to avoid persecution, which is the finding made by the judge. In addition it was submitted that the finding that he could cover the tattoo by long sleeves was an irrational finding. Ms Aboni on behalf of the Secretary

of State submitted that the findings at paragraph [49] were open to the judge to make having found that he was not a genuine Christian convert and that he would therefore take steps to remove the tattoo or wear long sleeves on return.

13. I am satisfied the judges' consideration of the Appellant's tattoo at [49]] discloses an error of law. Notwithstanding the observation made by the judge that it "appears to be an amateur application with faded colours" and that the judge was unable to make a finding as to whether it was permanent, the evidence before the Tribunal was that it had been on his arm for a considerable period of time. It was present at the time a medical examination took place in September 2017 (see paragraph 41; page 80 AB) and also at the date of the hearing some months afterwards. Consequently it would be reasonable to reach the conclusion that it was not a transfer or one that would wash off. That was particularly so bearing in mind the medical evidence which made reference to the tattoo as covering up substantial scarring in that area.

14. The judge went on to find that because she had formed an adverse view of his interest in Christianity (as set out in the findings at [46-48]), she was satisfied that the "tattoo was obtained for the sole purpose of enhancing his chances of a successful appeal" (see [49]). She went on to find that he had the option of having the tattoo removed or in the alternative it would not be unreasonable to expect the Appellant to keep his arm covered by "long sleeved clothing" so that the tattoo was not visible.

15. In my judgement that finding runs contrary to the decision of *HJ (Iran)* (as cited). In that case the Supreme Court was concerned with the issue as to whether an individual can be required to modify his conduct (including what he says and does) if that conduct or what he says or does, would otherwise put him at risk of serious ill-treatment or persecution. In other words, whether an individual can be expected to act differently from how he would otherwise act, including what he would say or do) in order to avoid persecution. The underlying rationale of that decision is that an individual cannot be required or expected to behave in a way that is inconsistent with the exercise of a fundamental right of freedom reflected in the Convention reason, for example his religious beliefs. The decision is not concerned with how the individual will in fact behave but it is concerned with whether, if he would behave in a way that would expose him to persecution, whether they can be reasonably expected to modify their behaviour in order to avoid persecution.

16. When applied to the circumstances of this particular Appellant, he cannot be expected to remove the tattoo to avoid persecution and there was no evidence before the judge to demonstrate that he had any intention of doing so. Furthermore, the finding that he could cover up the tattoo by wearing long sleeves fails to properly apply the jurisprudence relating to the circumstances of an individual on return to Iran.

17. In the decision *AB (and others) Internet activities-state of evidence) Iran [2015] UKUT 0257* at paragraphs 451, 455-457, 460,464 and 467, the Tribunal set out its consideration of the evidence relating to risk on return. The Tribunal said this:

> "451. It cannot be the case that a real risk of persecution is generated simply by making some unsavoury remark or mild criticism of the government of Iran. We make it clear that this is not because the government of Iran is tolerant of mild criticisms. There is evidence that it is not. Mild concerns can be enough as can association with western music or western ideas or western fashions. All of these things attract disapproval and, we are satisfied, might attract persecution.
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> 455. We do reject Mr Rawat's submission that a high degree of activity is necessary to attract persecution. It is probably the case that the more active persons are the more likely they are to be persecuted but the reverse just does not apply. We find that the authorities do not chase everyone who just might be an opponent but if that opponent comes to their attention for some reason then that person might be in quite serious trouble for conduct, which to the ideas of western liberal society seems of little consequence.
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> 456. It was accepted that being resident in the UK for a prolonged period may lead to scrutiny and screening on arrival.
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> 457. We accept the evidence that some people who have expected no trouble have found trouble and that does concern us. We also accept the evidence that very few people seem to be returned unwillingly and this makes it very difficult to predict with any degree of confidence what fate, if any, awaits them. There is clear evidence that some people are asked about their internet activity and particularly for their Facebook password. We can think of no reason whatsoever to doubt this evidence. It is absolutely clear that blogging and activities on Facebook are very common amongst Iranian citizens and it is very clear that the Iranian authorities are exceedingly twitchy about them. We cannot see why a person who would attract the authorities sufficiently to be interrogated and asked to give account of his conduct outside of Iran would not be asked what he had done on the internet. Such a person could not be expected to lie, partly because that is how the law is developed and partly because, as is illustrated in one of the examples given above, it is often quite easy to check up and expose such a person. We find that the act of returning someone creates 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. 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 a real risk of persecution.
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> 460. We find that our main concern is the pinch-point of return. A person who is returning to Iran after a reasonably short period of time

> on an ordinary passport, having left Iran legally, would almost certainly not attract any particular attention at all. However, very few people who come before the Tribunal are in such a category. At the very least people who would be before the Tribunal can expect to have had their ordinary leave to be in the United Kingdom to have lapsed and may well be travelling on a special passport. Nevertheless, 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.
> 464. We do not find it at all relevant if a person had used the internet in an opportunistic way. We are aware of examples in some countries where there is clear evidence that the authorities are scornful of people who try to create a claim by being rude overseas. There is no evidence remotely similar to that in this case. The touchiness of the Iranian authorities does not seem to be in the least concerned with the motives of the person making a claim but if it is interested it makes the situation worse, not better because seeking asylum is being rude about the government of Iran and whilst that may not of itself be sufficient to lead to persecution it is a point in that direction.
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> 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."

18. The country guidance decision of *SSH and HR (illegal exit-filed asylum seeker) Iran CG UKUT 00308 (IAC)* reached the following conclusions from the evidence; that returnees without passports are likely to be questioned (see paragraph 22), only if concerns arise about previous activities in Iran, or where ever they have returned from, would there be any risk of further questions, detention or ill-treatment (see paragraph 23). At paragraph 25, the Tribunal accepted the submissions that the evidence showed a real risk of persecution or ill-treatment in breach of Article 3 for a person who was imprisoned in Iran on the basis that the conditions in prisons and detention facilities are harsh and potentially life-threatening and are likely to reach the Article 3 threshold. At paragraph 31, the Tribunal found that a person guilty of another offence may additionally be imprisoned for illegal exit but that the mere fact of illegal exit or having made an asylum claim abroad did not create a risk of ill-treatment (because there were not enough examples of cases of ill-treatment about which sufficient is known (see paragraph 32). At paragraph 34, the Tribunal found that Kurdish ethnicity may be an exacerbating factor for a returnee otherwise of interest.

19. In *SSH* (as cited) the Upper Tribunal recognised that there was a two-stage questioning process on return. At the first stage, they would not be at a

real risk of persecution or serious ill-treatment. However, if that first stage of questioning, "any particular concerns arising from their previous activities either in Iran or in the United Kingdom or whichever country they have returned from" arose, they would be a risk of further questioning, detention and potential ill-treatment (see paragraph 23).

20. When applied to the circumstances of this Appellant's case, it was common ground that the Appellant had left Iran illegally and he had been absent from there since 2015. At the "pinch point "of return the Appellant is likely to be questioned and the evidence demonstrates that there was a reasonable likelihood that particular concerns arising from his previous activity in Iran and his family circumstances would lead to the risk of further questioning, detention and potential ill-treatment. The FFTJ found as a fact that the Appellant's sister had been executed in Iran for converting to Christianity. The judge also accepted that the Appellant had been arrested and detained and ill-treated by the Iranian authorities. The grounds (at 4(e) seek to challenge the further finding at [37] that the reason for his detention might have been because he was "alcohol dependent", I am satisfied that this was speculative when set against the medical report and the clinical letter and in the light of the Appellant's evidence. The judge considered the medical evidence in the light of the Appellant's account which was supportive and consistent with his claim that he had physical injuries and how they had been sustained. The expert rejected other causes and was satisfied that the Appellant had not exaggerated or embellished his account. The judge therefore concluded that the medical report taken with the other supporting evidence demonstrate that he was tortured mentally and physically during detention. It was the Appellant's account that he had signed a confession during his detention.

21. Against that background and having a tattoo depicting Jesus, the cross and the Virgin Mary would be likely to be seen as an outward manifestation of the Christian faith and in my judgement would be likely to lead to the second stage of questioning identified by the Tribunal.

22. This leads me to the second issue which relates to the Facebook posts. The judge considered his sur place activities at paragraphs 44 – 45. In respect of his posts, they were in support of the release of Dr Taheri. It is common ground that this man was in detention awaiting execution as a result of his belief in interuniversalism. The judge concluded that the Facebook account would not bring the Appellant to the attention of the authorities, because there was no evidence whether the Facebook account was "open" or "closed" and was therefore not satisfied that they would be able to browse the Facebook pages and see the content and also because the judge was aware that it was possible to manipulate Facebook pages by posting comments, copying them and then deleting the page. Thus the judge will was not satisfied that the postings could continue to appear on Facebook. Furthermore she noted that the name of the account was incorrectly spelled and that the authorities would not associate the postings on the Facebook pages with the Appellant.

23. At paragraph 45, the judge made reference to his attendance at demonstrations in support of Dr Taheri's release. There were photographs attached to the Appellant statement at an extract from YouTube. The judge accepted that the photographs depicted the Appellant with others holding banners relating to his release but they did not appear on the YouTube extract. The judge was therefore not satisfied he could be identified as being a protester and as it was such a small scale protest the judge was not satisfied that it would have attracted the attention of the authorities.

24. The grounds assert that the judge erred in her approach to that particular evidence failed to consider it in the light of *AB(and others)(*as cited) when the case was provided before the FTT. Miss Rutherford also submitted that the judge erred in considering whether the account was "open" or "closed" and that there was evidence of previous postings within the bundle and current posts which demonstrated that the postings continued to be present upon his Facebook page. Ms Aboni on behalf of the Respondent submitted that the judge adequately addressed the Facebook evidence and reached conclusions that were open to her that he was not likely to come to the attention of the authorities and would therefore be at risk. She submitted that the judge was not satisfied of the evidence of sur place activities nor was the judge satisfied that he was a genuine Christian convert for the reasons given at paragraphs 46 – 48.

25. I have made reference to the decision of *AB (and others)* earlier in this decision. There is no reference in the FTT decision to the findings made by the Upper Tribunal in that case. I take into account that that was not a country guidance decision and the findings of the Tribunal were made on the basis of the particular evidence before it but nonetheless some of those findings made which relate to the "pinch point" of return were also referred to in the country guidance case of *SSH* (as cited).

26. Whilst Miss Aboni submits that the judge was entitled to reject his claim of risk on return due to his Internet activity because he was not found to be credible relating to his conversion, at paragraph 464 of *AB (and others)* the Tribunal stated as follows:

> "We do not find it at all relevant if a person had used the Internet in an opportunistic way. We are aware of examples in some countries where there is clear evidence that the authorities are scornful of people who try to create a claim by being rude overseas. There is no evidence remotely similar to that in this case. The touchiness of the Iranian authorities does not seem to be in the least concerned with the motives of the person making a claim but if it is interested it makes the situation worse, not better because seeking asylum is being rude about the government of Iran and whilst that may not of itself be sufficient to lead persecution it is a point in that direction."

27. At paragraph 472, the Tribunal also stated (in the context of risk arising from Internet activity) that "it is not relevant if a person has used the

Internet in an opportunistic way. The authorities are not concerned with the person's motivation."

28. I recognise that in the CG decision of *SSH (*at paragraph 30) which stated that "one can expect a degree of reality on (the part of the Iranian authorities) in relation to people who, in the interests of advancing their economic circumstances, would make the story in order to secure economic betterment in a wealthier country." However on the factual findings of the judge, the profile of the Appellant was such that there was a real risk of further interrogation. This related to his previous arrest and detention and the execution of his sister.

29. The decision of *AB (and others)* demonstrates that an individual will be asked for their Facebook password upon returned to Iran and thus it is likely their Internet activity will become known (see paragraph 457). When looking at the judge's findings, it is therefore irrelevant whether the Facebook account is "open" or "closed". Furthermore whilst the judge found that she could not be satisfied that the postings would continue to be present on the page, there was evidence before the Tribunal of previous posts made but also current posts which were only printed three days before the hearing. There remains a question as to the name of the Facebook account which is spelled slightly differently and does not have his last name. It does not appear that he was asked about this issue and does not feature in the judge's determination. However in the light of the case law, and the evidence before the Tribunal I am satisfied that there is a reasonable likelihood that the authorities would check the Facebook page that he in fact uses.

30. At the hearing the advocates were given the opportunity to make any further submissions relating to the re-making of the decision. Ms Rutherford reiterated her submissions which related to risk on return based on the facts as found and in the light of the errors of law that I had already made reference to. Ms Aboni made no further submissions.

31. Having reached those conclusions and for the reasons set out, I am satisfied that the determination of the First-tier Tribunal demonstrates the making of an error on a point of law and that the decision should therefore be set aside. In my assessment of the evidence that was before the First-tier Tribunal and the relevant jurisprudence, and in the light of the findings of fact that were made by the judge, I am satisfied that the Appellant has demonstrated to the lower standard of proof that there is a reasonable likelihood that upon return to Iran he will be the subject of ill-treatment and persecutory harm.

32. In particular, I find that by applying the country guidance case of *SSH* (as cited) that having left illegally and having been out of Iran since 2015 he is likely to be questioned on return. He cannot be expected to remove the tattoo for the reasons I have already stated and I am satisfied that this would be viewed as a manifestation of Christian faith and would be readily seen by the authorities, even if he does not hold a genuine belief. This

would be likely to be of specific interest in the light of the accepted evidence that the Appellant's sister had been executed in Iran for converting to Christianity. The Appellant's previous profile someone had been arrested, detained and ill-treated on account of previous activities with the [xxxx] organisation would also become known. In addition, there is the likelihood that his Facebook pages would be scrutinised on return. In my judgement these factors when placed together indicate that the Appellant has demonstrated that there is reasonable likelihood that he would be at risk on return to Iran. Even if it could be said, as Ms Aboni submits that his motivation for his conduct is in issue, it is the perception of the authorities which is of relevance. The CG case makes it plain that the prison conditions in Iran would lead to treatment contrary to Article 3.

33. Accordingly the appeal against the refusal of his protection claim is allowed on asylum and human rights grounds.

Decision:

The decision of the First-tier Tribunal did involve the making of an error on a point of law and the decision is set aside. The appeal is re-made as follows- the appeal is allowed on asylum and human rights grounds (Article 3).

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed SM Reeds

Date: 1st May 2018

Upper Tribunal Judge Reeds