



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/01727/2018

**THE IMMIGRATION ACTS**

Heard at HMSTC Employment Tribunal Liverpool  
On 18 July 2018

Determination Promulgated  
On 14 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

CGA  
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Bednarek of Broudie Jackson and Canter Solicitors

For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

**DECISION AND REASONS**

- 1 The Secretary of State appeals against the decision of Judge of the First-tier tribunal JJ Maxwell dated 15 March 2018, allowing the claimant's appeal against the Secretary of State's decision of 19 January 2018 rejecting the claimant's claim for protection. In this decision, I shall retain the designations of the parties as they were before the First tier.

- 2 The appellant is a citizen of Iran and claimed protection in the United Kingdom after his entry on 7 August 2017, on the basis that he had come to the adverse attention of the Iranian authorities as a result of engaging in political activity for the Democratic Party of Iran (PKD). The Judge in fact uses both 'PKD' and 'KDP' as the acronym for party that the appellant claims to have been involved with in Iran; however, the anomaly has no bearing on the Judge's decision. The appellant's account was rejected by the respondent in the decision, on the grounds that the account was implausible and inconsistent.
- 3 On appeal, the Judge made findings at [29] that notwithstanding the appellant's alleged support for the PKD, it was clear, from paragraph 8.4.1 of the Home Office Country Information and Guidance note on Iran Kurds Kurdish Political groups that membership or support of PKD can be verified by the party, but the appellant had not taken any steps to seek such verification. Further, at [30] the Judge noted that the appellant had in the United Kingdom attended a meeting not of the PKD, but of the Kurdish Democratic Party of Iran ('KDPI'). Although the appellant had asserted they had similar interests, the Judge noted that the PKD was once part of KDPI, until the two groups splintered. The Judge queried why the appellant had chosen to go to that particular meeting rather than seeking out the party which he supported in Iran, and found that there was merit in the respondent's submission that the appellant had attended the meeting simply as a means to bolster his otherwise unmeritorious claim for protection. The Judge held at [31], that not having made a genuine effort to substantiate his claim, he could not rely upon paragraph 399L of the immigration rules to support his claim and in those circumstances, the Judge found that the appellant had failed to discharge his burden of proving his account to be true and accurate. It was on that basis that the Judge therefore appears to have rejected the appellant's account of events in Iran.
- 4 However, before the Judge the appellant also sought to rely upon certain evidence said to emanate from a Facebook account in his name. That evidence is set out paragraph pages 18 to 19 of the appellant's bundle. That comprises three screenshots of a Facebook page open on a web browser showing the appellant's name, and logos of the KDPI. (There is an example of the logo of the party on the party's Wikipedia entry at page 27 of the appellant's bundle, for comparison.) Also within the appellant's bundle are a number of photographs showing the appellant attending the KDPI meeting, standing in front of two large photographic portraits that are said to be of famous Kurdish political leaders, and other photographs of the appellant at the KDPI meeting.
- 5 The appellant had asserted before the Judge that the fact that he had posted pro-Kurdish materials online, including photographs of his attendance at the KDPI meeting, would cause him to be at real risk of serious harm in Iran on return. The Judge addressed this issue at the end of [31] and onwards in his decision. The Judge held as follows:

"32 The appellant told me, and I accept, the Facebook postings exhibited in his bundle represent but a fraction of the postings he has made and continues to make.

Whether a genuine or bogus supporter of KDP, there is a clear incentive for the appellant to have continued posting in this fashion.

33 The respondent's representatives readily conceded that if I accepted the appellant's account, then he would face the risk of persecution if returned to Iran. Having made that concession, she further submitted that if I was against the appellant and found that he had not made his account out any political danger he might face if returned to Iran, by reason of his recent Facebook postings, might be readily averted simply by deleting those posts. Whilst, at first blush, the second of these submissions would appear to be an appropriate and effective means of appellant protecting himself; without compromising his beliefs: close analysis of this course highlights its defects.

34 Deleting Facebook postings merely prevents the public from being able to see them. Deleted postings may be retrieved by the same account from which they were posted. Thus, anyone with access to the account holder's Facebook password may search for deleted postings and recover them. It is most unfortunate, but nothing is permanently deleted from Facebook. This being the case, in the light of the decision of the Upper Tribunal in AB and Others, this appellant would be at risk upon his arrival in Iran. The fact that his making these Facebook postings may well be a cynical act to bolster an otherwise meritorious (*sic*) application for protection is not a relevant factor. Cynical or not, the act of making such postings demonstrating an association with this organization if drawn to the attention of the Iranian authorities who would treat the appellant as someone who is a party to the KDP and the potential consequences which flow.

35 Further, it is suggested in AB and Others, there is some monitoring of activities outside Iran and, whilst not likely in my view, there is the possibility the Iranian authorities are already aware of the appellant's postings. The risk is minimal in my judgment however it is a matter which must be weighed in the appellant's favour; albeit slight."

6 The appeal was therefore allowed.

7 In grounds of appeal dated 22 March 2018, the Respondent argues in summary as follows:

- (I) The Judge made no findings at all with respect to the alleged events in Iran; any findings on that account would be relevant to the overall assessment of credibility, in particular whether or not the appellant had an adverse profile with the Iranian authorities prior to departure.
- (ii) The Judge failed to give adequate reasons why he accepted the appellant's profile was public, given the many ways in which postings can be manipulated and amended. Further, given the lack of findings about the appellant's pre-UK activities and his failure to provide supporting evidence regarding his political activities in the UK, inadequate reasons had been given for accepting the appellant had made his postings public.
- (iii) The Judge erred in law in failing to identify any evidential basis to support his finding that once posts were deleted from Facebook the information would still be visible within the user's account if accessed. In the alternative, if the Judge

conducted research after the hearing had concluded this would be procedurally unfair.

- 8 Permission to appeal was granted by Judge of the first Tier Tribunal O'Brien on 4 April 2018, granting permission on those grounds, but also on an additional ground, not seemingly raised by the Respondent, that the Judge appeared to have rejected the appellant's account of activities in Iran but did not explain why he nevertheless accepted the appellant's claim that the bundle only contained 'a fraction' of his political Facebook posts.
- 9 Before me I heard from Mr. McVeety for the respondent and Mr. Bednarek for the appellant.
- 10 There is a Rule 24 reply from the appellant dated 15 May 2018 arguing, in summary, that the Judge was entitled to find that the appellant's Facebook posts were public, given that the screenshot of the evidence of his Facebook posts clearly indicated a globe icon next to the date of the posting which signified that the individual posts were publicly accessible and viewable by all. Further, it was asserted in the Rule 24 apply that all Facebook 'cover photos' are by design publicly accessible, that setting being unchangeable. The appellant had a cover photo clearly containing Kurdish separatist imagery. The Judge's findings were open to him on the evidence available and disclosed no error of law. Further, it was submitted that it was well established that Facebook posts cannot be permanently deleted from any individual account. Whilst posts can be deleted from the public facing account, they nevertheless remain embedded within the individual account and are stored in the software's 'archive file'. With access to the account settings to use of the password all such 'deleted' posts therefore remain discoverable by accessing the archive file. Furthermore, the evidence contained in AB and Others (internet activity – state of evidence) [2015] UKUT 257 (IAC) paragraphs 211, 349, 393, 453, 460, 466, and 469 confirmed that the Iranian authorities monitor social media posts of persons outside the country. It was therefore open to the Judge to find at [35] that the Iranian authorities may already be aware of the appellant's Facebook posts, and that such a finding disclosed no error of law.
- 11 In the appeal before me, Mr. McVeety relied upon respondent's grounds. He also sought permission to rely upon an unreported decision of the Upper Tribunal, dated 2 May 2018 in the case of LKIK, reference PA/03758/2016 in which Upper Tribunal Hanson had heard expert evidence from a social media expert, Mr. Ross Patel, Senior Analyst with Afenis Forensics, addressing a number of questions put to him regarding the use of Facebook and what information can be retrieved from a Facebook account in certain circumstances. Further, the appellant sought permission in an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to rely upon further country information, being two webpages from Facebook itself entitled 'What audiences can I choose from when I share?' and 'What happens to content (posts, pictures) that I delete from Facebook?', and a further two web articles, not from Facebook, but rather by 'Tech Guide', and 'Techviral' entitled 'How

to download a copy of everything Facebook knows about you', and 'How to recover deleted Facebook messages' respectively.

12 I reserved my position as to whether to admit this material until I heard head submissions as to the error of law.

13 Contrary to the suggestion in the respondent's first ground, that the Judge had not made any findings of fact as to what happened in Iran, I find that the Judge's findings at [29] to [31] represent a rejection of the appellant's account of events in Iran. That does not substantially alter the remainder of the respondent's case, however, and Mr. McVeety continued to argue that inadequate reasons had been given for the finding that the appellant had made *public* postings on Facebook, and had given no adequate reason for the finding the three pages appearing in the appellant's bundle represented only a fraction of the appellant's posts. Further, he argued that there was no proper evidential foundation for the Judge's finding that deleted posts may be retrieved by anyone with access to the Facebook account holder's password and that nothing is permanently deleted from Facebook.

14 Mr. Bednarek submitted that the Judge's decision disclosed no error. He accepted that the Judge's findings in the first 5 lines of [34] were likely to have derived from submissions that he had made to the Judge, it being the appellant's case in submissions that even if a posting was deleted from Facebook, it remained within the archive file, which itself could be retrieved by the Iranian authorities if they held the password, which they would be able to obtain from the appellant upon return to Iran. Mr. Bednarek accepted that the Judge had not given adequate reasons for finding that the three webpages in the bundle were 'but a fraction' of the postings he had made.

15 I also invited the parties to address me on what actual finding was being made by the Judge at [35] as to the likelihood that the Iranian authorities were already aware of the appellant's postings. Mr. McVeety argued that the adjectives used by the Judge when assessing that possibility, being 'not likely', 'minimal' and 'slight', were not expressions of possibility which reached the relevant threshold of real risk or a reasonable degree of likelihood. It was therefore doubtful that the Judge had held, to the appropriate standard, at [35], that the Iranian authorities were aware of the appellant's postings. Further and in any event, Mr. McVeety argued that there was no proper evidential foundation for the Judge to come to that conclusion in any event, given that the appellant was not, on the Judge's findings, a known political activist in Iran, and there would be no reason for the Iranian authorities to be monitoring the appellant specifically.

16 Mr. Bednarek sought to argue that the Judge had held to the relevant standard that the Iranian authorities had already become aware of the appellant's postings.

#### **Decision on error of law**

17 I find that the Judge did materially err in law in making his decision. Facebook is clearly used by many individuals, including lawyers and judges. It may be the case

that certain features of a social media platform such as Facebook may be assumed to work in a particular way, and that a judge may have judicial notice of such matters even in the absence of any particular evidence. For example, it may be relatively uncontroversial to assert that a posting which has a globe icon next to it can be seen by any other Facebook user.

- 18 However, in my opinion, the Judge's finding that deleted postings may be retrieved via the same account on which they were posted by anyone with access to the account holder's Facebook password is a matter on which evidence was required. Although Mr. Bednarek had made such a submission, apparently adopted by the Judge, this issue is potentially determinative of the whole of the appellant's case. The respondent is entitled, I find, to query how the Judge was able to make such a finding, in the absence of any evidence on that point. I find that the making of such a finding, in the absence of supportive evidence, represents an error of law.
- 19 Such error would not have been material, if paragraph [35] was capable of standing alone as a sustainable finding that the Iranian authorities are already aware of the appellant's online political activities. However, I find that paragraph [35] of the decision does not represent such a finding, or in the alternative, if it is intended to represent such a finding, the Judge has misdirected himself as to the relevant standard of proof.
- 20 There was of course no evidence that the Iranian authorities had actually seen the appellant's posts - the assessment that this may have happened is more in the nature of an assessment of future risk to the appellant rather than making findings as to the historical features of the appellant's account. In assessing the possibility that the Iranian authorities may already be aware of the appellant's posts, the Judge uses the adjectives 'not likely', 'a possibility', which was 'minimal', or 'slight'. I find that such adjectives do *not* amount to a finding, applying the relevant authority of *R v SSHD ex p Sivakumaran* [1988] AC 958, that there were substantial grounds for thinking, or a serious possibility, or a reasonable degree of likelihood, that the Iranian authorities would already be aware of the appellant's postings upon his return to Iran, or, as per *MH (Iraq) v SSHD* [2007] EWCA Civ 852, that the risk of that being the case was real, as opposed to fanciful.
- 21 The Judge's error in paragraph [35], which I find is *Robinson* obvious, therefore makes his earlier error, in making crucial findings as to whether certain information in a Facebook account may be retrieved notwithstanding that there was no evidence before the Judge on that matter, material to the outcome of the appeal.

## **Decision**

- 22 I informed the parties at the hearing that I was of the view that the Judge's decision contained a material error of law, and I set aside the decision.

## Remaking

- 23 Neither party asked me to remit the matter for redetermination by First tier Tribunal. Further, neither party formally objected to the admission of the documents now relied upon. I therefore admitted the unreported Upper Tribunal decision in the case of LKIK. This is a detailed decision setting out expert evidence, which was uncontested in the parties to that appeal, as to whether or not certain information may be retrieved from a Facebook account. Such evidence, and the Upper Tribunal's view on it, is material to the determination of the present appeal, even of the decision is (as yet) unreported. The decision provides greater clarity on certain matters than is provided by e.g. AB and Others. I also admitted the evidence filed with the appellant's Rule 15(2A) notice.
- 24 It is appropriate to note the issues which were raised in LKIK. They were:
- (i) Can a Facebook account still be viewed after it has been deleted? If so, in what circumstances and for how long?
  - (ii) Can a Facebook post be viewed after it has been deleted? If so, in what circumstances and for how long?
  - (iii) If the information on the Facebook account has been stored at a point/s in the past as part of a filtering/data collection process, what happens to that information if the Facebook account/post is subsequently deleted?
  - (iv) If a person A comments on/likes/shares person B's post can person A be identified from person B's post, even if person A deletes their own Facebook account?
  - (v) If person A's post is shared by person B, what happens to the shared post if person A deletes it?
  - (vi) Can person A's Facebook post be copied/screenprinted by person B – does that mean person A can never delete the screenprinted copy?
  - (vii) Can the Facebook friends of a person A see everything person A posts/comments on/likes? How are person A's friends notified that person A has posted something?
  - (viii) Can the Facebook friends of person A see everything person A posts/comments on/likes? How are the Facebook friends of person A's Facebook friends notified that person A has posted something?
  - (ix) Who can see public posts? How can public posts be searched for?
- 25 The Upper Tribunal records the expert's responses to those questions, at paragraphs [13] - [25] of the decision, those answers seemingly being unchallenged by the appellant's representative in the appeal. I do not attempt to set out the whole of the expert's evidence, but of note is the following evidence, (in summary only):
- [13] (In reply to question (i)): no account content would be accessible after account had been deleted (as opposed to deactivated/suspended), and would within days be permanently removed from the service.

[14] (In reply to question (ii)): a Facebook post or a copy of it shared by others cannot be viewed after deletion.

[16] (In reply to question (iii)): (other than where a particular individual has been identified and is being monitored by the Iranian authorities - considered at para [17]) it is highly unlikely that any government or industry organisation could have comprehensive copies of all Facebook content that has been generated or accessed globally or even specific to their respective region.

[17] However, targeted individuals or groups could have their Facebook pages accessed and their online activities inspected in real time and all activity archived.

26 Upper Tribunal Hanson also formed the view at [38] that it had not been established that a person has the right to have a Facebook account or any other form of social media account, and possession of an existing account had not been shown to amount to a fundamental part of an individual's identity. There was, therefore, in principle no arguable defence to a suggestion that a person in the UK with a Facebook account cannot be expected to delete that account if the material on it does not represent a genuinely held belief or opinion. If an account is deleted, it will cease to exist and any posts created or sent by the account holder will be deleted and not accessible.

27 The individual appellant LKIK's appeal was dismissed at [67]-[68] on the following grounds:

"67. It is not made out that the appellant is a well-known musician or prominent individual in Iran or that there is anything in his profile that increases the risk of his being identified on return. There is no evidence the appellant has been subject to any adverse interest from the Iranian authorities before he left Iran, such that may create a risk of being identified and receiving greater attention.

68. It is not made out the Iranian authorities would have the ability or desire to access the appellant's Facebook account and it is not made out that even if questioned at the 'pinch point' that the authorities in Iran would have any knowledge of those matters that the appellant claims will place him at risk. I find the appellant's claimed political allegiances do not represent a view genuinely held by him but are matters created for the purposes of enhancing and otherwise non-existent asylum claim. I find the appellant will not be required to reveal to the Iranian authorities he previously had a Facebook account. I find it is reasonable and not contravening any established principles to delete the Facebook account in the appellant's name, on the available evidence. It is not made out the Iranian authorities have the capacity or ability to access a Facebook account once it has been closed down and the expert's report quite clearly indicates that for individuals and international third-party is, such as governments, this task is not feasible."

28 Mr. Bednarek argued that the expert's evidence in response to the nine questions listed above did not shed light on whether a post, if deleted, could be retrieved from an archive file if the Facebook account has been retained (i.e. merely deactivated/suspended, rather than deleted). When I pressed Mr. Bednarek as to whether he thought there was still a lacuna in expert evidence available either



directly to me, or by way of being set out in the decision of LKIK, Mr. Bednarek did ultimately indicate that he wished to apply for an adjournment of the appeal so that he could obtain expert evidence on the issue he identified.

- 29 I declined that application. My principal reason for doing so is that, as set out at paragraph [38] of LKIK, which although not binding on me, I find persuasive, a person who lacks genuinely held beliefs does not have a right to have a Facebook account, and he has no arguable defence to the suggestion that he can be expected to delete his account, as the material on it would not represent his genuinely held beliefs or opinions.
- 30 However brief the Judge's reasons might have been at [29] to [31] of his decision, it is clear to me that the Judge rejected the credibility of the appellant's account to have been involved in politics in Iran. Further at [33], the Judge appears to find that the suggestion that deleting Facebook would not compromise his beliefs, on the implied basis that the appellant did not have any genuine political beliefs. Therefore irrespective of whether or not it is possible to retrieve information from a suspended Facebook account from an archive file, I find, applying the analysis of LKIK at [38], that it is open to the appellant, who does not have genuinely held political beliefs, to delete the whole of his account. The unchallenged expert evidence recited in LKIK establishes that once a Facebook post is deleted, it is not possible to retrieve the post (LKIK, para [14]), and if an entire account is deleted, it is not possible to retrieve the content of the account (LKIK para [14]).
- 31 The appellant's evidence, from two pages from Facebook's 'customer help' web pages, and the two articles from other authors, about whom nothing is known, do not assist the appellant. They provide information about the visibility of posts that are 'public', provide that when a post is deleted, 'some things' (unspecified) can only be deleted when the account is permanently deleted; provide information about how to download a copy of the archive of a Facebook account, and how to retrieve deleted posts from that archive. However, none of that evidence, such as it is, contradicts the view of the expert in LKIK that deletion of an entire account results in the posts from that account being irretrievable.
- 32 I therefore find, remaking the decision in this appeal, that the appellant, not having demonstrated that he has genuinely held political views on Kurdish issues, can be expected to delete the whole of his account, which according to the evidence set out in LKIK, which I adopt, will result in the whole account being deleted and inaccessible, even to the Iranian authorities.
- 33 Mr. Bednarek argued that by reference to a number of passages within the decision in AB and Others, that the Iranian authorities search the Internet, using their Cyber Army, for comments critical of the Iranian regime and that there is still a possibility that the content of the appellant's Facebook pages as set out in the appellant's bundle, may have come to the adverse attention of the Iranian authorities already. Even if the terms used by the original Judge did not amount to a finding that there was a serious

possibility that this was the case, Mr. Bednarek asserted that there was such a serious possibility.

34 I find that there is no adequate evidence before me to establish that the appellant has posted anything more than the 3 pages that have been included in his bundle. The appellant has been found to lack credibility in relation to events in Iran, and his assertion that the evidence in his bundle is but a fraction of his on line activities is a bare assertion only.

35 I find that against the background that the appellant had no adverse profile in Iran prior to his departure, the possibility of the Iranian authorities having come across his three pages of Facebook posts is very remote, and that there is no serious possibility/reasonable degree of likelihood that the appellant is known to the Iranian authorities as a result of this limited material.

36 Even though it is the case that targeted individuals or groups could have their Facebook pages accessed and their online activity inspected in real time, and all activity archived (as per LKIK para [17]) the appellant is not a person who has previously come to the Iranian authorities' attention and there will be no reason for his name to be specifically sought out by the Iranian authorities, or for him to be identified either alone, as or as part of a group, as being a relevant person to target for scrutiny.

37 Thus, this appeal can be determined on the basis that it may be presumed that the appellant can delete the whole of his Facebook account, and it is irrelevant whether posts can be retrieved from an archived/suspended account that has not been deleted.

38 The appellant has not shown that there is a reasonable degree of likelihood that the Iranian authorities have already become aware of the posts that he has placed on a Facebook account. The appellant is not a genuine political supporter of a pro-Kurdish organization. The deletion of his Facebook account entirely will not contravene any fundamental right that he possesses.

### **Decision**

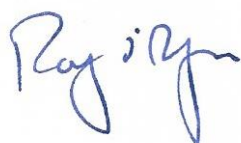
39 The Judge's decision involved the making of a material error of law.

I set aside the Judge's decision.

I remake the decision by dismissing the appellant's appeal.

Signed:

Date: 12.8.18



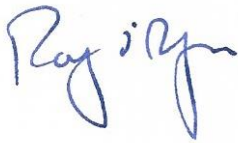
Deputy Upper Tribunal Judge O'Ryan

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

This appeal concerns a protection claim. Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

Date: 12.8.18

A handwritten signature in blue ink, appearing to read 'Ray O'Ryan', is written over the 'Signed:' label.

Deputy Upper Tribunal Judge O’Ryan