Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06867/2019

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On the 11 December 2019	**On the 17 December 2019**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

AH
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs Brakaj, Counsel instructed on behalf of the Appellant
For the Respondent: Ms Petterson, Senior Presenting Officer

DECISION AND REASONS

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.

1. The appellant is a national of Iran. He appeals with permission against the decision of First-tier Tribunal ("FtTJ"), promulgated on the 11 September 2019 dismissing his appeal against the decision to refuse his protection and human rights claim.

2. The appellant's history is set out in the decision letter of the 8th July 2019 and the decision of the FtTJ at paragraphs 1-2. The appellant arrived in the United Kingdom on the 13th November 2018 and made a claim for asylum on the following day.

3. He provided a screening interview and later provided a statement of evidence (SEF statement) and was interviewed about the factual basis of his claim.

4. The basis of his claim can be summarised as follows. The appellant is a citizen of Iran and is of Kurdish ethnicity. He claimed to have met a woman who was of the Christian faith and who told him that if he wanted to propose marriage to her, he would have to convert from Islam. The appellant wanted to know more, and his neighbour introduced him to a man whom the appellant met with and asked questions of. It was stated that this man was arrested, and the appellant left his home to travel to his Uncle's house.

5. The appellant left Iran a few days later on the 3 February 2018; travelling from Iran to Iraq to stay with a friend of his Uncle's. His family later found put about why he had left, and they threatened him whilst living in Iraq. He remained in Iraq for 6 months and then travelled to Turkey on foot and remaining in Turkey for around 9 days. He continued his journey and was then put on the back of a lorry and arrived in France. After 2 ½ months, via a lorry, he arrived in the United Kingdom.

6. Since arriving in the UK, the appellant stated that he had attended demonstrations in front of the Iranian embassy in London, to express his dissatisfaction of the Iranian government. He also posted material on his Facebook account that was also critical of the regime.

7. In a decision letter dated the 8 July 2019, the respondent refused his claim for asylum and humanitarian protection. It was accepted the appellant was an Iranian national of Kurdish ethnicity but did not accept his claim that he had been of interest to the Iranian authorities .The Secretary of State set out a number of credibility issues relating to the core aspects of his claim to be of interest to the Iranian authorities as a result of interest in Christianity or from his family members. As to the issue of risk on return, the respondent applied the relevant country guidance case of HB (Kurds) Iran CG [2018] UKUT . Having done so, it was considered that there was no real risk of persecution or serious harm on the basis of his ethnicity as a Kurd.

8. The appellant sought to appeal that decision and in a decision promulgated on the 11 August 2019 the FtTJ dismissed the appeal having concluded that the appellant had not given a credible or consistent account as to his activities in Iran or that he was a genuine Christian convert. Those findings are set out at paragraphs 9-11. There is no

challenge to those findings of fact, or the assessment made by the FtTJ of the evidence relating to events in Iran or his claimed conversion.

9. Since arriving in the UK, and since the substantive asylum interview, the appellant stated that he had attended three pro-Kurdish demonstrations in the UK and he also posted material on his Facebook account.

10. When considering the appellant's activities in the UK, including his attendance at demonstrations and the postings on Facebook, the FtTJ reached the conclusion that he was not genuinely committed to supporting pro-Kurdish organisations and had shown no interest when in Iran and the evidence of his involvement was "light on detail". The FtTJ accepted tht he had posted details of attendance on his face book page. After taking into account the decision in AB and others (internet activity-state of evidence Iran [2015] UKUT 00257, relating to the face book posts , the FtTJ concluded that social media postings may place him at additional risk upon return to Iran given that he had left Iran illegally in 2018 and thus the FtTJ then considered the decision of BA (demonstrators in Britain-risk on return) Iran CG [2011] UKUT 36. At [13] the FtTJ concluded that the appellant was not politically active, nor would he be perceived to be so and having applied that country guidance decision she reached the conclusion that the appellant would not be at risk of harm, taking into account his stated activities. The judge therefore dismissed his protection claim.

11. Following the dismissal of his appeal, grounds of appeal were issued for permission to appeal and that application was granted by Judge Loke on the 9th October 2019, 2019 for the following reasons:

> " It is arguable that the Judge, having accepted at [13] that the appellant had posted on social media photographs of him supporting Kurdish rights, notwithstanding the finding that this was with cynical intent, ought to still have consider the risk on return in light of Danian v SSHD CO/30274/97 and HB (Kurds) Iran CG [2018] UKUT 0430".

12. It is as a result of that grant of permission that the appeal comes before the Upper Tribunal. The grounds advanced by the appellant are those originally provided, and Ms Brakaj on behalf of the appellant, relies upon those grounds.

13. At the outset of the hearing there was a preliminary issue raised on behalf of the respondent. On the day prior to the hearing an application was made on behalf of the respondent to rely upon an unreported determination of the Upper Tribunal of PA/03758/2016. In the application it was said that it had relevance to the appellant's claim and the acceptance of the FtTJ that the appellant had posted comments on Facebook and that the Tribunal would be assisted by the expert evidence in that case which considered a number of specific questions in relation to the scope and limitations of Facebook including technical aspects around data storage. It was submitted that it would be extremely difficult to find such evidence in the public domain. Mrs Brakaj submitted that permission should not be granted to the

respondent to rely on that decision on the basis that the issues raised in that decision had not formed any part of the evidence before the FtTJ and that the appellant had not been cross-examined on the basis of the material within that decision in particular the deletion of his Facebook account or whether that was something that he would have done in any event.

14. I have considered the submissions made by each of the advocates. In doing so I have reached the conclusion that I should not grant permission for the respondent to rely upon that unreported determination. Whilst it is submitted that it is relevant to the FtTJ's decision and the acceptance by the judge that the appellant had posted comments on Facebook, as Mrs Brakaj submitted there had been no cross-examination of the appellant upon any of the issues set out in the unreported decision. In particular, he had not been questioned about the specifics of his Facebook account nor had it ever been suggested to him that he would be able to delete his account or whether it fact he would even do so. As there is no evidential foundation for that decision when considering this particular appellant's claim, I am not satisfied that it should be taken into account in reaching a decision on this appellant's claim.

15. In the written grounds, it was submitted that the judge made an error of law by failing to properly assess the claim by reference to the country guidance decision HB(Kurds) and that by applying the decision in BA (demonstrators) (as cited) the FtTJ failed to take into account the appellant's Kurdish ethnicity as a risk factor which would lead him to being questioned on return or that he will be asked to log into social media accounts upon return.

16. The grounds make reference to the decision in in HB(Iran), and by reference to paragraph 95 of that decision it was submitted that the "hair trigger" approach would apply and that the threshold for suspicion of Kurdish returnees is low and the reaction of the authorities is reasonably likely to be extreme.

17. It was further submitted that HB at paragraph 9 recognise that even "low-level" political activity can be perceived to be political. Therefore the wrong test had been applied and there was a failure to consider the most up-to-date country guidance. It was the appellant's case that his low-level political activity (accepted by the FtTJ) would be discovered via his Facebook activity; A would be questioned on arrival as a Kurd (paragraph 97 HB) and he would be asked if he had a Facebook page which would then be examined. It was submitted that this was consistent with the approach the Tribunal took in HB and at paragraph 114 of HB the Tribunal accepted that the appellant and that case be questioned on return as a Kurd and that a person would be asked for their Facebook account logon details.

18. Consequently she submitted that this had not been considered when assessing risk upon return and that there were material errors of law in the decision of the FtTJ.

19. There was no rule 24 response on behalf of the respondent. As to the merits of the appeal, Mrs Petterson recognised that the FtTJ had not directed herself correctly in relation to the decision in HB (Kurds) and in terms of risk on return and that it was an error of law not to apply relevant CG decision and it had not been referred to either by name or in substance.

20. As to the Danian point, the judge accepted that he had attended demonstrations but that he was not someone who had a prominent role . The judge also accepted that he placed posts on Facebook, but he was entitled to draw the inference that he was posting such material in a cynical attempt to bolster his claim.

21. At the conclusion of the hearing I reserved my decision which I now give.

22. I turn to the grounds advanced on behalf of the appellant which relate to the sur place claim.

23. Paragraph 339P states:
"A person may have a well-founded fear of being persecuted or a real risk of suffering serious harm based on events which have taken place since the person left the country of origin or country of return and/or activates which have been engaged in by a person since he left his country of origin or country of return, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin or country of return."

24. There is no appeal advanced that there is any error of law in the FtTJ's assessment of the appellant's claim as to events in Iran. Therefore the FtTJ's assessment that the appellant would not be known to the authorities as a result of his claimed activities before leaving Iran is correct.

The relevant Country Guidance:

25. The Upper Tribunal in HB(Kurds) Iran CG [2018] UKUT 430 (IAC). provided as follows as summarised in the headnote:

"(1) SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 308 (IAC) remains valid country guidance in terms of the country guidance offered in the headnote. For the avoidance of doubt, that decision is not authority for any proposition in relation to the risk on return for refused Kurdish asylum-seekers on account of their Kurdish ethnicity alone.

(2) Kurds in Iran face discrimination. However, the evidence does not support a contention that such discrimination is, in general, at such a level as to amount to persecution or Article 3 ill-treatment.

(3) Since 2016 the Iranian authorities have become increasingly suspicious of, and sensitive to, Kurdish political activity. Those of Kurdish ethnicity are thus regarded with even greater suspicion than hitherto and are reasonably likely to be subjected to heightened scrutiny on return to Iran.

(4) However, the mere fact of being a returnee of Kurdish ethnicity with or without a valid passport, and even if combined with illegal exit, does not create a risk of persecution or Article 3 ill-treatment.

(5) Kurdish ethnicity is nevertheless a risk factor which, when combined with other factors, may create a real risk of persecution or Article 3 ill-treatment. Being a risk factor it means that Kurdish ethnicity is a factor of particular significance when assessing risk. Those "other factors" will include the matters identified in paragraphs (6)-(9) below.

(6) A period of residence in the KRI by a Kurdish returnee is reasonable likely to result in additional questioning by the authorities on return. However, this is a factor that will be highly fact-specific and the degree of interest that such residence will excite will depend, non-exhaustively, on matters such as the length of residence in the KRI, what the person concerned was doing there and why they left.

(7) Kurds involved in Kurdish political groups or activity are at risk of arrest, prolonged detention and physical abuse by the Iranian authorities. Even Kurds expressing peaceful dissent or who speak out about Kurdish rights also face a real risk of persecution or Article 3 ill-treatment.

(8) Activities that can be perceived to be political by the Iranian authorities include social welfare and charitable activities on behalf of Kurds. Indeed, involvement with any organised activity on behalf of or in support of Kurds can be perceived as political and thus involve a risk of adverse attention by the Iranian authorities with the consequent risk of persecution or Article 3 ill-treatment.

(9) 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.

(10) The Iranian authorities demonstrate what could be described as a 'hair-trigger' 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."

26. The issue relates solely to his conduct in the United Kingdom which the FtTJ accepted that the appellant had had attended demonstrations (see findings of fact at

[9] and [13]) which were on his face book page, and thereafter the judge did make an assessment of the sur place issue in the context of risk on return.

27. The FtTJ's findings at paragraph 9 can be summarised as follows:

1. The appellant is not a genuine convert to Christianity.
2. The appellant is not genuinely committed to supporting pro-Kurdish organisations and he showed no interest in supporting such organisations whilst in Iran and is only chosen to attend the pro-curd demonstrations post his substantive asylum interview.
3. His own statement of his involvement with pro-curd organisations in the UK is "surprisingly light on detail".
4. The FT TJ accepted that he was present at three demonstrations and that he posted details of his attendance on his Facebook page.
5. There is no suggestion that he is regularly attended any pro-Kurdish meetings.

28. By reference to the decision in AB and others (as cited) and whilst not a CG case, the FT TJ considered that it gave some indication that social media postings may place the appellant at additional risk upon return to Iran and that given that he left Iran illegally in 2018 the authorities may seek to question him upon return which may then lead to the discovery of the postings on social media (see paragraph 12).

29. The FtTJ then made a self-direction that the appellant's claim should be assessed in accordance with the country guidance decision of BA (demonstrators in Britain – risk on return) Iran CG [2011) UKUT 36 which identified the following factors, the nature of the sur place activity, identification risk, factors triggering enquiry/action on return, consequences of identification and identification risk on return.

30. At paragraph 13 the judge applied those factors to the evidence that was before the Tribunal. The assessment of the FtTJ can be summarised as follows:

(i) the theme of the demonstrations is to support Kurdish rights and the regime would take exception to such demonstrations, but the appellant had no particular role at the demonstrations. He is seen holding a Kurdish flag and making an obscene gesture outside the embassy but was not responsible for organising the demonstration.
(ii) He is a member of the crowd and is pictured holding the Kurdish flag the photograph of him doing so is not taken outside the Iranian embassy. Instead he is standing away from a group of demonstrators holding a flag with the church in the background.
(iii) The picture of him making an obscene gesture outside the Iranian embassy is a selfie, the appellant has his back to the embassy was making the gesture and is not a group of pro-Kurdish demonstrators.
(iv) He has attended two or three demonstrations and is not a regular participant.
(v) The Iranian authorities may operate surveillance on demonstrators, but the FtTJ was unaware of any methods used by them to identify individuals.

(vi) The only evidence of the appellant outside the Iranian embassy is a photograph showing him with his back to the embassy making an obscene gesture; he is a hundred metres away from the Iranian embassy.
(vii) The appellant is not known by the Iranian authorities as a Christian convert and he has only sought to lend his support to pro-Kurdish activities four months ago and therefore the Iranian authorities would not regard him as a committed opponent or someone with a significant political profile.
(viii) The appellant may come to the attention of the Iranian authorities upon return because he left Iran illegally and whilst he may be questioned upon return, for all of those reasons above, he is unlikely to be subjected to treatment which amounts to persecution or breached Article 3.

31. As identified in the grant of permission, activities undertaken in bad faith can found a sur place claim but careful attention must be given to whether those activities are likely to come to the attention of the authorities on return - see the reasoning in YB (Eritrea) v SSHD [2008] EWCA Civ 360.

32. The real question in, most cases is would be what followed for an individual claimant if any information reached the authorities. This was a question of fact for the judge to assess on the evidence. The FtTJ accepted that he had attended demonstrations and even if it could be inferred that this was solely to found a sur place claim rather than any genuine political commitment, the FtTJ would have to consider whether the appellant in his particular circumstances would, as a result of his activities coming to the attention of the authorities and be at a real risk of serious harm or persecution in Iran.

33. Whilst the FtTJ did make reference to the decisions of AB and others (internet activity-state of evidence Iran [2015] UKUT 00257 (which is not a country guidance decision) and BA (demonstrators in Britain-risk on return) Iran CG [2011] UKUT 36 ((which is CG) there was no assessment of risk and by reference to the CG decision of HB. Ms Petterson acknowledges that there was no reference to that decision or importantly any reference to it in substance. Failure to apply relevant country guidance decision is an error of law and I am satisfied that it was a material omission on the facts of this case because that decision was relevant to a number of aspects of the appellant's claim and most notably his Kurdish ethnicity which is not a factor set out in BA (demonstrators in Britain-risk on return) and therefore was missing from the factual assessment of risk.

34. I therefore set aside the decision of the FtTJ and proceed to remake the decision. I was not asked to hear any further evidence given that the FtTJ had made findings of fact which were not challenged. I have given reasons earlier in this decision as to why I have not granted permission to the respondent to rely upon the unreported decision and that remains in place as I have not heard any further evidence relevant to the issues outlined in the unreported decision. There may be cases before the Tribunal where that decision may be relevant and therefore lead to its citation but that will depend on the particular facts and the evidential basis upon which the facts

were considered. I therefore proceed to re-make the decision on the basis of the FtTJ's findings of fact which I have summarised earlier and in the light of the current CG decision as to risk on return.

35. The issue to be determined is whether or not the appellant would on return be viewed or perceived by the authorities in Iran as a person that has been adversely acting against the Iranian government by reason of his Facebook posts at the point of re-entering the country. The issue not being whether or not the appellant was a genuine in his activities, but whether the authorities in Iran on his return would, irrespective of whether he is a genuine, wish to see his face book posts and by reason thereof view him as an individual that had acted adversely against the government and would the appellant in those circumstances be at risk.

36. As set out above there is a reasonable likelihood that he will be questioned as the FtTJ accepted. The decision in SSH and HR sets out that the duration of initial questioning would be for a "fairly brief period" (at 12]), although I recognise that there is other evidence which demonstrates that questioning may take a few hours (see [58] of HB(Kurds). What follows from that questioning is if the authorities have any particular concerns arising from activities in the UK then there is a real risk that there would be further questioning accompanied by ill-treatment.

37. The appellant is also an illegal departee from Iran and gives an additional reason as to why the appellant is likely to be questioned at the point of return. He will also be returned without a passport (see paragraph[97] of HB(Iran). He is also of Kurdish ethnicity.

38. Paragraph 23 of SSH and HR highlighted that a failed asylum seeker will be questioned and that 'if there are particular concerns arising from their previous activities either in Iran or in the United Kingdom or whichever country they are returned from, then there would be a risk of further questioning, detention and potential ill-treatment'.

39. It is necessary therefore to consider the individual factors relating to a particular appellant and to consider them cumulatively when making a decision as to risk on return. In relation to this appellant he is of Kurdish ethnicity. As set out in the CG decision of HB (Kurds) (as cited above), since 2016 the Iranian authorities have been increasingly suspicious of Kurdish political activities and as a result those of Kurdish ethnicity are regarded with even greater suspicion and subjected to heightened scrutiny on return. Mrs Brakaj has referred me to the description in HB(Kurds) at [95] where it is stated that the evidence indicates that the Iranian authorities demonstrate what could be described as a "hair trigger" approach to those suspected of or perceived to be involved in Kurdish political activities or support for Kurdish rights. As the Tribunal set out at paragraph 95, that means that the threshold for suspicion is low and the reaction of the authorities is reasonably likely to be extreme.

40. As to the face book posts the judge makes reference to them and on the basis that they were of recent origin and the inference raised is that they had been put up to bolster his case. The FtTJ did accept that the pictures of his attendance at demonstrations were posted on his face book page and accepted that he would be questioned on return (see [13]

41. In HB (Kurds) Iran CG [2018] UKUT the Tribunal said this at paragraph 116:-

> "We are satisfied that the content the appellant's Facebook page would become known to the authorities on return as part of the process of investigation of his background. That is the effect of the expert background evidence before us. It is then, no step at all to the conclusion that this would involve a real risk of persecution and Article 3 ill-treatment in his case."

42. The FtTJ accepted that there were photographs of the appellant which were placed on his Facebook account holding a Kurdish flag (at [13]). The Facebook posts that were set out in the appellants bundle at pages 15 – 23 show the appellant prominently holding a Kurdish flag and that his updated profile picture, showing his face clearly, as against a Kurdish flag. There are also posts that appeared to lend support to the circumstances of Ms Ratcliffe in Iran. The posts show that there have been a large number of comments also. Whilst the account is in a shortened version of his name, it has his photograph as his profile picture.

43. I have taken into account that the posts are at the lower end of the scale in terms of number and the timing of posts are presently over a short period. I also take into account that the FtTJ reached a finding that the activities were undertaken in "bad faith" in the light of his previous lack of political activity and that his attendance at demonstrations and that placing posts on his Facebook page came after his substantive interview. I also take into account the finding that he was not of any interest to the Iranian authorities before he left Iran. However, the objective material demonstrates that it is reasonably likely that the Iranian authorities will be less interested in the reasons or motivation for undertaking activities. Furthermore, it is not necessary for there to be large amounts of material and that there may be cases even with low-level activity, such as in this case, that would give rise to a real risk of ill-treatment on return. On the facts of this particular appellant's case, those posts do demonstrate pro-Kurdish sympathies and are reasonably likely to be perceived in a negative light and risk the adverse attention by the Iranian authorities.

44. Therefore taking into account the particular factors in this appellant's case, I am satisfied that he has demonstrated to the lower standard of proof that upon return the activity undertaken is likely to become known upon questioning and from his posts and alongside his Kurdish ethnicity would give rise to a real risk of persecution or Article 3 ill-treatment. I therefore remake the appeal by allowing it.

Notice of Decision

45. The decision of the First-tier Tribunal involved the making of an error on a point of law and is therefore set aside. I remake the appeal; the appeal is allowed.

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 Upper Tribunal Judge Reeds Date 12/12/2019

Upper Tribunal Judge Reeds