Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02001/2018

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On the 29 January 2020	**On the 26 February 2020**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

A K
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The appellant appeared in person
For the Respondent: Ms R. 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.

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1. The appellant is a national of Iran. He appeals with permission against the decision of First-tier Tribunal ("FtTJ"), promulgated on the 18th July 2019 dismissing his appeal against the decision to refuse his protection and human rights claim.

2. Permission to appeal was initially refused by the FtTJ but was granted on reconsideration by Upper Tribunal Judge Kopiciek on the 23 September 2019, for the following reasons:

> " It is arguable that, I light of HB (Kurds) Iran CG [2018] UKUT 00430 that the First-tier Tribunal failed to undertake a proper assessment of the potential for discovery of the appellant's Facebook posts to create a real risk of persecution or article 3 harm, regardless of the motives behind the face book posts."

<u>The background:</u>

3. The appellant's history is set out in the decision letter of the 26th January 2019 and the decision of the FtTJ at paragraphs 2-7. The appellant arrived in the United Kingdom on the 14 December 2015 and made a claim for asylum on the following day.

4. He provided a screening interview and later provided a statement of evidence (SEF statement) and was interviewed about the factual basis of his claim on the 2 November 2017.

5. The basis of his claim can be summarised as follows. The appellant is a citizen of Iran and is of Kurdish ethnicity. He was an only child and his family had limited money. His family had a farm, but his father carried out work as a smuggler, bringing goods, including alcohol into Iran illegally. The appellant would assist his father on smuggling trips from the age of about 13. It was said that his father was also a supporter of the Kurdish opposition, and it would also bring in literature on behalf of the party known as Komala. Some months before the appellant left Iran, his father informed him that he must assist in delivering pro-Kurdish propaganda leaflets from this political party to houses in the area, which he stated he did several times.

6. On 10 October 2015 the appellant had been working tending to the family's livestock, when his grandfather told the appellant that a friend of his father had said that the appellant's father been arrested in their home and been raided. The appellant's grandfather said that the authorities were now looking for him. Arrangements were then made for him to leave Iran. He travelled into Turkey and then onwards into Europe. He claimed to have had no contact with any friends or family in Iran since.

7. In a decision letter dated the 26th January 2018, 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 (see paragraphs 31-47).

8. As can be seen within those paragraphs, 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 his activities in that country either through smuggling or through any claimed political involvement.

9. As to the appellant's claim that he would smuggle alcohol into Iran with his father and that he had done so since the age of 13, the respondent concluded that when asked for details about the smuggling, the goods being smuggled and the people involved, the appellant gave very vague and limited answers and was not able to provide any evidence of any of the issues that he claimed to have had or that the Iranian authorities were aware of his participation or were actively seeking him (see paragraphs 31 – 37).

10. As to his political involvement and the claim that he smuggled documents into Iran for the Komala party, the respondent considered that the appellant had not given a credible account of this. Other than claiming his father was a member of Komala and that he would help the party by smuggling and distributing leaflets, he did not know what he did for the party or how long he was a member of the party (Q33,Q97,Q110).

11. The appellant had claimed that he did not know what the leaflets contained as they were in Farsi which he could not read that they were red and green and he did not ask his father what they contained as he didn't like it when he did so. It was further claimed his father would demand him to distribute the leaflets in the village and surrounding areas by dropping them in houses and putting them on walls which we do once or twice a week.

12. The respondent considered that it was not reasonably likely that a Kurdish party would dispute leaflets were predominately in Farsi the when the audience would be the Kurdish people. It was further not plausible that he would continue to distribute leaflets without knowing what was contained on the leaflets given that he knew the party was illegal in Iran and that the punishment was either life in prison or execution if caught doing this (see paragraph 41).

13. Furthermore, he was asked number of questions as regards the party's leaders, the aims of the party, headquarters of the party, any affiliations with other parties and any divisions of the party. He was not able to give answers that held any specific detail and the answers given when checked against objective evidence available were incorrect (see paragraph 42).

14. It was also noted that in the screening interview he stated that his father worked for the Kurdish Labour Party and when challenged as to why the account varied, he could not give a sufficient explanation as to why there was a difference in his account and he stated he did not say that party and it was properly written down wrongly (see question 39).

15. He claimed the authorities knew about his involvement with Komala because his father was arrested and that he had helped his father with everything and possibly because they had informants watching. He further claimed that they were looking for him as his grandfather's friend told his grandfather they were looking for him.

16. He did not attend any demonstrations or meetings for the party. The documents supplied from Komala was not in the original and therefore little weight could be added to them.

17. The respondent concluded that he had not supplied any evidence of the authorities were interested in him and that he was only aware of their interest through word-of-mouth. Considering the inconsistencies in the account, his inability to explain inconsistencies and lack of any specific detail as regards the party, and his role, he had not demonstrated that he was of interest to the Iranian authorities.

18. Paragraphs 49 – 50 the respondent referred to Section 8 of the 2004 Act and that he travelled through safe countries and failed to take a frontage of a reasonable opportunity to make an asylum human rights claim.

19. The appellant sought to appeal that decision and his appeal was originally heard on the 28th August 2018. In a decision promulgated on the 7th September 2018 the FtTJ dismissed the appeal having concluded that the appellant had not given a credible or consistent account as to his activities in Iran.

20. Following the dismissal of his appeal, grounds of appeal were issued for permission to appeal and that application was granted by Judge Nightingale on the 2 October 2018.

21. At a hearing on the 1 March 2019, deputy Upper Tribunal Holmes found that the decision of the FtTJ involved the making of an error on a point of law, that the FtTJ had erred as to his approach to the corroborative material and thus remitted the appeal for a fresh hearing before the First-tier Tribunal.

22. The appeal then came before the FtTJ (Judge Gumsley). The FtTJ recited the factual history of his claim as set out above but noted that in addition to the issues raised before the respondent, the appellant also raised the fact that he been involved in commenting on various pro-Kurdish and anti-Iranian regime pictures and articles on Facebook. He also claimed to be at risk of persecution or serious harm on return and that this would be as a result of his actual and/or imputed political opinion on the basis that he was a smuggler. In addition, he claimed that upon return he would be a particular interest to the authorities and risk, as a Kurd returning as a failed asylum seeker, who had taken part in sur place activity and who had exited the country illegally.

23. In a decision promulgated on the 18h July 2019, the FtTJ dismissed his appeal. The FtTJ was not satisfied that he was ever engaged in smuggling, but even if he was, he

was never caught or identified as a smuggler (see [46]). The judge also did not accept that the appellant assisted Komala at the assistance of his father or otherwise and rejected his evidence of any political activity whilst in Iran.

24. The FtTJ considered the issue of his sur place activities at paragraphs [42]-49]. As to the appellant's sur place activities, he rejected any suggestion that these were carried out other than on the basis of an improperly motivated attempt to try to bolster or create is otherwise fabricated asylum claim. The timing of the start of his activity, the lack of enthusiasm or knowledge of the Kurdish political cause hitherto, the fact that a friend telling what to do on Facebook, and the advice he accepts being given by another "to publish", left the judge "with no doubt that the appellant's motives are entirely cynical".

25. The FtTJ then turned to the issue of risk on return. The FtTJ referred to his earlier findings and found that he would not be at risk arising from any smuggling or any political activities which he carried out in Iran. He was not satisfied that engaged in or it come to the attention of the authorities for those activities at all.

26. As to the sur place activities, the judge recorded at [51] that he had to consider even if they had been "cynically motivated" whether there is a real risk they will be known to the authorities. The FtTJ reached the conclusion for the reasons he gave that the appellant would not be at risk of harm, taking into account his Kurdish ethnicity and his stated activities. The judge therefore dismissed his protection claim.

<u>The appeal before the Upper Tribunal:</u>

27. The appellant appeared unrepresented. At a previous hearing he had informed the Tribunal that he did have legal representation and therefore the hearing was adjourned to enable them to attend. At this hearing the appellant again stated that he had representation but that they had not attended court. However, when further enquiries were made by the Tribunal clerk, an email was sent stating that the representatives identified by the appellant were not representing him. Having taken into account the overriding objective and that the appellant had been given the opportunity to obtain representation but had not done so, I concluded that the appeal could be determined fairly without any further adjournment. There was a court interpreter present and I am satisfied that both the interpreter and the appellant understood each other during the hearing and that neither identified any difficulties in understanding the other.

28. The grounds advanced by the appellant are those originally provided, and the appellant informed the court that he relied upon those grounds. He referred to further documents which upon enquiry he confirmed related to his attendance at demonstrations that had taken place since the decision of the First-tier Tribunal decision.

29. In the written grounds, provided by the appellant in person 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 the decision in Danian v SSHD [2009] and that the FtTJ erred when questioning the date of his Facebook posts.

30. Ms Petterson submitted that there was no challenge in the grounds to the findings of fact made by the FtTJ that he had not been involved in any political activity whilst in Iran, or that he not been involved in smuggling or that he had not come to the attention of the authorities. Consequently, on return nothing would be known which would be adverse to him.

31. When looking at the Facebook evidence, the FtTJ made unchallenged findings that they were put on recently, four years after he arrived in the UK but importantly that the appellant had not demonstrated that they were available in the public domain. At [55] the FtTJ was entitled to take into account that the appellant had not posted anything himself and the judge was not even satisfied the posts were even still available to the public. The appellant would be able to delete them. It would not be a breach of the principles of HJ (Iran) to expect appellant delete social media posts before return when they do not represent genuinely held beliefs. She therefore submitted that the FtTJ did not make any error of law when considering the Facebook posts which were not even translated.

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

Relevant Country Guidance:

33. 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."

Decision on the error of law:

34. The FtTJ made the following findings of fact in relation to the events in Iran which are not challenged in the grounds:

1. He was not satisfied that the appellant had told the truth about his date of birth and did not accept that he was a minor when he made his asylum claim and found his correct date of birth is 1996 or 1997 but not 1999. The FtTJ found that the appellant had made admissions as to using false dates of birth in his screening interview and even more concerned, and a factor to which he afforded significant weight, was that he was still trying to be untruthful about

this issue and perpetuate his attempt to deceive (see paragraphs [24]-[27] and conclusion at [45]).

2. The appellant's core claim appeared to lack credibility and that the appellant had failed to tell the truth about large portions of his evidence. In his evidence the appellant said that he had been helping his father with Komala work for 10 to 12 months before his father was arrested. In his asylum interview he said 3 to 4 months. When asked, he specifically denied ever saying 3 to 4 months claiming he had always said 10 to 12 months. The judge regarded that as an inconsistency in his account. Furthermore, in his screening interview, the appellant said his father worked for the KL P although later the appellant did speak about his support for Komala like his father. When asked about this apparent discrepancy in evidence, the appellant said that it always said Komala, again denying that he had ever said what had been recorded. This was a further inconsistency.
3. As to the lack of knowledge or wrong answers given in relation to Komala, as set out in the respondent's decision letter, in his witness statement the appellant said that he was not really involved in the party and was not even a "direct supporter", and that his father did not tell him much other than the basics and he could only get information from leaflets which he was unable to read. The judge considered that his lack of knowledge and activity should be considered in the context of what was contained in the letters from Komala which the appellant heavily relied upon. The judge accepted that the letters did come from someone in Komala as claimed and considered the external country evidence. However, there were aspects of the evidence that caused concern. Firstly, in the way that they were sought. The appellant stated that he had contacted Komala by telephone and spoke to a man called A. he didn't know where A was but thought that he might be in Iraq. He said he got the details on Facebook, through the Komala page. The judge found that this did not sit well with the appellant's claim to be illiterate and have limited understanding of Facebook itself. There was no "audit trail of him having contacted Mr A. He said he'd been able to upload a picture of his UK ID card and send it to Komala and told A that he was in the UK and detailed what happened to him. However, there was no record of the upload provided or Facebook or other message having been sent. The appellant said he been told to delete it. The judge found that his ability to do all of that given his accepted lack of IT knowledge and issues of literacy was of concern. Komala had originally stated the appellant stated birth was in 1996. The FtTJ had already set out why the appellant's explanation did not stand up to scrutiny. Given that Komala did state the wrong date of birth and the lack of detail as to what given by them, the judge was concerned as to how they managed to investigate and find details about the appellant prior to correcting the date of birth. The judge was also uncertain as to how Komala knew the date of birth was in fact wrong and no audit trail of communications in that respect it be been provided. As to the contents of the letters, there seem to have been two different interpretations of the same document. One letter stated that he joined the organisation in January 2015. That was inconsistent with the appellant's

account that he was not a member, or even a "direct supporter". Another interpretation stated that he had contacted Komala's secret cells in January 2015. Again, this is inconsistent with the appellant's case because he said he had nothing to do with Komala directly and that he obeyed his father's instructions. Neither translation refers to him only working with his father or comments on his father's involvement at all. One translation suggested that he was involved in "many" secret political activities like delivering and is debiting publications. The appellant said that delivery is all that he did. What other secret activities were not detailed but the judge was not satisfied that they were consistent with the appellant's account. There was also no indication as to how the p claims had been checked by Komala and by and with whom. The judge concluded that he could only attach the most limited weight to that evidence.

4. The judge also did not accept that the appellant's grandfather who kept livestock and lived next to the appellant and his family would be able to recruit an agent and pay the agent to assist the appellant. The appellant said his grandfather was not rich but was not poor, had no idea as to how matters had been arranged, what was agreed and the costs and he made no call home to confirm that he been properly delivered by the agent.
5. The FtTJ was not satisfied that he was ever engaged in smuggling, but even if he was, he was never caught or identified as a smuggler (see [46]).
6. The judge did not accept that the appellant assisted Komala at the assistance of his father or otherwise and rejected his evidence.

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

36. As summarised in the earlier part of this decision, the Judge made several adverse credibility findings in relation to his claim to have been involved in political activity and having been of interest to the Iranian authorities before he left that country. The FtTJ therefore rejected his claim to have been involved in any political activity in Iran and that therefore he was not at risk on return to Iran for that reason. It follows from those unchallenged findings of fact that the appellant was of no interest to the Iranian authorities when he left Iran.

37. No specific submissions are made in the grounds as to how the FtTJ erred in his assessment of the sur place issue beyond the general complaint that the appellant maintained that his sur place activities placed him in danger on return and as a failed asylum seeker. Reference is made to the decision of Danian and that "risks generated by actions in bad faith do not exclude a person from refugee status". The grant of permission is more illuminating in which it identifies that it was arguable that the First-tier Tribunal failed to undertake a proper assessment of the potential for discovery of the appellant's Facebook posts citing HB(Iran).

38. The assessment made by the FtTJ concerning the nature of the appellant's sur place activities can be summarised from his decision at paragraphs [42]-49]. The FtTJ

considered the evidence to the security services in Iran from the CPIN Iran; background information including protection and internal relocation, which referred to the Ministry of intelligence and Ettela'at.

39. The appellant said that he had been posting and/or liking pro-Kurdish, anti-Iranian material on Facebook. He had been in the UK since 2015 but it only started doing this in April 2019. The judge recorded the appellant's evidence that he said a friend of his had set it up and shown what to do and that his friend had "told him to publish". He said he was not familiar with Facebook at all, but the pages produced suggests the appellant has 283 friends.

40. Whilst in his statement the appellant suggested his pages were public, the appellant said in evidence that he did not know if that was the case. The judge concluded that "it seemed to me that he didn't really understand the concept of publicly available postings and activity." The presenting officer produced some evidence from "Facebook for dummies" which suggests that pages open to the public have a "Globe" on them. The judge, whilst being cautious about this as an authoritative reference book, found that there was no indication that the globe appeared on any of the pages provided. Thus, he concluded that there was no indication from the evidence provided that the appellant pages were publicly available at all, how long they were available and whether they are still available and if so, to whom. The judge found "it was apparent the appellant had no real knowledge of what he was doing in this regard. In addition, he questioned as to how the appellant had been able to properly engage with Facebook given his claimed lack of literacy. He said he looked at photos of friend requests to see if they had photos or flags, or the executions of people, before accepting them. The FtTJ stated "This seemed to me to be an inherently unlikely method of vetting friends" (see [43]).

41. The judge concluded at [49].
"as to the appellant's sur place activities, I reject any suggestion that these were carried out other than on the basis of an improperly motivated attempt to try to bolster or create is otherwise fabricated asylum claim. The timing of the start of his activity, the lack of enthusiasm or knowledge of the Kurdish political cause hitherto, the fact that a friend telling what to do on Facebook, and the advice he accepts being given by another "to publish", leave me with no doubt that the appellant's motives are entirely cynical. I am satisfied that his Facebook pages do not in any way reflect a genuine sense of the need to politically protest or inform."

42. The FtTJ then turned to the issue of risk on return. The FtTJ referred to his earlier findings and found that he would not be at risk arising from any smuggling or any political activities which he carried out in Iran. He was not satisfied that engaged in or it come to the attention of the authorities for those activities at all.

43. The grounds assert that the judge fell into error by failure to have regard to the decision in Danian. Having carefully considered the decision of the FtTJ, I am not satisfied that the FtTJ failed to apply the ratio of Danian.

44. As to the sur place activities, the judge recorded at [51] that he had to consider even if they had been "cynically motivated" whether there is a real risk they will be known to the authorities.

45. The judge expressly referred himself to the decision of YB (Eritrea) v Secretary of State for Home Department [2008] EWCA Civ 360 and that when dealing with any risk in relation to sur place activities, ill motivated sur place activity is not an automatic bar to the claim. The judge stated "the question for me to consider remains as to whether I am satisfied that there is a reasonable degree of likelihood that the appellant will suffer mistreatment (amounted to persecution by reason of perceived political opinion) as a result of those sur place activities"(at [52]).

46. As set out in Danian [1999] EWCA Civ 3000, even if his credibility might be low, it was still necessary to scrutinise and assess the new claim (sur place claim). Consequently, it has not been demonstrated that the FtTJ failed to direct himself in accordance with the decision in Danian which is consistent with that set out above.

47. The grounds seek to challenge that risk assessment. In his analysis, the FtTJ accepted that Iran has a sophisticated intelligence system and made reference to the country material recited at [42] where the library of Congress noted that the function of the security services included "collecting, analysing, producing and categorising internal and external intelligence and uncovering conspiracy, subversion, espionage, sabotage and sedition against the Islamic Republic of Iran."

48. He made reference to the decision in BA (demonstrators in Britain-risk on return) Iran CG [2011]UKUT 36 and the CPIN Iran : journalist and Internet-based media (October 2016) para 2.2.2 which set out reports of the Iranian authorities harassing, detaining, abusing and torturing, flogging or otherwise severely punishing "those involved in Internet-based media, such as bloggers and the users of social media, whether reporting is, or is perceived to be, critical of the government or offensive to public authority." And that "the press, Internet café's, cyberspace and private communications including social networking sites and messaging apps."

49. Having referred himself to those two matters, he set out at [54] that whilst he was satisfied that the Iranian government did have an interest in Facebook and other social media sites, it considered that the material on the Internet was so vast that it was unrealistic to assume that the Iranian authorities could or would trawl through all of it, Iran being a country of 81 million people), even with keywords or specific search terms. He found that this was supported by the same CPIN note at paragraph 2.2 for that "since the reigning government is not able to monitor the activities of every individual, decision-makers must consider the level of involvement of the person, in addition to any political activity that the person may have previously been involved with in Iran."

50. In addition the judge cited the decision of BA which stated that "given the large number of those who demonstrate here and the publicity which the demonstrators receive, for example on Facebook, combined with the inability of the Iranian government to monitor all returnees who been involved in demonstrations here, regard must be hard to the level involvement of the individual here as well as any political activity which the individual might have been involved in Iran before seeking asylum in Britain."

51. The FtTJ then applied that to the particular circumstances of this appellant.

52. His assessment was as follows:
    - (i) He was not satisfied that the sur place activities were anything other than minimal.
    - (ii) there were no postings by the appellant himself.
    - (iii) most significantly the judge was not satisfied on the evidence that the appellant activity was even public and reminded himself that the onus is on the appellant to establish his claim (see EZ v SSHD [2017] CSOH 30). That decision related to a fresh claim where the court found that the respondent did not erred in his refusal to accept further submissions where there was reliance on for Facebook posts. It was not known how widely circulating those posted been or whether the posts were accessible to the public as opposed to Facebook friends.
    - (iv) Here, the judge was not satisfied that there was a real risk that is pages would be of interest to or even seen by the authorities.
    - (v) He recorded that it was suggested that one of his friends might be being watched or that the Iranian authorities might obtain details of the appellant through other means or through his Facebook friends. The judge rejected that and stated that there was no evidence that any of his "friends" have any significant profile.
    - (vi) There was no evidence that the appellant had been of any interest to the Iranian authorities whilst it been in the United Kingdom.
    - (vii) He concluded at [56) that he was not satisfied that the appellant would be at any real risk of persecution arising from the "extremely limited sur place activity in which had been involved."

53. The FtTJ then turned to whether the appellant had left Iran illegally. On the facts, he was not satisfied that the appellant had illegally left Iran. However, he considered the position if he had been wrong about that aspect of his account and made reference to the case law of SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 0038 and HB (Kurds) Iran CG [2018] UKUT 0430. He summarised the country guidance caselaw that merely being a failed asylum seeker even having left illegally would not in itself generally place a person risk on return to Iran. However, that is, with the caveat that the individual circumstances of the case (including possible increased interest in a person by reason of them being a Kurd) must naturally be considered.

54. At [57] having applied that decision he stated as follows "I accept that returnees are screened on arrival. I am mindful of the guidance in HB and accept that the Iranians do operate a "hair trigger" policy to suspicions they may have and do not afford someone about whom they are not sure the benefit of the doubt. The appellant submits that as he is left Iran illegally there is a risk he will be questioned, particularly as he is of Kurdish ethnicity and a failed asylum seeker. It is submitted that if questioned, as he is not required to lie, he would have to say that he claimed asylum on the basis that he had assisted Komala. This would result in a very real risk of him thereafter being treated in a way that would amount persecution or serious harm. "

55. The conclusion reached by the judge at [58] is as follows:

> "I am not satisfied that his illegal exit, and failed asylum seeker status even as a Kurd would in itself be sufficient to satisfy me that the appellant would be risk upon return such as to justify international protection being afforded to him. Whilst I do accept that being a Kurd particularly when taken cumulatively with being a failed asylum seeker might present a heightened risk of being asked questions, and I take this into account, as for explaining the basis for his asylum claim, if you told the truth he would have to say it was rejected as wholly untrue, as I have found it to be.
> I have had regard to MA v SSHD [2017] CSOH 134 where the FtTJ had concluded that the appellant had in fact been a genuine support of the Kurdish cause, but had not been a member of (in his case) the KDP, that he had involved himself in sur place activity in the UK to the extent of attendance at one meeting and contact with the KDPI but that was highly unlikely to cause him to be of interest to the authorities. The Court of session concluded that it had been recently opened to the FTT in the light of the country guidance to find that even for disclosure by MA of his activities (when questioned at the airport by the authorities) would not create an interest in him as his activities were of such a low level. In this case the level of the activities of the appellant is significantly lower than in MA. In any event I found that there is no real risk the authorities would be aware of such activities in the case of the appellant."

56. Whilst he grounds assert that the FtTJ failed to have regard to the decision in HB (Iran), the above summary makes it plain that the FtTJ did so and expressly took into account what would happen on arrival and the "hair trigger approach".

57. 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. This was a question of fact for the judge to assess on the evidence before him.

58. On his assessment of the evidence, which is not challenged in any material respect, the FtTJ found that there were no postings by the appellant himself and that he had not even set up the page. Most significantly the judge was not satisfied on the

evidence that the appellant activity was even public and reminded himself that the onus is on the appellant to establish his claim (see EZ v SSHD [2017] CSOH 30). It was not known how widely circulating those posted been or whether the posts were accessible to the public as opposed to Facebook friends. On the particular facts, the judge was not satisfied that there was a real risk that his pages would even be seen by the authorities.

59. He recorded that it was suggested that one of his friends might be being watched or that the Iranian authorities might obtain details of the appellant through other means or through his Facebook friends. The judge rejected that and stated that there was no evidence that any of his "friends" have any significant profile.

60. Whilst paragraph 116 of HB (Kurds) Iran CG [2018] UKUT makes reference to the process of investigation and that in that case of HB his face book pages would become known, part of the assessment of risk would necessarily include the commitment shown in the UK, and whether he would be likely to continue that political activity on return. On the factual assessment, the FtTJ reached the conclusion that the activity was an "improperly motivated attempt to try to bolster or create is otherwise fabricated asylum claim. The timing of the start of his activity, the lack of enthusiasm or knowledge of the Kurdish political cause hitherto, the fact that a friend telling what to do on Facebook, and the advice he accepts being given by another "to publish", leave me with no doubt that the appellant's motives are entirely cynical. I am satisfied that his Facebook pages do not in any way reflect a genuine sense of the need to politically protest or inform."

61. It was therefore open to the FtTJ to reject the claim that if questioned that he is not required to lie (the HJ(Iran principle) because as the FtTJ found he did not hold any genuinely held political views that he would wish to continue to express. If asked directly, upon return to Iran the appellant would truthfully be able to confirm that he had not been engaged in any political activity outside of Iran. It must follow, as Ms Petterson submitted, that as the appellant did not even set up the posts or the Facebook account, he, or his friend responsible for setting up the account could delete the account. This is a "common sense consideration" (see AM (Iran) and one that would apply on the factual findings of the FtTJ. Consequently, it was open to the FtTJ to reach the overall conclusion as to risk that the appellant would not be at risk on return to Iran, even taking into account in his ethnicity as a Kurd and his status as a failed asylum seeker (see SSH and HR (illegal exit: failed asylum seeker Iran CG [2016] UKUT 0038 and HB (Kurds) Iran CG [2018] UKUT 0430).

62. The appellant has stated that since the decision of the FtTJ he has become involved in attending demonstrations and other political activity. That material cannot demonstrate an error law in the decision of the FtTJ but it is open to the appellant to make fresh claim if there are further grounds and evidence now available upon which he seeks to rely.

Notice of Decision

63. The decision of the First-tier Tribunal did not involve the making of an error on a point of law and is therefore the decision of the FtTJ shall stand.

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 14/02/2020

Upper Tribunal Judge Reeds