IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-000607
First-tier Tribunal No: PA/03456/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 19 April 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

AN (IRAN)
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Azmi, instructed by Central England Law Centre
For the Respondent: Mr Williams, Senior Presenting Officer

Heard at Birmingham Civil Justice Centre on 2 February 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court. I make this order in order to reduce the risk to the appellant in the event that he is ultimately unsuccessful in his claim for international protection.

DECISION AND REASONS

1. The appellant is an Iranian national who was born on 3 September 2002. He appeals, with the permission of First-tier Tribunal Judge Neville, against the decision of First-tier Tribunal Judge French (“the judge”). By that decision, which was issued on 28 April 2021, the judge dismissed the appellant’s appeal against the refusal of his claim for international protection.

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2. It is not clear to me why it took more than a year for the appeal to the Upper Tribunal to be listed after Judge Neville's decision.

Background

3. The appellant entered the UK in May 2019. He was an Unaccompanied Asylum-Seeking Child at that stage. He stated that he was Kurdish and that he had worked as a smuggler in Iran. He said that his brother's house had been raided by the Iranian authorities and that political material which was critical of the regime had been discovered, as a result of which he was sought by the authorities, and had exited Iran illegally. The respondent did not believe his account and refused his claim.

The Appeal to the First-tier Tribunal

4. The appellant appealed to the First-tier Tribunal against the refusal of his claim. Before the judge, he claimed that he was at risk for the reasons above and also on account of political activity he had undertaken in the UK, both online and in person.

5. The judge heard oral evidence from the appellant and submissions from the advocates before reserving his decision. In his reserved decision, the judge concluded that the appellant's primary account (of the papers being discovered in his brother's house) was not reasonably likely to be true. At [10], he analysed the risk to the appellant as a result of his ethnicity, illegal exit and sur place activity. The judge concluded as follows:

> As far as the sur place activity was concerned it is my view that this was contrived to bolster a weak case. There was no evidence that the material was publicly available and in event it was mainly re-postings of material produced by other people. It was claimed that the Facebook screen shots showed his attendance at demonstrations, but it is not clear when and where the photographs were taken. There is nothing to suggest that he was a leader or organiser of a demonstration, which might have made it feasible that he might be of interest to the Iranian authorities. I also find it strange that as far as I can see from the produced material there was no political material on Facebook between December 2019 and October 2020. That does not seem to reflect a person who is politically active. Moreover it is unbelievable that someone who had demonstrated some IT proficiency, should be unable to contact PJAK members in the UK and join the party, if he was supportive of it. The fact that he had no done so was not an indicated that PJAK material and contact details were not available online, but rather the fact that he had never looked. Leaving aside the fact that I do not believe that the Appellant is at risk because of smuggling or political activities, I must still consider whether the Appellant would be at risk, simply by virtue of being a Kurd and/or because he left the country illegally. On the first point I note that in HB it was stated that a person of Kurdish ethnicity would not face a real risk of ill treatment or persecution tantamount to the threshold set by Article 3, purely on account of his ethnic origin. I do not believe his account of fearing return to Iran on fear of death or torture. On the second point I rely on the findings of the Upper Tribunal in SSH and HR (illegal exit: failed asylum seeker) (referred to above) where it was stated that "evidence suggests that there is no appetite to prosecute for illegal exit alone".

> Since in my view there was no other reason for the Appellant to have come to the adverse attention of the Iranian authorities, he would not be prosecuted upon return for his illegal exit. In my view there was no reason why anyone should have cause to wish to cause him harm. It follows from what I have said above that I reject the Appellant's asylum claim. Equally since I do not accept that the Appellant is at risk of death or serious physical harm upon return to Iran, I reject the claim that a refusal of the application would be a breach of the Appellant's rights under Articles 2 and 3.

The Appeal to the Upper Tribunal

6. Grounds of appeal were settled by the appellant's solicitors on 19 May 2021. It was expressly acknowledged at [3] of the grounds that no challenge was made to the judge's rejection of the appellant's account of events in Iran. The two grounds of appeal which were advanced were as follows.

7. Firstly, that the judge had wrongly directed himself that the 'essential question' was whether he believed the appellant, whereas the real question was whether the appellant was at risk on return to Iran.

8. Secondly, that the judge had failed in his decision as a whole to apply the guidance in HB (Kurds) Iran CG [2018] UKUT 430 (IAC).

9. Judge Neville extended time for bringing the appeal and granted permission on both grounds. In doing so, he observed as follows:

> The grounds are arguable in their assertion that the Judge failed to consider whether the appellant's political activity, even if conducted in bad faith, might give rise to risk on return. The submissions recorded by the Judge at the lower part of page 7 would appear to have been applied in the subsequent analysis at [10], by an examination of whether the appellant has an organisational or leadership role in pro-Kurdish political activity such as to engage the interest of the Iranian authorities. That approach is, arguably at least, contrary to the guidance at headnote (7)- (10) of HB (Kurds) Iran (illegal exit: failed asylum seeker) CG [2018] UKUT 430 (IAC).

10. Before me, Mr Azmi made oral submissions with economy and precision. He submitted that the judge had failed to consider whether the appellant's *sur place* activity would give rise to risk even if it was not genuine. The judge had considered whether the appellant occupied a leadership role in the UK diaspora but he had failed to consider other aspects of the guidance in HB (Iran).

11. For the respondent, Mr Williams opposed the appellant's appeal. He submitted that the judge had found for proper reason that the appellant's *sur place* activities were contrived. The judge had not then proceeded to consider the risk factors set out in HB (Iran) but any such failing was immaterial to the outcome. The appellant could delete the Facebook account, as considered in XX (PJAK - sur place activities - Facebook) Iran CG [2022] UKUT 23 (IAC), since he had no genuinely held belief in the opinions expressed. In response to my question about whether the appellant would be expected to lie on return, Mr Williams submitted that this was not so; the question was not whether he was expected to lie but whether it was anticipated that he would do so. Given the lies told to the

British authorities by the appellant, it was inevitable that he would lie to the Iranian authorities about his activities in this country.

12. In reply, Mr Azmi acknowledged the point made by Mr Williams in reliance on XX (Iran) but he submitted that there would need to be a closer analysis of the Facebook evidence and the three demonstrations which the appellant had attended. The appellant should, he submitted, have an opportunity to provide full disclosure of his Facebook account in compliance with the guidance in XX (Iran), which post-dated the FtT's decision in this case.

13. The advocates agreed that the proper course, in the event that I found there to be material error of law of the type contended for by Mr Azmi, was to set aside the decision to that extent and to remake the decision on the appeal in the Upper Tribunal.

14. I reserved my decision on the question posed by s12(1) of the Tribunals, Courts and Enforcement Act 2007, of whether the FtT's decision involved the making of an error on a point of law.

Analysis

15. At [1]-[5] of the headnote to HB (Iran), the Upper Tribunal stated that those of Kurdish ethnicity are not at risk on return to Iran on account of their ethnicity alone, but that Kurds faced discrimination and those of Kurdish ethnicity were viewed with even greater suspicion than hitherto. Kurdish ethnicity was therefore confirmed to be a risk factor, albeit not a determinative one, which was to be considered alongside the factors listed at [6]-[9] of the headnote. Paragraph [6] (which concerns residence in the KRI) is not relevant to the present case. Paragraphs [7]-[10] are relevant, however, and I will reproduce those paragraphs in full:

> (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.

16. It is apparent, and was quite properly conceded by Mr Williams, that the judge failed to apply this guidance, despite his brief references to HB (Iran) at [1] and [10] of his decision. The difficulty with the judge's decision is that he failed to consider what would be revealed when the appellant – a Kurd who left Iran illegally – was questioned by the Iranian border guards upon return. It has been clear for years that such questioning would take place, and would include scrutiny of the appellant's emails and Facebook account: [116] of HB (Iran) refers. Whether or not the appellant's *sur place* activity was a contrivance, the judge should have considered what risk, if any, arose from it, in connection with the other known risk factors (ethnicity and illegal exit) which apply in this case. As contended in the grounds of appeal, it is clear that the judge failed to consider what would become known to the authorities on return as part of the process of investigation into the appellant's background.

17. Mr Williams submits that the judge's error was immaterial to the outcome. He notes that the judge's unchallenged finding is that the appellant's activity was merely to enhance his claim and that he had no commitment to the oppositionist cause, online or in person. He also notes the unchallenged finding at [10] that the appellant has not come to the attention of the Iranian authorities to date. In those circumstances, Mr Williams submits that the appellant would delete his Facebook account and would, in reality, lie to the Iranian authorities about his activity in the United Kingdom. To return him in those circumstances would not, Mr Williams submits, be anathema to the Refugee Convention on the basis considered in HJ (Iran) v SSHD [2010] UKSC 31; [2011] 1 AC 596, RT (Zimbabwe) v SSHD [2012] UKSC 38; [2013] 1 AC 152. Mr Williams submits that the appellant – who is shown to be a liar – can be expected to lie upon return, and to do so would not be to expect him to conceal a genuinely held belief.

18. Mr Williams is able to draw significant support for his submissions from XX (Iran). Considering that the appellant's Facebook account does not reflect his genuinely held beliefs, I accept that he can properly be expected to delete that account. As the Upper Tribunal held at [9] of the headnote to that decision, there is no right under the Refugee Convention to have access to a specific social media platform. There is no reason to think in this case that the appellant would not close the account prior to his return. The Upper Tribunal confirmed at [3] of the headnote to XX (Iran) that the absence or deletion of a Facebook account would not 'as such' raise suspicions on the part of the Iranian authorities. Equally, there is no reason to think that the appellant would not delete any emails he might have about his contrived *sur place* activity in the United Kingdom. Again, it would not be contrary to the Convention to expect him to do so, given the lack of commitment to the causes in question.

19. There is no challenge to the judge's finding at [10] that the appellant has not come to the attention of the Iranian authorities to date, and they will not be able to learn about the appellant's activities by searching his Facebook account or his emails. The real question, it seems to me, is whether the appellant would lie on return, so as to deny that he had engaged in contrived *sur place* activity in the

UK. Any such suggestion always brings to mind what was said by the IAT in IK (Turkey) [2004] UKIAT 312, where the Secretary of State memorably accepted that decision-makers should not "simply proceed on the basis that individual can lie about his background and circumstances." The correct approach, was, instead, "to assess what questions are likely to be asked of the individual and what his responses are likely to be."

20. In my judgment, there was only one proper answer to each of those questions in this particular case. The appellant would inevitably be asked whether he had undertaken political activity in the UK and he would inevitably lie to the Iranian authorities in order to mitigate the risk of persecution (XX (Iran) refers, at headnote paragraph 10). He has been shown to be person who tells lies when he considers it advantageous to do so and it would not be contrary to the Refugee Convention to return him in anticipation of his behaving in a similar way. I note that Underhill LJ reached a similar conclusion at [107] of his concurring judgment in SR (Sri Lanka) v SSHD [2022] EWCA Civ 828.

21. The judge found that the appellant would not be at risk on account of his ethnicity and his illegal exit. Those findings were undoubtedly correct and are unchallenged. What he failed to do was to consider the risk on return to the appellant holistically. Had he done so, however, he would have found that the appellant's *sur place* activity would not have added anything to the equation, for the reasons I have set out above. In those circumstances, I accept Mr Williams' submission that the error on the part of the FtT was immaterial to the outcome of the appeal, in the sense that the decision would inevitably have been the same had the judge not fallen into error. The appellant's appeal to the Upper Tribunal will be dismissed accordingly.

Notice of Decision

The appeal to the Upper Tribunal is dismissed.

M.J. Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 February 2023