**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/24234/2013

**THE IMMIGRATION ACTS**

| **Heard at Newport** | **Determination Promulgated** |
|---|---|
| **On 3 July 2014** | **On 15 July 2014** |

**Before**

**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**NAV**
**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr M McGarvey of McGarvey Immigration & Asylum Practitioners Limited

**DETERMINATION AND REASONS**

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind

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the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. For convenience I will refer to the parties as they appeared before the First-tier Tribunal.

**Background**

3. The appellant is an Iranian citizen of Kurdish ethnicity who was born on 3 April 1993. He arrived in the United Kingdom on 28 March 2008 and claimed asylum. He was then 14 years of age. On 25 September 2008, the appellant was granted discretionary leave as an unaccompanied minor valid until 3 October 2010. The appellant did not appeal against that grant of leave on the basis that he should be granted asylum.

4. On 29 September 2010, the appellant again applied for further leave on asylum grounds maintaining his fear on return to Iran. On 1 July 2013, the Secretary of State refused the appellant's application for asylum and for leave to remain on the basis that his removal would breach Article 8 of the ECHR.

**The First-tier Tribunal**

5. The appellant appealed that decision to the First-tier Tribunal. The appeal was heard on 11 November 2013 by Judge Burnett.

6. At that hearing, the appellant no longer relied upon a claim to fear return to Iran on the basis put forward since his arrival in March 2008 based upon his (and his family's) political activities in Iran. Instead, the appellant relied upon an entirely different basis to claim that he was at risk on return to Iran. He relied upon what Mr McGarvey (who represented the appellant before me) described as his "social presentation". The essence of this is that the appellant's appearance and lifestyle would be considered "un-Islamic" in Iran and he might be perceived to be gay although the appellant maintains (and has always maintained) he is not gay. Reliance was placed upon the appellant's appearance including his hairstyle and that he is a hairdresser/hair stylist (including for women) and part-time male stripper. The appellant claimed that he was a "metro-sexual" man and that this would put him at risk on return to Iran. He relied upon his 'Facebook' page which included photographs (reflecting his social presentation and lifestyle). It was argued that there was a risk that this material would come to the attention of the Iranian authorities given their surveillance of the internet including Facebook accounts.

7. It was accepted before Judge Burnett that the appellant's part-time work as a male stripper was contrary to Islamic values and would not be tolerated. It was also accepted that the appellant had "chosen an occupational pathway as a hairdresser". Judge Burnett cited a number of paragraphs from the *Country of Information Report for Iran* (September 2013) in relation to the Iranian authorities' attitudes and action in respect

of the internet and Facebook (paras 16.22- 16.39). Having set out a number of passages from that report, Judge Burnett concluded that it was:

> "clear that the internet is closely monitored by the Iranian state. It is possible that the appellant's profile has been monitored. It was accepted by [the Presenting Officer] that the appellant's behaviour in the United Kingdom was un-Islamic. Un-Islamic behaviour could be seen as showing a view point or that an individual is anti the Iranian authorities. I consider that such [as] an imputed opinion to an individual would engage the Refugee Convention." (at para 59).

8. Then at paras 60-62, Judge Burnett set out his findings in relation to the appellant's "social presentation" and whether there was a risk his un-Islamic behaviour would come to the attention of the authorities as follows:

> "60. I accept that the appellant has grown and developed his personality in the United Kingdom. I accept the evidence of the witnesses that the appellant is proud of his appearance and greatly enjoys his occupations. I do consider that these are the "personal traits" and characteristics of the appellant that he has developed whilst growing up in the United Kingdom.
>
> 61. I also consider that although there are matters which affect the credibility of the appellant, his account of his occupations in the United Kingdom was not challenged. It was the respondent who provided the appellant's "Facebook" account and his list of friends. It was the respondent who produced the appellant's profile on "Facebook" in the hearing not the appellant himself.
>
> 62. It is likely in my judgment, from a consideration of the background evidence, that the appellant's participation in this site would have been monitored."

9. At paragraph 63, Judge Burnett concluded that:

> "Given the attitudes of the Iranian authorities expressed in the COI report and set out above, I do conclude that the appellant would be at risk of being arrested and ill-treated due to his un-Islamic behaviour. He could also face the possibility of being imprisoned."

10. At para 64, Judge Burnett considered that, applying the approach in HJ (Iran) v SSHD [2010] UKSC 31, it would not be reasonable to expect the appellant to change his "personal traits and characteristics" in order to avoid persecution, Judge Burnett said this:

> "I also consider that it would be very difficult for the appellant to readjust to life as it is now in Iran. He has personality traits and characteristics which would mean he would come to the attention of the Iranian authorities. These have become integral to the appellant and part of who he is. It would not be reasonable now to expect such a radical change in him. Also he would be doing this in order to avoid persecution which I consider is contrary to the leading authority HJ (Iran)."

11. Consequently, Judge Burnett allowed the appellant's appeal on asylum grounds and also under Article 3 of the ECHR. He also allowed the appeal

under Article 8 on the basis that that result followed from his findings in relation to the asylum and Article 3 claims.

## The Appeal to the Upper Tribunal

12. The Secretary of State sought permission to appeal on a number of grounds including that the background evidence did not establish that the Iranian authorities had monitored Facebook pages from those living in the UK; that he would be at risk in Iran as a metro-sexual man; and that it would be unreasonable to expect the appellant to change his behaviour and profession if he were returned to Iran.

13. On 17 December 2013, the First-tier Tribunal (UTJ Renton) granted the Secretary of State permission to appeal on the basis that the Judge may have speculated whether the Iranian authorities would learn of the appellant's activities in the UK through his Facebook page.

14. The appeal in the Upper Tribunal was initially listed on 25 March 2014. Following a hearing, the Upper Tribunal (McCloskey J (President) and Arfon-Jones V-P) concluded that Judge Burnett had erred in law by failing to give adequate reasons why the appellant's participation on his Facebook site from the UK "would have been monitored" by the Iranian authorities. The panel also concluded that the Judge's decision to allow the appeal under Article 8 could not, therefore, stand. The panel's reasons are set out in full in its decision dated 31 March 2014 which I do not repeat here. The panel set aside Judge Burnett's decision and directed that the appeal be relisted for a resumed hearing in order to remake the decision.

15. Thus, the appeal came before me.

## The Appellant's Submissions

16. On behalf of the appellant, Mr McGarvey in his detailed skeleton argument and oral submissions sought to put the appellant's claim under the Refugee Convention on three bases.

17. First, he relied upon the appellant's "social presentation" which he submitted would create a risk to the appellant on return to Iran of being perceived as un-Islamic, pro-western and immoral. Linked to that would be the perception (albeit wrongly) that the appellant was a gay man. Mr McGarvey submitted that it would not be reasonable to expect the appellant to change his social presentation and that amounted to persecution relying on HJ (Iran) especially at [82]. Mr McGarvey also relied on the appellant's Facebook activity and the risk this would create of similar perceptions in Iran.

18. Secondly, he relied upon the fact that in one of the photographs the appellant was displaying the Kurdish national flag which would further be perceived as an unacceptable statement of political opinion in Iran.

19. In support of the appellant's case both as to the perception of his "social presentation" in Iran and also in relation to the monitoring of the internet, including Facebook by the Iranian authorities Mr McGarvey relied upon an expert report by Dr Mohamed Kakhki dated 24 June 2014. Although this report was not before the First-tier Tribunal, Mr Richards on behalf of the Secretary of State raised no objection to its admission under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

20. Mr McGarvey also drew my attention to an extract from the *US State Department Report on Human Rights Practices for Iran 2012* (at page 4 of the appellant's objective bundle) referring to the authorities stopping citizens arriving at Tehran International Airport, asking them to log into their You Tube and Facebook accounts, and in some cases forcing them to delete information officials deemed controversial or threatening.

21. Thirdly, based upon pages 46-47 of Dr Kakhki's report, Mr McGarvey submitted that the appellant was at risk on return of being treated as a draft evader and being conscripted into the Iranian military which in itself, and in relation to how he would be treated in the military, amounted to persecutory treatment.

22. Mr McGarvey relied upon Article 8 of the ECHR. He accepted that the appellant could not meet the requirements of any of the Immigration Rules but submitted that the appellant's case was exceptional and should be considered outside those Rules. I will return to Mr McGarvey's submissions in relation to Article 8 below.

**The Respondent's Submissions**

23. On behalf of the respondent, Mr Richards made a number of brief and succinct submissions.

24. First, as regards the appellant's claim based upon being a draft evader or subject to conscription, Mr Richards submitted that a significant amount of Dr Kakhki's report was concerned with desertion which was not the appellant's situation. Mr Richards submitted that the most that could be said was that the appellant, by being in the UK would be seen as a draft evader on return with a possible prosecution for an offence of imprisonment for 6 months to 2 years. Mr Richards submitted that this could not be described as persecution. Mr Richards reminded me that the appellant did not claim that he was a conscientious objector and there was no evidence to persuade me, he submitted, that his failure to perform military service so far amounted to persecution or was contrary to Article 3 of the ECHR.

25. Secondly, in relation to the principal aspect of the appellant's case, Mr Richards noted that the appellant was not pursuing the case on the basis that he was gay. Mr Richards accepted that the claim was about perception by others. In that regard, he referred me to a letter dated 17 January 2011 written by the appellant's (then) social worker which identified the "verbal abuse and taunts" the appellant had experienced in the Bridgend area where he lived in relation to his appearance "including taunts of 'pretty boy' and 'gay boy'". Recognising this evidence, Mr Richards invited me (rhetorically) to consider what would be the reaction in Iran given the background evidence concerning the social and moral environment in Iran.

26. Mr Richards invited me to apply the approach set out by the Supreme Court in HJ (Iran) and to consider whether the appellant's "social presentation" was an aspect of the appellant's life which it would not be reasonable to expect him to give up in Iran. Mr Richards indicated that he did not wish to make any positive submissions that the appellant's "social presentation" did not come from his underlying personality. Mr Richards accepted that if the appellant was at risk on this basis then it was for a Convention reason.

27. Mr Richards invited me, however, not to accept Dr Kakhki's view that the appellant's Facebook site was likely to be monitored by the Iranian authorities.

## The Evidence

28. A considerable body of evidence was presented in this appeal: an appellant's subjective bundle; an objective bundle; and a supplementary bundle. The latter contains the expert report by Dr Kakhki's dated 24 June 2014.

29. There are three witness statements from the appellant dated 21 October 2013 (at pages 4-9 of the subjective bundle); 18 April 2014 (at pages 1-3 of the subjective bundle) and 30 June 2014 (at pages 48-49 of the supplementary bundle). In addition, there are a number of supporting letters including a number from the appellant's foster mother (at pages 23 and 24-26 of the subjective bundle); from the appellant's foster uncle (at pages 35 and 36-38 of the subjective bundle); from the appellant's foster sister (at pages 51A and 51-53 of the subjective bundle) and a friend of the appellant, a housemate, "CG" (at pages 44-45 of the subjective bundle).

30. In addition I heard brief oral evidence from the appellant, his foster uncle, his foster sister and CG.

31. None of that evidence or the other evidence concerning the appellant's life in the UK since he arrived in 2008 was challenged by Mr Richards.

32. In addition, the appellant submitted an objective bundle although Mr McGarvey referred me to a short extract from the *US State Department Report on Human Rights Practices for Iran 2012* to which I referred above. He placed greater reliance upon Dr Kakhki's report.

## The Law

33. In relation to the appellant's asylum claim, the burden of proof is upon the appellant to establish that there is a real risk or reasonable likelihood that if returned to Iran he would be subject to persecution for a Convention reason, namely (so far as relevant in this appeal) as a member of a particular social group or because of imputed political opinion.

34. In relation to Article 3 of the ECHR, the burden is upon the appellant to establish that there are substantial grounds for believing that if returned to Iran there is a real risk that he would be subject to torture, inhuman or degrading treatment contrary to Article 3 of the ECHR.

## Discussion and Findings

*The "Social Presentation" Claim*

35. The primary facts are not in dispute. The appellant came to the UK in March 2008 and claimed asylum. At that time he was 14 years of age. His claim for asylum was not accepted by the Secretary of State and the basis for that claim relying on his family's involvement with the Pro-Kurdish Komala Party was not pursued in his appeal. In those circumstances, like Judge Burnett in the First-tier Tribunal at para 53, it cannot be accepted that the appellant's original asylum claim was true. I do not, however, consider that that affects any assessment of the veracity of the appellant's claim now based upon his "social presentation".

36. First, the evidence in respect of that (new) aspect of his claim for asylum was not challenged at the hearing. Secondly, in any event, the overwhelming evidence supports a positive finding in relation to the appellant on all those aspects of his claim, namely his "social presentation". I have the evidence of the appellant himself, evidence from his foster family and also from his friend, CG. I have no reason to doubt what they say about the appellant or what he says about himself. There is copious evidence in the form of photographs and extracts from his Facebook page which substantiate his claim based upon his "social presentation". The appellant is clearly a young man who takes considerable care of his physical appearance. He both dresses and adopts a hairstyle consistent with a westernised approach to his appearance. He is a hairdresser who works in a salon (which includes female clients) and a part-time male stripper. No doubt the obvious care that the photographs show in relation to his appearance and physical stature reflect a "metrosexual" outlook. His foster sister told me in her oral evidence that he, for example, shaped his eyebrows which was, in any event apparent from the appellant's appearance in the hearing. The appellant's Facebook

page including the photographs reflects his social presentation as a "metrosexual" man.

37. What then is the risk, if any, to the appellant on the basis of his "social presentation" in Iran?

38. In his report, Dr Kakhki deals with the Iranian state's attitude to lifestyle issues and morality at some length at pages 2-25.

39. At page 2 Dr Kakhki notes that the appellant has:

> "since his arrival in the UK...adopted westernised behaviours and characteristics that are completely different and contradict the Islamic values and lifestyle in Iran."

40. Dr Kakhki notes also that:

> "freedom of expression only exists in so far as it is not harmful to the government/country/society".

41. Dr Kakhki continues:

> "Considering the ever-restrictive approach and what actually constitutes a breach of freedom of expression, as evinced by the general crackdown on alternative cultural activities/non-conformative lifestyles including persecution of members of the public for their hairstyle, clothes etc. [The appellant] would be subject to similar oppressive treatment of policies by the Iranian authorities if he returned. His chosen lifestyle, including his effeminate behaviour and activities as a male stripper, would place him at serious risk of persecution/prosecution in a society like Iran's whereby the segregation of sexes is paramount. Such behaviour will be considered to be a severe violation of the boundaries for freedom of expression under Iranian law, and would attract legal liabilities for the crimes against public morality and decency. The relevant laws control any form of expression including hairstyle/ clothing, online blogs, social media etc. Anything that is deemed to be against the morality of society or the regime's Islamic policies may result in the prosecution of the perpetrator(s)."

42. Dr Kakhki continues at page 3:

> "With regards to morality offences, including hairstyle, tattoos, non-conformity in dress etc, it should be highlighted that Iran frequently implements crackdowns on morality standards to force the populace to conform to the Islamic standards, in terms of socially acceptable behaviour and presentation. Any individual detected with blatantly non-Islamic appearance, displaying western cultural influence in this manner or appearance or showing their dissatisfaction with the Islamic Regime, would be subjected to arrest and/or harassment by the security forces."

43. Dr Kakhki then quotes from a Sky News item on its website headed "Satanic Fashion Thugs Arrested" as follows:

> "At least 49 people have been arrested during a crackdown on "satanic" clothing in Iran. Police said five barber shops were also shut and 20 warned for "promoting Western hairstyles".

The measures are the latest in a country-wide campaign against cultural influences from the West in the Islamic Republic, where strict dress codes are enforced. In the past, such crackdowns have lasted a few weeks or months, but the current campaign was launched in 2007 and is still continuing.

It includes measures against men sporting spiky “western” hairstyles or women wearing tight trousers and high boots. The latest arrests took place in the northern city of Qaemshahr.

“Police confronted rascals and thugs who appeared in public wearing satanic fashion and unsuitable clothing.” police commander Mahmoud Rahmani said.

Women are supposed to wear clothing that covers their hair and disguises the shape of their bodies.

But some, particularly in cities, wear headscarves pushed back well beyond their hairlines and sport tight-fitting outfits. The authorities fear such open acts of defiance against Iran’s values could escalate if they go unchecked, according to some analysts.

“Some individuals, not knowing what culture they are imitating, put on clothing that was designed by the enemies of this country,” Mr Rahmani said. “the enemies of this country are trying to divert our youth and breed them the way they want and deprive them of a healthy life,” he added…

Previously Iran’s supreme leader, Ayatollah Ali Khamenei, has suggested Iran’s enemies may try to stage a “soft” or “velvet” revolution by infiltrating corrupt culture or ideas.”

44. In relation to the Iranian government’s perception of western influence, dress and presentation, Dr Kakhki continues at pages 4-6 as follows:

“As can be seen from the above account, one of the government’s perceptions of those wearing Western-influenced dress, hairstyles and tattoos is sourced in the belief that they are “designed by the enemies of this country” to undermine the Islamic regime. This highlights the authorities’ rationale and policy in detection and taking corresponding action, often persecutory in nature, including acts of cutting the offending hair in public, calling the subjects derogatory names, physically assaulting them etc. Such practices can be further seen in the below account:

**Iran’s Fashion Crackdown Moves Beyond Headscarves**

It’s an Iranian rite of summer: Islamic morality squads pressure women to keep their headscarves snug and coverings in place, and after a few extra tugs for modesty’s sake the crackdown inevitably fades.

This year, however, Iran’s summer fashion offensive appears bigger and more ominous, and has expanded the watch list to men’s hairstyles and jewellery considered too Western….

*Nearly two-thirds of Iran’s parliament have signed a statement supporting the latest fight against “Western cultural invasion.”* It’s blamed for such challenges to Islamic dress codes as women’s

> headscarves pushed back and pants cropped short to show as much leg as possible.
>
> Some 70,000 police officers have been deployed in Tehran this month to enforce the dress codes, the state news agency IRNA said.
>
> “Confronting those who are not sufficiently veiled is a legitimate demand of the people” said Iran’s police chief, Gen. Esmaeil Ahmadi Moghadam, who was added to the U.S. sanctions list earlier this month for his alleged role in the political clampdowns after Ahmadinejad’s disputed re-election in 2009.
>
> …Last year, a fashion watchdog group gave the Culture Ministry a guide to acceptable men’s haircuts. On the blacklist: ponytails, a spiked style known locally as the “rooster,” and the retro “mullet” do, with its cropped front and cascading back.

The above account further indicates that the Iranian authorities target non-conformist individuals in their efforts to combat Western influences. Many individuals have been subjected to persecutory treatment, as is also shown in the below account:

> Photos and news published in Iranian media describe continuous crackdowns in Iran. To “increase public security”, the regime’s Security Forces have now started clamping down on “thugs” in Tehran. The drive is a follow-up to the commonplace plan that traditionally starts in the springtime with nationwide morality crackdowns on women labelled “bad hijab” (badly veiled).
>
> Authorities in Iran speak of a steadily increasing number of arrests and claim that “Our decisive confrontation will continue in Tehran down to the very last thug,” said the head of the capital’s metropolitan police force, Ahmad Reza Radan, according to the semi-official Fars news agency.
>
> According to different sources, pictures taken by the Fars news agency and reproduced by several moderate dailies showed a man barefoot and stripped to the waist, with two plastic watering cans around his neck, being grabbed by a police officer, while other images showed black balaclava-clad police officers beating their captives. A number of captives were forced to ride a donkey as a “warning to others”.
>
> Some scenes of humiliation were so repulsive that IRI’s police chief had to admit that some officers had overstepped the mark, but he emphasised that the parading of suspects around neighbourhoods had been carried out with prior approval.
>
> *Since the beginning of the morality crackdowns, it is believed that thousands of people have been arbitrarily arrested mostly on a range of “phoney charges” from non-conformity to the Islamic standard dress to alleged drug trafficking. Many thousands of women and young men have been waned or forced to make a written pledge to respect Islamic standard dress. Furthermore, a number of the “culprits” have been turned over to the judicial authorities for the alleged offence of improper dressing.*

…Following the sporadic reactions of victims in Iran and international pressure, a number of Islamic factions of the regime, in order to play down the IRI's constitutional violence, especially against women, simply accused the government of undermining the IRI's laws by beating and parading the suspects. The parade in the neighbourhood is however permitted with prosecutors' approval. These suspects, not yet accused, are punished because the punishment indeed serves as a warning and intimidation to other people.

*Most people in Iran believe that such accusations are mainly being used as justification for the arrest and repression of political activists and those perceived to be potential threats to the security of the IRI*."

45. Dr Kakhki concludes (at page 6) in relation to the appellant that:

> "The above extract clearly highlights the persecutory manner in which the morality police enforce the government's Islamic standards, ranging from public humiliation to physical and arbitrary assault. In light of the above information, in my view, [the appellant] would not have any chance of continuing his current lifestyle in Iran without the risk of attracting persecutory treatment from the authorities and the ensuing legal liability. As shown, even non-conformist hairstyle and dress attracts negative attention; considering the addition that [the appellant] is an 'effeminate metrosexual' and a male stripper, his behaviours and mannerisms would single him out for adverse attention even if his appearance was within Islamic boundaries."

46. Dr Kakhki then deals with a number of further items relating to a crackdown in dress code observing as follows (at page 7):

> "….it is apparent that [the appellant] has chosen a very open and liberal lifestyle. If an individual is arrested for any morality offences, the wearing of westernised symbols and fashions such as male jewellery, make-up, etc would normally be utilised as contributory and incriminating factors of the authorities when establishing his criminality."

47. Dr Kakhki then concludes at page 9 of his report:

> "…Iran has been involved in a cultural 'war' against Western influences, evinced by their consistent efforts in disrupting any source of outlet that may be used to promote Western values. In such an environment, it is likely that [the appellant's] social activities, in addition to his lifestyle and characteristics developed whilst residing in the UK, would place him at risk of persecution/prosecution if returned. Therefore, I concur with the findings of Immigration Judge Burnett at paragraphs 63-64 of the Determination, in that [the appellant] would be at risk of arrest, ill-treatment and even imprisonment on the basis of his un-Islamic behaviour if returned to Iran."

48. In relation to the Iranian authorities' attitudes to the appellant's lifestyle and social presentation in the UK and via his Facebook page, Dr Kakhki deals with this at pages 9–25. having set out the provisions of the Islamic Penal Code, Dr Kakhki concludes (at page 10) that the appellant's:

> "…actions would therefore have to impact on the Islamic values of the Republic or otherwise have an impact on the moral fabric of Iranian

> society, thereby being regarded against the Islamic Republic of Iran's policy. In making this determination, the authorities would look both at the nature of the act and the motivation behind it. As regards to the act itself, constituted by publicising half naked photographs, posing with the Kurdish flag, would all, in my opinion, be regarded as propaganda against the regime. These factors would be taken into consideration when making a determination of whether [the appellant] has acted against the Islamic Republic of Iran."

49. Dr Kakhki continues (at page 10) in relation to the activities of the Iranian intelligence and security forces in monitoring the behaviour of Iranian citizens as follows:

> "With regard to the ability of Iranian intelligence and security forces to detect illegal behaviour abroad, I would like to highlight that to comply with its duties to prevent damage to national security from abroad, the Iranian Ministry of Intelligence will closely monitor all behaviour and activity of Iranian citizens outside Iran. Any action that is deemed to be against the Islamic regime, its security or independence, reported through various means, including the country's embassies, would be filed and investigated. Please bear in mind that the Islamic regime of Iran claims to be a model for other Islamic States and has tried to export their model to other Islamic countries since 1979. For this reason the authorities are very sensitive to any external negative propaganda or criticism of the regime especially if the issue challenges the Islamic values or makes direct condemnation of the behaviour and attitude of the regime.
>
> Of relevance to [the appellant's] case and his Facebook activities, it is evident that the Iranian authorities have consistently displayed the ability to detect and arrest those whom they perceive as a threat to Islamic society by virtue of the posts they share via social media."

50. Dr Kakhki sets out (at page 11-12) from the *Mirror* newspaper's web page a case of a British woman who faces 20 years' imprisonment in jail for comments made on her Facebook page critical of the Iranian state's leadership and Islam. That matter is also set out in a web page extract in the *Telegraph* newspaper at pages 48-49 of the appellant's objective bundle. Dr Kakhki is correct, in my view, that the individual concerned, though arrested having travelled to Iran, made the comments on her Facebook page whilst in the UK.

51. Dr Kakhki then sets out a number of other incidents concerning monitoring by the Iranian authorities of internet activity perceived as insulting to Islam including internet activity <u>from abroad</u> (see especially pages 14-15) and then at page 15 concludes:

> "In my view the appellant's Facebook page is a clear example of an attempt to challenge the Islamic values promoted throughout Iranian society by the regime, particularly when he made a very public gesture of sharing his photographs posed with the Kurdish nationalism flag, which could be interpreted as a sign of support for Kurdish independence. This interpretation is particularly likely in view of [the appellant's] Kurdish ethnicity and background which would increase the probability of the act being translated as one beyond a normal Facebook post."

52. Dr Kakhki then goes on to describe and discuss Iran's "sophisticated monitoring system to gather intelligence". That is, of course, a matter dealt with in the *Country of Information Report for Iran for 2013* at paras 16.22-16.39 and in particular in the passages cited by Judge Burnett at para 47 of his determination referring to paras 16.26-16.27 and 16.31-16.32 of that report. Dr Kakhki, based upon his assessment of the material, comments (at page 17) that:

> "…Iran utilises sophisticated technology to track and trace internet activity, allowing them to identify what is being accessed and determine whether such access has resulted in what it can term as anti-state activity. This is not restricted to domestic users – as the account below shows Iran has implemented a global policy on monitoring the internet activity of Iranians abroad with a view to limiting the support of anti-government/Islamic groups, which have found great fervour in the international Iranian community."

53. In his most recent statement dated 30 June 2014, the appellant states – and this evidence was not challenged – that a Google search with his name produces his Facebook account as the first result.

54. In my judgement, based upon Dr Kakhki's report (including the news item of a UK based individual being of interest to the authorities on travelling to Iran), the appellant has established that there is a real risk that his Facebook page maybe accessed by the Iranian authorities even though it arises from his time in the UK and on that page is displayed material which may be perceived as un-Islamic because of the appellant's westernised appearance and behaviour that it discloses. In addition, one photograph shows the appellant displaying the Kurdistan flag which, although not the main part of the appellant's claim, adds to the risk that he will be of interest to the Iranian authorities as someone who is perceived as un-Islamic in his behaviour.

55. I find, therefore, that there is a real risk that if the appellant returns to Iran his behaviour in the UK will be known to the Iranian authorities and he will be perceived as behaving in an un-Islamic way. I accept Dr Kakhki's view, which was not challenged, that this would put him at risk of persecution and serious ill-treatment as he would be liable to arrest, detention and prosecution for un-Islamic behaviour.

56. In any event, I am satisfied that the appellant's "social presentation" creates a real risk that he would be perceived as un-Islamic and he may be perceived (albeit wrongly) to be gay in Iran.

57. In HJ(Iran), Lord Rodger (at [82])set out the correct approach in the case of an individual who claimed to be at risk because he was gay:

> "When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

> If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.
>
> If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.
>
> If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".
>
> If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so.
>
> If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.
>
> If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

58. Substituting "social presentation" for "gay", that is the correct approach in this appeal.

59. First, I accept the evidence of the appellant's "social presentation". I have already referred to the evidence, which I accept, from the appellant's (then) social worker that the appellant's "social presentation" has led to that perception in the UK and it would be even more likely, in my judgement, that he would be so perceived in Iran. All the witnesses, including the appellant himself in his oral evidence before me, spoke to the genuineness of the appellant's social presentation. The appellant accepted that he would not be able to be a hairdresser (at least for women in Iran) nor would he be able to be a male stripper. He told me that he had grown up in this country and his personality and dress (which would not be allowed in Iran) was something that he could not give up. He told me that it was "just the way I am" and that he would "not fit in Iran". The appellant's foster sister told me that the appellant had a "very flamboyant personality" and that he was a "natural born hairdresser".

She told me that he “loves going to the gym” and that “everything about his lifestyle” is him. She told me that she did not know what he would do if he could not be a hairdresser as that was his career. She told me in her evidence that by “flamboyant” she meant that he likes looking “good” and loves going to the gym and has an outgoing personality, liking to look his best. She also confirmed that he liked nice clothes. He did not, to her knowledge wear make-up but he did shape his eyebrows.

60. Secondly, I am satisfied (and it was not argued to the contrary) that if the appellant continued to give expression to his “social presentation” as in the UK he would be at risk of serious ill-treatment or persecution in Iran because he will be perceived as un-Islamic and subject to arrest, detention and prosecution.

61. Thirdly, whilst I accept that the appellant has no right to carry on his employment as a hairdresser (at least for women) or male stripper, neither of which he could do in Iran, I am satisfied that his “social presentation” derives not from a fad or the following of a current fashion trend but derives from how the appellant perceives himself as a person. The latter may give rise to a claim for asylum whilst the former will not. The appellant’s “social presentation” is as much an aspect of his personality and inner-self as would be his sexual orientation such that, following HJ (Iran), it would not be reasonable to expect the appellant to suppress that aspect of his personality and, if he did, on return to Iran that would only be because he would fear the consequences. Mr Richards did not make any positive submissions to the contrary.

62. For those reasons, applying the approach set out in [82] of Lord Roger’s judgement in HJ (Iran), I am satisfied that, in addition to the risk of persecution or serious ill-treatment that he faces as a result of his perceived un-Islamic behaviour through his Facebook page, the appellant would also be at real risk of persecution or serious ill treatment because of his “social presentation” and he cannot reasonably be expected to change and suppress that expression of his inner personality on return to Iran. If he did so that would only be out of a fear of persecution at the hands of, or with the condonement of, the Iranian state.

63. That fear of persecution is by reason of a Convention reason, namely his imputed political opinion or because, as Mr Richards acknowledged, a westernised individual perceived as un-Islamic forms part of a particular social group in Iran.

64. For these reasons, I am satisfied that the appellant has established that there is a real risk that he will be subject to persecution for a Convention reason or serious ill-treatment contrary to Article 3 of the ECHR if he returns to Iran.

65. Consequently, for these reasons the appellant’s appeal is allowed on asylum grounds and under Article 3 of the ECHR.

*The Military Service Claim*

66. In the light of those findings, I can deal briefly with the alternative basis upon which Mr McGarvey put the appellant's asylum claim. That was on the basis that he had avoided military service since the age of 18 as he had been in the UK. This has not been previously relied upon by the appellant and arises wholly out of Dr Kakhki's report of 24 June 2014.

67. This is dealt with at pages 45-47 of Dr Kakhki's report. As Mr Richards observed, a significant part of Dr Kakhki's report on this aspect of the appellant's claim relates to "deserters". I see no basis upon which the appellant could (or would) be perceived by the Iranian authorities as a deserter given that on return it would be palpably clear that he had been in the UK since he was 14 years of age. I also agree with Mr Richards that even if the appellant were considered to be a draft evader, notwithstanding that he had been outside Iran since the age of 14, the penalty, if he were prosecuted and convicted, consists of an extra 2 to 6 months service. The usual period of conscription being reduced in 2008, in general, from 2 years to 20 months. I do not accept that, even if the appellant were required to do this extra service, that it can be described as persecution in the sense of entailing serious harm to him or be sufficiently serious to constitute a severe violation of his basic human rights (see Article 9 of Council Directive 2004/83/EC). Dr Kakhki refers to the possibility that military officials may "integrate persecutory treatment when allocating tasks" to the appellant such as "forced labour and serving in deprived, hostile areas, particular due to his Kurdish ethnicity". Dr Kakhki cited no background evidence to support that possibility and, in any event, it is in my judgement wholly speculative both as to whether the appellant would be subjected to any "additional" burden and that those burdens could rise to the required level of impact upon him to qualify as "persecution" or "serious harm" for the purposes of the Refugee Convention and Article 3 of the ECHR.

68. Therefore, I would reject this basis of the appellant's claim for asylum and under Article 3 on the basis that he has not established a real risk of persecutory treatment or serious harm falling within Article 3 of the ECHR based upon him being a potential draft evader.

## Article 8

69. In relation to Article 8, it follows from my finding that the appellant faces a real risk of persecution or serious harm on return to Iran that his claim also succeeds under Article 8. His return would amount to a sufficiently serious interference with his private life to engage Article 8.1 and it could not be said to be proportionate to expose the appellant to that risk of persecution or serious harm in furtherance of the legitimate aim of effective immigration control.

70. Nevertheless, I will consider the appellant's claim under Article 8 based upon the effect upon his private and family life in the UK and the

consequences to him in Iran if he is returned to Iran in the absence of that real risk but taking into account the constraints he will face in relation to his lifestyle and "social presentation" in Iran.

71. Mr McGarvey accepted that the appellant could not meet the Immigration Rules. However he submitted that the appellant's circumstances were exceptional or compelling such that he should succeed outside the Rules. He relied upon the fact that the appellant had lived in the UK since 2008 and that the 7 years of his life (he is now only 21) was a long time. He had a foster family in the UK with whom he had lived when he came to the UK and he had developed close friendships here. Mr McGarvey relied upon the copious evidence dealing with the appellant's development of private life in the UK both with his foster family and friends and in his work and education until he left school. He also relied upon the fact that the Secretary of State had delayed 2 years and 10 months between September 2010 (when the appellant made his renewed application for leave) and 1 July 2013 when eventually the Secretary of State made her decision.

72. The burden of proof is upon the appellant to establish that he has private and family life which will be sufficiently severely interfered with if he is returned to Iran so as to engage Article 8.1 of the ECHR. Thereafter, it is for the Secretary of State to establish that any such interference is justified under Article 8.2 as being in accordance with the law, for a legitimate aim and is proportionate. That is the well known approach set out the speech of Lord Bingham of Cornhill in Razgar [2004] UKHL 27 at [17].

73. In considering Article 8, given that the appellant cannot meet any of the requirements of the Immigration Rules, only if there are exceptional or compelling circumstances such that the appellant will suffer unjustifiably harsh consequences can he succeed in establishing that he should be granted leave under Article 8 outside the Rules (see R (Nagre) v SSHD [2013] EWHC 720 (Admin); MF (Nigeria) v SSHD [2013] EWCA Civ 1192 and Gulshan (Article 8 – New Rules – Correct Approach) [2013] UKUT 00640 (IAC)).

74. I accept on the evidence that the appellant has established a strong and substantial private life in the UK since his arrival in 2008 when he was 14 years old. He has been educated in the UK and has worked as a hairdresser and part-time male stripper since he finished school in July 2009. Between 2008 and 2011, he lived with his foster family – his foster mother and two other foster children. Thereafter, the appellant moved out from his foster home and has lived independently. He shared accommodation with his friend CG when he turned 18. More recently, CG has changed his address and no longer shares a house with the appellant. However he has known him for 6 years and he told me about an incident in which CG (because of his profession as a policeman) was subject to an attack one night whilst out with the appellant and the appellant helped protect CG from his attackers. He told me that the appellant had been

subject to racial abuse on that occasion and the assailants pleaded guilty in the Magistrates' Court to offences committed against them both. CG told me that the appellant was a very good friend, they remained in regular contact, they went out together and he looked upon the appellant as a brother and one of his best friends. He said that he would be sorely missed and that he would be "gutted" if the appellant was removed.

75. The appellant's foster sister also gave evidence and spoke about how close he was to her – like a real brother – and that she saw him about once a week. She usually saw him at her mother's when he visited. She would be devastated if the appellant had to return to Iran. She told me that he was fairly quiet when he first arrived and had learned English and had developed an interest in hairdressing for which he had a real talent. She said the appellant was a lovely, lovely person.

76. The appellant's foster uncle told me that he had known the appellant since he arrived. He had learned to communicate in English and he had obviously changed since he had been here. The appellant was a presentable and kind individual. He said that he would be extremely disappointed if the appellant had to return to Iran and that he could not see any reason why the appellant should not stay. He told me that the appellant saw his sister (the appellant's foster mother) on a regular basis and that he went on family outings.

77. Although the appellant's foster mother did not give any oral evidence, her letters of support are at pages 22 and 24-26 of the appellant's subjective bundle. Those letters speak to the closeness of the appellant both to his foster mother and other family members. She states that the appellant has no contact or ties with his birth parents. He sent her cards and flowers and he is a part of her family. He went on family holidays with them; he comes to lunch on Sundays and he enjoys Christmas with them. She says that the appellant integrated well into school and worked hard.

78. All the witnesses speak to the appellant studying hairdressing and gaining an apprenticeship in a salon and is now a qualified stylist in a salon in South Wales. She says that the appellant has "completely westernised and feels no affinity with Iranian life".

79. I am satisfied that the appellant has established a rich private life in the UK. However, since 2011 he has not lived with his foster mother and family. He now lives independently although he maintains strong social ties with his foster mother and family. Whilst the appellant may well, at the time he was living with his foster family, have established "family life" for the purposes of Article 8 that has, in my judgement, dwindled and come to an end as a result of his moving out and living an independent life as a young working man. Indeed, the latter is a central aspect of his claim before me to remain in the UK. The evidence does not establish any financial dependency or emotional dependency other than that which would exist between an adult child and his mother (in this case foster mother) and other family members. Nevertheless, there is a strong

private life element to the family relationships which the appellant enjoys in the UK. I also accept the evidence that the appellant has ceased to be in contact with his family in Iran. That has, in my judgement, occurred gradually and over time as the appellant has become more integrated in society in the UK and developed a western approach to his lifestyle and, it is fair to say, his ambitions. Whilst I accept that the appellant would have family in Iran if he returned, and could regain contact with them, he would lose contact (other than through electronic means) with his friends and foster family in the UK. More importantly, however, the appellant's lifestyle would have to radically change in Iran. He would no longer be able to work in his chosen vocation of hairdressing or to act as a male stripper. His appearance would have to change dramatically if he were not to be perceived as a westernised male with the consequences that I have already set out. He would, in effect, be forced to conform to an Islamic way of life contrary to his development over the last 6 or 7 years since he came to the UK aged 14.

80. For these reasons, I am satisfied that there would be a serious interference with the appellant's private life if he were returned to Iran and Article 8.1 is engaged.

81. I accept that the appellant's removal would be in accordance with the law and for a legitimate aim, namely the economic well being of the country (or effective immigration control).

82. The crucial issue is, in my judgement, whether that interference would be proportionate. That assessment requires a balancing of the interests of the individual against the public interest reflected in effective immigration control and, in particular that the appellant cannot succeed under the Immigration Rules.

83. In assessing proportionality, I take into account the following factors:

- The appellant arrived in the UK aged 14;
- He has lived in the UK for just over 6 years;
- The appellant has no lawful basis to be in the UK now, in particular his asylum claim has no basis;
- However, the appellant has leave as an unaccompanied minor;
- The appellant has established a strong private life in the UK and his return to Iran will prevent him following the lifestyle and social presentation which has become an integral part of his personality would be impossible to follow in Iran;
- The appellant's removal would have a significant effect on his foster family and also his close friend if he were removed;

- There was a delay of almost 3 years in the Secretary of State determining the appellant's most recent application during which time the appellant became an adult continuing his integration into life in the UK by developing his interest in hairdressing as a vocation and, as an adult expressing his personality in his social presentation.;

- The appellant would not be able to express his personality through his "social presentation" and work as a hairdresser (at least for women) or a male stripper in Iran.

84. In assessing whether the appellant's removal would be proportionate, I weigh in the balance all these factors. In my judgement, of particular significance in this appeal is the appellant's very real integration into UK life and the expression of his personality through his social presentation which would be impossible in Iran. That factor weighs, in my judgement, heavily in the balance.

85. Giving due weight to the public interest reflected in the fact that the appellant cannot meet any of the requirements of the Immigration Rules, I am satisfied that there are compelling circumstances such that the appellant's removal would be unjustifiably harsh so that the public interest is outweighed by the interference with the appellant's private life if he were removed. I am satisfied that the appellant's removal would be disproportionate in these circumstances.

86. For these reasons, the appeal is also allowed under Article 8 of the ECHR.

**Decision**

87. The decision of the First-tier Tribunal to allow the appellant's appeal on asylum grounds and under Article 8 of the ECHR involved the making of an error of law. The decision is set aside.

88. I remake the decision allowing the appeal on asylum grounds and under Articles 3 and 8 of the ECHR.

Signed

A Grubb
Judge of the Upper Tribunal

Date: