Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/12522/2017**

THE IMMIGRATION ACTS

Heard at Field House | **Decision & Reasons Promulgated**
On 12 February 2019 | **On 16 April 2019**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

AR
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Spurling, instructed by Barnes Harrild & Dyer Solicitors
For the Respondent: Mr T Wilding, Senior Presenting Officer

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

Unless and until a Tribunal or court directs otherwise, the appellant herein is granted anonymity. No report of these proceedings shall directly or indirectly identify the appellant or any member of the appellant's family. Failure to comply with this direction could lead to contempt of court proceedings

© CROWN COPYRIGHT 2019

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Iran, born in 1991. He made a protection claim in the United Kingdom on 23 June 2017 having entered, it appears, in November 2015. The Secretary of State refused this application by way of a decision dated 10 November 2017 and the subsequent appeal to the First-tier Tribunal ("FtT") was dismissed in a decision promulgated on 16 February 2018. Thereafter, FtT Judge Grant-Hutchinson granted the appellant permission to appeal to the Upper Tribunal, thus the matter came before me.

2. Having heard the parties at a hearing of 24 September 2018, I set aside the decision of the FtT, for reasons which are set out below. I directed that the decision on the appeal be re-made in the Upper Tribunal and the matter duly came before me on 12 February 2019 for that task to be undertaken.

Setting aside of the First-tier Tribunal's decision

3. Before the FtT the appellant asserted that he was at risk in Iran for four reasons:

    (i) He had worked for PJAK in Iran and the Iranian authorities had found out about this involvement;

    (ii) He had participated in anti-regime demonstrations in the United Kingdom, and photographs of his participation have been published on his Facebook account;

    (iii) He has posted anti-Iranian regime material on his Facebook account, which is available for the public to view;

    (iv) He is Kurdish.

4. The FtT considered with the appellant's claimed PJAK involvement and the consequences thereof within paragraphs 33 to 41 of its decision, rejecting the truth of the evidence given by the appellant in this regard. The FtT also rejected the appellant's assertion that removal would breach Article 8 ECHR. It is common ground, however, that the FtT did not consider any of those matters set out in paragraphs 2(ii) to 2(iv) above.

5. At the outset of the hearing in September 2018, Ms Pal (who appeared for the Secretary of State on that occasion) properly accepted that the FtT had erred in failing to consider three central aspects of the appellant's claim to be at risk of suffering persecutory treatment if returned to Iran and accepted that the consequence of such failure is that the FtT's decision must be set aside. She submitted, however, that the scope of the remaking should not include matters relating to the appellant's claimed PJAK activity, given the clear findings made by the FtT on this issue.

6. Mr Khan indicated that the appellant no longer sought to pursue challenge to the FtT's findings made in relation to the appellant's claimed PJAK activities and the asserted consequences thereof. In my view, this was an entirely proper concession given the limited nature of the pleaded challenge made in this regard. Had Mr Khan maintained such a challenge I would, in any event, have rejected it. When looked at as a whole paragraphs 35-41 of the FtT's decision provide cogent and compelling reasons for the conclusions reached. Mr Khan also accepted that the appellant could not succeed on Article 8 ECHR grounds absent his Article 3/protection claim succeeding – at least insofar as the evidence currently stands.

7. In these circumstances, I set aside the decision of the FtT and directed that the Upper Tribunal would remake the decision under appeal. I further directed that the scope of the re-making would include asylum, humanitarian protection, Article 3 and Article 8 ECHR grounds, and the finding of the FtT rejecting the truth of the appellant's account of his involvement with the PJAK would stand as the starting point.

8. The task of re-making could not be completed immediately because the Upper Tribunal was, as of September 2018, in the process of considering evidence which was likely to lead to the issuing new Country Guidance in relation to Iran.

Remaking of Decision

9. The proposed Country Guidance decision referred to above was ultimately reported as HB (Kurds) Iran CG [2018] UKUT 00430. The headnote to that decision reads as follows:

> "(1) SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 308 (IAC) remains 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 reasonably 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.”

10. Turning then to the instant appeal, as identified in the error of law decision the appellant’s claim now rests on four features: (i) his participation in anti-regime activities in the United Kingdom; (ii) that photographs of his participation have been published on his Facebook account; (iii) that he has posted other anti-regime material on his Facebook account which is available for the public to view; and, (iv) that he is of Kurdish origin.

11. There is no dispute as to the factual matrix which makes up each of these features, indeed, although the appellant was made available to give evidence to the Upper Tribunal, Mr Wilding indicated that he did not dispute the appellant’s evidence in this regard.

12. The appellant’s bundle contains numerous examples of posts on Facebook either authored by the appellant of shared by the appellant. The content of these posts is, for the most part, anti-Iranian regime. It is not in dispute that the posts range in date from September 2018 to 31 January 2019. I need not identify with any more specificity the contents of these posts,

because it is accepted by Mr Wilding that their contents are that if they were to come to the attention of the Iranian authorities the appellant would be at risk of being detained and persecuted upon return.

13. To put this concession in context, the appellant in HB exhibited a number of similar features to the instant appellant in that he is Kurdish, had posted or shared anti Iranian regime pictures on his Facebook page of a similar ilk to the images and text found on the instant appellant's Facebook page, and he was to be returned to Iran without a passport. HB did also have features which the appellant does not share, such as the political history of his family members in Iran.

14. Given the aforementioned concession, the issue in the instant case resolves to whether the information on the appellant's Facebook account is reasonably likely to come to the attention of the Iranian authorities. As already indicated, the tribunal in HB concluded that it was reasonably likely that the information in relation to HB's Facebook account would come to the attention of the Iranian authorities at the point of return. I appreciate that each case turns on its own facts, but it is instructive to consider the circumstances that the Tribunal concluded would have met by HB upon his return to Iran:

> "[114] …it is not disputed that a returnee without a passport is likely to be questioned upon return…it is part of the routine process to look at an internet profile, Facebook and emails of a returnee. A person would be asked whether they had a Facebook page and that would be checked. When a person returns, they would be asked to log onto their Facebook and email accounts. …"

15. Mr Wilding's only submission in support of a contention that this particular appellant would not be at risk upon return was that he could be expected to delete his Facebook account or the offending posts, prior to departing the UK. In such circumstances, says Mr Wilding, there is nothing else in the evidence before the Tribunal that could lead to the persecution of the appellant.

16. In response, Mr Spurling submits that the appellant should not be required to delete the posts because requiring him to do so would be requiring him to suppress his genuine political views contrary to the decision of the Supreme Court in RT (Zimbabwe) SSHD [2012] UK SC38.

17. I need not determine whether Mr Spurling is correct in his submission (which would require me to determine whether the appellant has genuine political views or whether the views he has posted on his Facebook account are as a consequence of his desire to remain in the United Kingdom), because I do not accept Mr Wilding's submission that the appellant could simply delete his Facebook account and that this would reduce the likelihood of the Iranian authorities becoming aware of his views via such account, such that there would be no real risk of the appellant being persecuted.

18. This is the first occasion in these proceedings that such a submission has been made and this submission was neither made to, nor addressed by, the country guidance Tribunal in HB. It is to be recalled that a Country Guidance decision should be followed unless there is cogent evidence to lead to a conclusion that it should not.

19. The Tribunal in HB found there to be a real risk of a returnees Facebook account becoming available to the Iranian authorities at the point of return, particularly in the context of a returnee without a passport who is of Kurdish origin – as the instant appellant is. There is no evidence before me, let alone cogent evidence, that leads me depart from such conclusion. All that is before is the Presenting Officer's assertion that a Facebook account can be deleted, and this would alleviate the possibility of it being accessed by the Iranian authorities.

20. Given the terms of the Country Guidance decision, I am not prepared to accept that there would be no real risk of the instant appellant's account (or material information held on that account) becoming available to the Iranian authorities. Although the burden of proof is on the appellant, that burden is met in my view by the terms of the Country Guidance decision. Absent any evidence to support the Secretary of State's belated contention to the contrary, I conclude that there is a real risk to the appellant upon return. I am not persuaded to do anything other than follow the rationale deployed in the Country Guidance decision.

21. In any event, and this does not form any part of my reasoning for allowing this appeal but is included merely by way of observation, I would take some persuading that simply deleting a user's Facebook account would leave the Iranian authorities unable to access data which had previously been held on that account i.e. it would remove traces of relevant material from internet search engines. For example, a number of the posts on the appellant's account are shared by the appellant from other users' accounts. This can be seen from the evidence produced. It is also reasonably likely that a number of the appellant's posts have been shared by other users. The appellant has 211 friends on Facebook. The underlying posts on these other users' accounts would plainly not be removed by deletion of the appellant's account.

22. As I have indicated, I need not make the above finding [in 21] definitively because in my view the correct starting point, absent anything from the Secretary of State to the contrary other than mere assertion, is the Country Guidance decision. Applying that decision, I conclude that the authorities in Iran would, at the point of the appellant's return, have access to information that he has posted and/or shared on his Facebook account.

23. If I am wrong about the relevance and effect of the appellant deleting his Facebook account before removal then, in any event, in my conclusion the questioning of the appellant upon return would also lead to a real risk of his detention and ill treatment. The Tribunal in HB concluded that a

returnee without a passport is likely to be questioned [97]. The appellant cannot be expected to lie upon return if questioned. Even if it is not accepted that he has a genuine political belief in support of the Kurdish rights, it is true that he has posted such beliefs on his Facebook account. He cannot be expected to lie about this. If asked for the credentials to access his account, the appellant can genuinely say that his account has been deleted. There is a real risk, however, that the questioning will then turn to why that is the case. At this point the appellant will, if not required to lie, be required to disclose that he deleted the account in order to prevent the Iranian authorities from discovering that he had put anti-regime material on it. This is of itself sufficient, in my conclusion, to lead to a real risk of detention and subsequent ill treatment.

24. For all these reasons, which are not cumulative, I am satisfied that the appellant has established to the required low standard that he has a well-founded fear of persecution for convention reason, namely his actual and perceived political opinion. Thus, I allow his appeal on Refugee Convention and Article 3 ECHR grounds. I need not deal with Article 8 in such circumstances, save to say that absent the features which lead to the appeal being allowed on the Article 3 ground, there is little else which falls in the appellant’s favour under Article 8.

Decision

The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

Having remade the decision, I allow the appeal on Refugee Convention and Human Rights grounds (the latter with reference to Article 3 ECHR).

Signed: Dated:

Mark O’Connor 15 April 2019

Upper Tribunal Judge O’Connor