Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/12474/2019 (V)**

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
Working Remotely by Skype
On 6 May 2021

Decision & Reasons Promulgated
On 28 May 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRCS
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms R Pettersen, Senior Home Office Presenting Officer
For the Respondent: Mr M Karnik instructed by Orchid Solicitors

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the respondent (MRCS). This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

2. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Background

3. The appellant is a citizen of Iran who was born on 10 May 1973. He arrived in the United Kingdom on 12 October 2000. He was initially refused leave to enter and claimed asylum. That claim was initially refused on 4 December 2000 but, following the lodging of an appeal against that decision, on 8 June 2001 the decision was withdrawn. His asylum claim was again considered and refused on 29 January 2002. He unsuccessfully appealed against that decision and he became appeal rights exhausted on 26 September 2002.

4. On 3 March 2005, the appellant married a British Citizen ("F") and their daughter ("M") was born on 17 August 2007.

5. On 17 September 2007, the appellant returned to Iran and, on 20 September 2007, he made an application to enter the UK as a spouse. On 11 October 2007, the appellant was granted a spouse visa valid until 11 October 2009. On 25 October 2007, the appellant re-entered the UK and, on 19 April 2010, the appellant was granted Indefinite Leave to Remain.

6. The appellant was convicted of a number of offences between 9 June 2008 and 5 November 2013.

7. On 9 June 2018, he was convicted at the Blackburn, Darwen and Ribble Valley Magistrates' Court of harassment and breach of a civil injunction for which he was sentenced to a conditional discharge of twelve months.

8. On 6 October 2011, he was convicted at the Preston Crown Court of the offence of affray and was sentenced to eight months' imprisonment suspended for 24 months. That sentence was subsequently varied on 18 February 2018 and activated to a period of imprisonment of one month following his conviction on 18 February 2013 at the Preston Crown Court on five counts relating to the possession and control of identity documents and making a false statement to obtain a driving licence. He was sentenced to twelve months' imprisonment together with his earlier suspended sentence being activated to a period of one month's imprisonment.

9. Following those convictions, on 4 March 2013, a notice of liability to deportation was issued. The appellant made representations on 15 March 2013 and 8 April 2013. A deportation order was signed on 19 August 2013 along with a decision to refuse his human rights claim. The appellant appealed against that decision and his appeal was dismissed on 23 May 2014 and, subsequently, permission to appeal was refused by both the First-tier Tribunal on 17 June 2014 and the Upper Tribunal on 4 August 2014 after which the appellant became appeal rights exhausted.

10. On 5 November 2013, again at the Preston Crown Court the appellant was convicted of five counts relating to perverting the course of justice for which he was sentenced

to two years' imprisonment on each count to run concurrently and disqualified from driving for eighteen months.

11. Following the dismissal of his appeal, the appellant made further submissions but these were rejected as not amounting to a fresh claim under para 353 of the Immigration Rules (HC 395 as amended). Further submissions were again made on 1 December 2014 and these were also rejected under para 353 on 15 January 2015.

12. Further submissions were made on 3 March 2015 and 22 September 2015 which were refused on 16 December 2015 and certified. Following the decision of the Supreme Court in R (Kiarie & Byndloss) v SSHD [2017] UKSC 42, the certification decision was withdrawn. Following further submissions made on 21 January 2018 and 10 January 2019, on 5 December 2019the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under Art 8 of the ECHR. The Secretary of State also certified the appellant's asylum claim under s.72 of the Nationality, Immigration and Asylum Act 2002 ("the NIA Act 2002").

The Appeal to the First-tier Tribunal

13. The appellant appealed to the First-tier Tribunal. The appellant claimed to be at risk on return to Iran as a Christian convert and because of his interest in Erfan-e-Halqeh, a form of mysticism founded by Dr Mohammad Ali Taheri. In relation to Art 8, the appellant claimed that it would be "unduly harsh" upon his wife and British Citizen child if he were deported to Iran and so Exception 2 in s.117C(5) of the NIA Act 2002 applied.

14. In a determination sent on 24 November 2020, Judge Evans allowed the appellant's appeal on asylum grounds and under Art 8 of the ECHR.

15. First, the judge found that the appellant had rebutted the presumption under s.72(2) and Art 33(2) of the Refugee Convention that the appellant, although convicted of a "particularly serious crime", constituted a danger to the community in the UK.

16. Secondly, the judge was not satisfied that the appellant was a genuine Christian convert. However, the judge found that nevertheless, on investigation at Tehran Airport on return to Iran, the appellant would disclose his history including his claim to be a genuine Christian convert (though rejected in the UK), his claimed association with Erfan-e-Halqeh, his marriage to a Christian convert and, with whom, their daughter was brought up a Christian, together with his internet activity in the UK. It was reasonably likely that, having done so, he would be persecuted and suffer serious ill-treatment during prolonged detention by the Iranian authorities.

17. Thirdly, the judge found that Exception 2 applied under s.117C(5) on the basis that it would be "unduly harsh" upon the appellant's British Citizen child (M) to remain in the UK if he were deported to Iran. The judge did not accept that the appellant's deportation would be "unduly harsh" on his spouse and it was not suggested that the appellant's spouse (F) (who is herself a recognised refugee) and their daughter should accompany him to Iran.

The Appeal to the Upper Tribunal

18. The Secretary of State sought permission to appeal to the Upper Tribunal. The Secretary of State did not challenge the judge's decision in relation to the certification under s.72 of the NIA Act 2002. However, the grounds contended that the judge had failed properly to consider the risk on return to the appellant, given the judge's finding that he was not a genuine Christian convert, applying the country guidance decision in PS (Christianity – risk) Iran CG [2020] UKUT 00046 (IAC). Further, the judge had failed properly to apply the elevated test for "unduly harsh" in Exception 2 and had, therefore, wrongly found that Exception 2 applied.

19. On 22 January 2021, the First-tier Tribunal (Judge O'Garro) granted the Secretary of State permission to appeal on both grounds. However, in doing so, the judge noted that the respondent's application was "clearly out of time" having been made on 4 January 2021 when notice of the First-tier Tribunal's decision had been served on the parties on 24 November 2020. I will return to this shortly as an issue arose prior to the hearing, although it was resolved at the hearing, as to whether or not the judge had properly granted permission given that the respondent's permission application was out of time.

20. Following the grant of permission, the Upper Tribunal issued directions, including in respect of the issue of whether Judge O'Garro had extended time in granting permission. In response to those directions, Mr Karnik (who represented the appellant before me) made written submissions on 2 March 2021. On behalf of the Secretary of State, Mr Deller made submissions in relation to the timeliness issue in a response dated March 2021.

21. The appeal was listed for hearing at the Cardiff Civil Justice Centre with the Upper Tribunal working remotely. At that hearing, the appellant was represented by Mr Karnik and the respondent by Ms Pettersen, both of whom joined the hearing remotely by Skype.

The Grant of Permission

22. At the hearing, the representatives agreed that, sitting as a First-tier Tribunal Judge, I could determine the issue of timeliness on the basis that Judge O'Garro's grant of permission was conditional. Mr Karnik accepted, on the basis of the evidence presented by the Secretary of State and referred to in Mr Deller's submissions, that the permission application filed on 4 January 2021 was, in fact, made in time. That was because, although the judge considered that the parties had been served on 24 November 2020, it was accepted that the respondent had, in fact, not been served with the First-tier Tribunal's decision until 22 December 2020. In those circumstances, both Mr Karnik and Ms Pettersen accepted that, sitting as a First-tier Tribunal Judge, I could perfect the conditional grant of permission and conclude that the application was made in time and, on the basis of Judge O'Garro's reasoning, permission was granted on the basis that both grounds were arguable.

23. I agreed with that course of action which was, in my judgment, plainly the truth of the situation. Therefore, the hearing proceeded on the basis that permission to appeal was granted to the Secretary of State and both representatives made submissions on the substantive issues raised in the two grounds. Mr Karnik also relied upon his rule 24 reply dated 29 April 2021 which, having been produced both to the Tribunal and respondent on the date of the hearing, I gave Ms Pettersen time to consider after which she made submissions.

The Issues

24. There are two grounds of appeal raised by the Secretary of State and a further point raised in response in the appellant's rule 24 reply.

25. Ground 1 contends that the judge, having found that the appellant had not established that he was a genuine Christian convert, wrongly concluded that the appellant would nevertheless be at risk on return to Iran applying the country guidance decision in PS.

26. Ground 2 contends that the judge reached an irrational conclusion on the evidence in concluding that it would be "unduly harsh" upon the appellant's daughter if he were deported to Iran.

27. The point raised in para 8 of the appellant's rule 24 reply challenges the judge's adverse credibility finding on the basis that the judge failed to properly take into account the evidence of the appellant's wife, who is a genuine Christian convert, that the appellant is also a genuine Christian convert.

Discussion

Ground 1

28. I will deal first with Ground 1 concerning the risk to the appellant, the judge having found that he was not a genuine Christian convert.

29. Having considered the evidence at paras 74–78, the judge at para 79 found as follows:

> "79. Taking all the evidence in the round, I find that the Appellant has failed to show that it is reasonably likely that he is either a genuine convert to Christianity or has a genuine interest in Erfan-e-Halqeh".

30. Then at paras 79.1–79.7, the judge set out a number of reasons to support that finding.

31. Having made that finding, at para 81 the judge made the following additional finding:

> "81. I conclude that because the Appellant is not a genuine Christian convert and does not have a genuine interest in Erfan-e-Halqeh he will, so far as that is possible, erase his Facebook account, his Instagram account, his blog and any other internet

related activity before being returned to Iran and the risk of him on return should be assessed on that basis".

32. At para 82, the judge set out the relevant country guidance in PS concerning the risk to someone who had been found to be "insincere in his Christian beliefs". That country guidance is summarised in para (4) of the headnote (and at [144] of the decision) as follows:

> "4. In cases where the claimant is found to be insincere in his or her claimed conversion, there is not a real risk of persecution 'in-country'. There being no reason for such an individual to associate himself with Christians, there is not a real risk that he would come to the adverse attention of the Iranian authorities. Decision-makers must nevertheless consider the possible risks arising at the 'pinch point' of arrival:
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> i) All returning failed asylum seekers are subject to questioning on arrival, and this will include questions about why they claimed asylum;
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> ii) A returnee who divulges that he claimed to be a Christian is reasonably likely to be transferred for further questioning;
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> iii) The returnee can be expected to sign an undertaking renouncing his claimed Christianity. The questioning will therefore in general be short and will not entail a real risk of ill-treatment;
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> iv) If there are any reasons why the detention becomes prolonged, the risk of ill-treatment will correspondingly rise. Factors that could result in prolonged detention must be determined on a case by case basis. They could include but are not limited to:
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> a) Previous adverse contact with the Iranian security services;
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> b) Connection to persons of interest to the Iranian authorities;
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> c) Attendance at a church with perceived connection to Iranian house churches;
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> d) Overt social media content indicating that the individual concerned has actively promoted Christianity."

33. The judge, applying this approach, noted the "pinch point" on return and the potential risk to an individual, who despite not being a genuine Christian convert, might be exposed to if prolonged detention occurred. At paras 83–84, the judge said this:

> "83. I conclude that the Appellant will be returned as a failed asylum seeker and so he will be asked why he claimed asylum. He will divulge (because he cannot be expected to lie) that he claimed to be a Christian and an adherent to Erfan-e-Halqeh (but will also say that in fact he is neither). He will therefore be transferred for further questioning. He will be expected to sign an undertaking renouncing his claimed Christian faith and would in light of my findings above do this. The question, therefore, is whether there are other factors which might then result in the detention becoming prolonged. Such factors might include: the fact of his claimed adherence to Erfan-e-Halqeh, the fact of being married to a Christian, the fact of having a daughter attending a Christian school, the length of his absence

from Iran, the disclosure of his previous social media activity and the possibility of the Iranian authorities then accessing the same despite the Appellant's attempts to delete them.

84. It is worth considering at this point the relevance of AB and Others (internet activity – state of evidence) Iran [2015] UKUT 0257 in relation to the Appellant's social media activities. I conclude that AB and Others does not in principle suggest that the Appellant's internet activities are likely to have been identified by the Iranian authorities: [469] notes that it is difficult to 'make any sensible findings about anything that converts a technical possibility of something being discovered into a real risk of it being discovered'. It is therefore necessary to look carefully at the specific evidence relevant to the likelihood of discovery in this case. I find that the appellant has failed to adduce evidence which would suggest that it is reasonably likely that his internet activities have come to the attention of the Iranian authorities. In particular, he was notably unable in his oral evidence to provide any evidence about how widely or where his blog was read – he said he did not know. Further, although he suggested he had been criticised online, his evidence in this regard was unconvincing: the one specific criticism he produced (page 104 of the Appellant's bundle) appeared to be directed at [MA], not at him, and I do not accept that the person who posted it [] was known to the Appellant as he claimed for the first time in his oral evidence. Such an important fact would, I find, have been included in his witness statement if it were true. Finally, he has not produced country background evidence to suggest that it is reasonably likely that the Iranian authorities would have details of the internet activities of someone with as little profile as he. Nor has he produced evidence supporting a contention that if he delegates his blog, Facebook page and Instagram account the Iranian authorities will be able to access it".

34. Having reached those findings as to what the appellant would disclose to the Iranian authorities on return and that he had not established that they had already accessed his internet activity, the judge went on in para 85 of his determination to set out a number of factors that led him to conclude that the appellant would nevertheless be at real risk of serious ill-treatment or persecution on return. The judge said this:

"85. However, notwithstanding this, I find that there is a real risk of ill-treatment amounting to persecution on return because of religion (his connection with the Christian faith and his claimed interest in Erfan-e-Halqeh). This is because when he divulges that he claimed to be a Christian he will be transferred for further questioning. I find it is reasonably likely that he will not be able to bring an end to such further questioning by simply agreeing to sign an undertaking renouncing his claimed Christianity. I find it is reasonably likely that his detention will become prolonged and that he will be ill-treated when the following factors are taken into account:

85.1 he will tell those investigating that he has been married for some fifteen years to a Christian who was born an Iranian Muslim and that they have brought up their daughter as a Christian. The length of this relationship, the former nationality of his wife and the fact that she is an apostate are reasonably likely to raise a question mark over his renunciation of his faith which may therefore not be accepted. In summary, it is reasonably likely that the Iranian authorities will not believe his protestations that he is in fact not a Christian;

85.2 in light of this, it is reasonably likely that his renunciation of Erfan-e-Halqeh will not be accepted at face value and so may result in further interrogation

and detention. In making this finding I take account of the hostility of the Iranian state to Erfan-e-Halqeh revealed by the country background materials contained in the Appellant's bundle;

85.3 the fact that he will be returned without an Iranian passport after an absence of nearly twenty years (ignoring the brief return trip to Iran in 2007) is reasonably likely to heighten the suspicion of the Iranian authorities. The Appellant, in the light of his marriage, the faith of his wife and the length of his absence is clearly in a very different category to an asylum seeker being returned after a brief stay in the UK;

85.4 he will tell those interrogating him about the blog, his Facebook page and his Instagram account. This is reasonably likely to extend the interrogation even though he will have deleted their contents. Further, the possibility of the Iranian authorities being able to access some of these materials (because they had been reposted or copied by other internet users) is a factor to include in the assessment of whether it is reasonably likely that the Appellant will be exposed to ill-treatment, even if not a factor which in and of itself makes such ill-treatment reasonably likely".

35. Then at para 86 the judge reached his conclusion as follows:

> "86. Overall, this is a relatively unusual case because of the length of the Appellant's stay in the UK, the strength of his family ties here and the extent of his internet activities. In summary, therefore, I conclude it is reasonably likely that he will be persecuted on return as a result of ill-treatment he is reasonably likely to receive as a result of it being reasonably likely that his detention will become prolonged. I reach this conclusion even though I do not accept that it is reasonably likely either that the Appellant is a genuine Christian or that he has a genuine interest in Erfan-e-Halqeh".

36. Ms Pettersen's submissions may be summarised as follows. First, the judge erred in law by making inconsistent findings as to whether or not the appellant's internet activity would come to the attention of the Iranian authorities. At para 84 the judge had found that they had not come to the Iranian authorities' attention but at para 85.4 the judge speculated that they could come to the attention of the authorities in the future. Second, the judge had been wrong to take into account as a relevant factor in assessing whether the appellant would be subject to a prolonged detention and therefore an increased risk of ill-treatment that he had been out of Iran for a considerable length of time. This was not a relevant factor applying PS. Third, the appellant's wife would not be returning with the appellant and it was not entirely clear that his wife was a Christian and that her religion would be of any note for the Iranian authorities. Finally, Ms Pettersen accepted that the UT in PS had not set out an exhaustive list of factors which might lead to the prolonged detention and increased risk of ill-treatment to a person who had been found not to be a genuine convert but, she submitted, the factors relied upon by the judge did not justify his ultimate finding.

37. For the following reasons, I do not accept Ms Petterson's submissions that the judge erred in law in reaching his finding that the appellant would be at real risk of persecution or serious ill-treatment on return to Iran.

38. I set out above the judicial headnote at para (4) concerning the risk, if any, to a returning Iranian national who had been found not to be a Christian convert. At [113]–[116], the UT said this:

> "113. We are satisfied that a returnee who had made a false claim of conversion would be reasonably likely to excite sufficient interest to warrant further questioning. His is an asylum claim that is likely to have depended on *sur place* activities, including baptism and attending church, *prima facie* evidence of a crime under Iranian law. The evidence overall indicates that the security services follow a specified procedure when it comes to Christians: they are taken in and required to sign the undertaking. It does not seem likely to us that this procedure would be followed standing at an arrivals desk, even if the subject was protesting that it was all false and that he was perfectly willing to sign. A returnee is not someone who has been picked up on an Iranian street. He is someone who has just come back from the United Kingdom, possibly having spent a considerable amount of time here; the Iranian security services perceive there to be a clear link between Christianity and attempts by the West to undermine the Iranian state. These factors cumulatively give rise, in our view, to a "particular concern" such that a transfer to second-line questioning would be likely.
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> 114. What then? The person tasked with conducting that interrogation will be one who, to put it bluntly, will know what he is doing. It is an important job. His task will be to ensure that this returnee is not in fact a Western spy, or someone otherwise deployed to engage in subversive activities such as organising prayer meetings. The returnee will be asked to sign the undertaking. There being no reason for him to refuse, he will do so. He will explain that yes, he attended church in the United Kingdom, and yes, he may have been baptised, but in fact it was all a charade to try and get asylum so that he could settle and work in the United Kingdom. The Iranian security services are no doubt well aware that people make such claims (the Iranian embassy in London only need read certain newspapers to know that this is a concern).
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> 115. In SSH & HR the panel were satisfied that during secondary questioning there is the *potential* for ill-treatment, and given what we know about the behaviour of the Iranian security services generally, this must be right. We are however mindful of Mrs Enayat's evidence that returnees would be treated like "any other convert". The specific evidence we have been given about what happens when suspected Christians are held in short 'disruptive detentions' does not indicate that physical abuse is being used. Psychological pressure is applied with the clear motive of frightening the subject into signing an undertaking, and thereby disrupting house church networks. In the case of our disingenuous returnee, the interviewing officer would not have to do much to ensure compliance: he need do no more than ask. We therefore find that this secondary questioning is generally likely to be very short, perhaps no more than a few hours, and that it will not, in those circumstances, involve a real risk of serious harm. The returnee will likely be subject to surveillance once he is released, but this will not involve any risk of harm given that he is not a genuine Christian.
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> 116. We accept that this will not always be so. Risk assessment must always be fact specific and decision makers must look to the particular characteristics and behaviour of claimants to assess whether there is a reasonable likelihood of physical harm during these 'second-line' investigations. We accept the Secretary of State's general rule of thumb that the longer the detention, the greater the risk of torture. Decision-makers must therefore assess whether there are any reasons why interrogation would be prolonged. We do not propose to offer an exhaustive list of

> the kind of factors that might be relevant here, since the evidence does not permit us to do so. We would however note that one aggravating factor identified in the sources is 'very outspoken' social media activity: this would have to project the personal commitment of the individual, rather than for instance simply 'liking' posts by others. Past adverse interest by Iranian authorities would also increase risk, as would connections to other individuals with a 'profile'. We have found that the primary focus of the Iranian state is the perceived threat of *organised* religion, and for that reason we are satisfied that association in the United Kingdom with a Church with known links to Iranian house churches would certainly be a risk factor".

39. In summary, the UT recognised that a disingenuous Christian convert would not be at risk *within* Iran as, despite his disclosure to the Iranian authorities, any surveillance of the individual once in Iran would not reveal any association with Christians or Christian religion as the individual would not be a practising Christian (see [115]). However, the UT recognised that a returning failed asylum seeker would be subject to questioning on arrival, including questioning as to why they had claimed asylum. An individual could be expected (indeed is entitled) to tell the truth about this including the basis of his claim but also that it had not been accepted. That would lead potentially to the so-called "pinch point" on arrival when further and prolonged questioning might take place which could lead to ill-treatment during a period of prolonged detention (see [116]). In para (4)(iv) of the headnote (above) the Tribunal set out a number of factors relevant to that issue. However, as the Tribunal itself pointed out at [116], and Ms Pettersen rightly accepted, that is not an "exhaustive list of the kind of factors that might be relevant".

40. In this appeal the judge found, and it is not challenged, that the appellant would disclose his history, recognising that he had not been believed, but also his family's religious and other circumstances and his internet activity. The appellant cannot be expected to lie but, on the other hand, he can be expected to tell the truth including the outcome of his asylum claim. The UT, in particular in [116], recognised that even a disingenuous Christian convert may be at risk on return if he or she would be subject to prolonged detention when an increased risk of ill-treatment arises. Here, the judge recognised, following PS, that the latter issue was the crucial one. He did not wrongly conclude that the appellant would per se be at risk as a failed asylum seeker who had not been believed to be a Christian convert. He recognised that the issue concerned what would happen at the "pinch point" and whether there was a real likelihood of prolonged detention with a concomitant greater risk of torture. On reading the judge's reasons, I see nothing inconsistent with the approach set out in PS.

41. First, I do not accept Ms Pettersen's submission that the fact that the appellant had been in the UK for fifteen years was an irrelevant factor. Some reliance was placed on [113] of PS to suggest that that was an irrelevant or neutral factor. In fact, in [113] the UT's reference to an individual "possibly having spent a considerable amount of time here" was seen as a background factor relevant to how the Iranian security services might perceive an individual returning to Iran (when they might be a risk) rather than a returnee who was someone who had been picked up on an Iranian street. I do not accept that the UT concluded that the length of time an individual

spent in the UK was necessarily irrelevant. The appellant had spent fifteen years in the UK and, given the account he would have to truthfully tell, that was a factor which fell to be considered as part of an accumulation of factors in determining whether a prolonged detention was reasonably likely.

42. Secondly, I do not accept that the judge made inconsistent findings concerning the Iranian authorities' knowledge of his internet activities. What the judge found in para 84 was that they had not *yet* discovered his internet activity. The judge did find at para 81 that the appellant would delete his internet activity. However, at para 85.4, having found that he would, by telling the truth, inform the Iranian authorities on return about his internet activity, the judge found that there was a possibility that the Iranian authorities might be able to access those materials even though he would have deleted them. The initial finding is about he past; the second finding is about the future.

43. Mr Karnik submitted that once material is put on the internet, an individual loses control of it. It was open to the judge to find that there was a real risk that given his activity, some of it might have been reposted or copied by others and that there would be traces of his activity on the web which, if alerted to it, the Iranian authorities might now discover. I do not accept Ms Pettersen's submission that that is pure speculation rather than a reasonable inference which the judge was entitled to draw given the evidence about the Iranian authorities' interest and capacity in relation to investigation of the internet and, as a matter of common sense, the reality of internet activity which entitled the judge to conclude that, despite attempts to delete activity, there is a real risk of an individual's activity leaving a footprint that can be discovered.

44. Thirdly, the judge correctly identified that the risk recognised in [116] of the UT's decision, and reflected in para (4) of the headnote, did not impose an exhaustive list of factors that might create a reasonable likelihood or real risk of prolonged detention and thereafter possible serious ill-treatment or torture. In my judgment, the judge rationally and reasonably identified a number of relevant factors including the length of time that the appellant had been out of the UK, the fact that his wife (previously an Iranian national) had converted to Christianity in the UK and her refugee claim had been accepted on that basis, their daughter had been brought up a Christian, the appellant professed (albeit disingenuously) to be a Christian convert and also an adherent to Erfan-e-Halqeh. Those were facts that the judge was entitled to accept.

45. What the judge found was that, given this *combination* of factors, he was satisfied that it was reasonably likely that the Iranian authorities would subject the appellant to prolonged detention and a risk of serious ill-treatment. That finding would only be legally unsustainable if no reasonable Tribunal properly directing itself could reach that conclusion, i.e. the conclusion was Wednesbury unreasonable or perverse. The fact that not every judge would necessarily have reached the same conclusion does not mean that, a more generous view taken by the judge, amounts to an error of law.

As the Supreme Court pointed out in R (MM (Lebanon)) v SSHD [2017] UKSC 10 at [107] (per Lady Hale and Lord Carnwath):

> "It is no doubt desirable that there should be a consistent approach to issues of this kind at tribunal level, but as we have explained there are means to achieve this within the tribunal system. As was said in *Mukarkar v Secretary of State for the Home Department* [2006] EWCA Civ 1045, para 40 (per Carnwath LJ):
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> > "… It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case … The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law … Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist tribunal should be respected."

46. In my judgment, having correctly identified the approach to the assessment of any risk on return applying PS, and having set out a number of relevant factors (none of which were excluded by the UT in PS), the judge reached a reasonable and rational finding that it was reasonably likely that the Iranian authorities would not believe his protestations that he was in fact not a Christian. Taken with the other factors, it was within the range of reasonable conclusions that the judge was entitled to reach, that in those circumstances it was reasonably likely that the appellant would be subject to prolonged detention which, as the UT in PS recognised, was increasingly likely to expose an individual to serious ill-treatment or torture and for the judge to conclude that the appellant had established that risk on return.

47. For these reasons, therefore, I reject the Secretary of State's Ground 1.

Ground 2

48. Turning now to Ground 2, that concerns Art 8 of the ECHR. To some extent, the Art 8 issue is academic as the appellant has succeeded in establishing his international protection claim. However, it was common ground before me that I should, nevertheless, resolve the Secretary of State's challenge to the judge's decision to allow the appeal under Art 8 even if I sustained the judge's decision to allow the appeal on asylum grounds.

49. Ground 2 challenges the judge's conclusion that Exception 2 in s.117C(5) is satisfied. That provision provides that:

> "(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh".

50. As was common ground before me, if the appellant – who is a medium offender - could establish that he fell within Exception 2 then his deportation would not be proportionate and would be a breach of Art 8 (see s.117C(3) and NA (Pakistan) v

SSHD [2016] EWCA Civ 662 at [23]) . The crucial finding of the judge was that the effect upon his daughter (M), who is a qualifying child as a British Citizen and with whom he had a genuine and subsisting relationship, would be "unduly harsh". At paras 89–90, the judge set out the background circumstances as follows:

> "89. Turning to Article 8 considerations I make the following findings of fact in relation to the Appellant's relationship with his daughter. I find that he is the primary carer of his daughter (who is now 13) because his wife works as a solicitor whereas he does not work. I find that he is very involved in her life and that this involvement increased when the appellant, his wife and daughter moved to Blackburn in the period following his release from prison in 2015. I find that his daughter [h]as been separated from [him] twice previously, once when she was around 5, when he was estranged from his wife, and then again between 2013 to 2015 when the Appellant was in prison. These findings are supported by a variety of evidence in addition to the witness statements of the Appellant (who I do not find to be a credible witness) and that of his wife. Such other evidence includes the letter from the guitar teacher (page 182 of the Appellant's bundle) and the email from [MS] relating to school matters (page 184 of the Appellant's bundle).
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> 90. I further find that the Appellant's daughter is upset and anxious at the prospect of her father being removed to Iran in the light of the contents of his letter dated 5 February 2020 (page 329 of the Appellant's bundle), the contents of the psychotherapist's report dated 28 January 2020 (page 331 of the bundle) and the contents of the Appellant's wife's witness statement. I find that if he is removed to Iran she is unlikely to see the Appellant again: her mother is unlikely to travel to Iran having been granted asylum here and the Appellant's daughter, having been brought up a Christian, and against the background of Iran being the country from which her mother fled, is unlikely to choose to live there even [when] she reaches the age of 18. I find against this background she is also unlikely to visit. Consequently if the Appellant is removed the physical separation from his daughter is likely to be permanent".

51. Then at paras 91–92, the judge dealt with a psychotherapist's report relied upon by the appellant as follows:

> "91. The psychotherapist's report is an unimpressive document running to just two pages. It was apparently prepared following a single meeting with the Appellant's daughter on 18 January 2020. No detail of the length of that meeting are included. No reference is made to whether the psychotherapist had access to the daughter's medical records or, indeed, to whether there is any history of the daughter having been treated for mental health issues. The report is also not framed as a medico-legal report: for instance there is no reference to the psychotherapist's understanding her obligation to the Tribunal etc. It is unclear whether the 'Background History' is simply what has been reported to the psychotherapist by the daughter and wife of the Appellant or whether the psychotherapist has also relied on other sources of information (although this does not seem likely). However, notwithstanding these shortcomings, I give some weight to the opinion contained in it which is as follows:
>
> > *'It is clear to me that [child] is suffering from 'Separation Anxiety' which stems from her traumatic experience of sudden disappearance of her father at a very young age as well as uncertainty about his immigration status and deportation ... I strongly believe that [child's] father's deportation will have a tremendous negative psychological impact on her affecting her future development on different levels'.*

> 92. I give some weight to the opinion (1) because it reflects the opinion of a professional; and (2) because it is indeed the case that the Appellant disappeared from his daughter's life for a significant period of time when she was younger (both when he and her mother temporarily separated and when he was in prison in 2013 and 2015), and because in the light of my finding of fact above in relation to who is her primary carer it is unsurprising that the possibility of her father being deported has had a negative effective on her and that his deportation will have negative psychological consequences for her".

52. Then at para 93, the judge went on to find that the impact upon the appellant's daughter would be "unduly harsh" as follows:

> "93. In the light of these findings of fact, I conclude that it would be 'unduly harsh' for the Appellant's child to remain in the UK without the Appellant for the following reasons:
>
> 93.1 The Appellant's child has been separated from him for significant periods on two previous occasions. This might have reduced the likely negative psychological effects of his deportation on her (because she has lived without his presence for a significant period of time with the result that her relationship with him was not important to her). However, I find it is likely to have had the opposite effect, that is to say that the previous separations will increase the negative psychological effect of his deportation on her.
>
> 93.2 I have reached this conclusion because of (1) the contents of the psychotherapist's report, (2) the contents of the Appellant's child's letter referred to above, and (3) the witness evidence.
>
> 93.3. I conclude that that amplified negative psychological effect means that the effect of the Appellant's removal on his daughter will go beyond 'mere undesirability of what is merely uncomfortable, inconvenient or difficult'.
>
> 93.4 I further conclude that when that amplified negative psychological effect is combined with: (1) the day-to-day loss of the Appellant's child's primary carer, who has helped her adapt to life in Blackburn since she has moved there; and (2) the fact that his removal will for the reasons I have set out above be likely to result in his permanent physical separation from her, the result is that the elevated test is reached.
>
> 93.5 That is to say, the harshness which the deportation of the Appellant will cause for his daughter is of a sufficiently elevated degree to outweigh the public interest in the deportation of foreign criminals".

53. Then at para 94, although this is not relevant to the grounds, the judge found that it would not be "unduly harsh" on the appellant's partner (F) if he were deported.

54. On behalf of the Secretary of State, Ms Pettersen submitted that the judge's finding in relation to Exception 2 and the issue of 'unduly harsh' was unsustainable. First, the judge had wrongly concluded that the appellant was his daughter's "primary carer" when, in reality, the care of the appellant's daughter was at best shared between the appellant and his wife. Secondly, the judge had found the psychotherapist's report to be an unimpressive document but had nevertheless relied upon it. Ms Pettersen submitted, in her oral submissions, that the judge's finding was irrational on the evidence.

55. There is no doubt that the judge correctly self-directed on the test to be applied under Exception 2 in determining whether the impact upon the appellant's daughter of his deportation would be "unduly harsh". At para 59 of his determination, the judge set out a summation of the law, derived from the Supreme Court's decision in KO (Nigeria) v SSHD [2018] UKSC 53 and HA (Iraq) v SSHD [2020] EWCA Civ 117, by the Court of Appeal in KB (Jamaica) v SSHD [2020] EWCA Civ 1385 at [15]. There, Popplewell LJ (with whom McCombe and Asplin LJJ agreed) said this:

> "15. The meaning of "unduly harsh" in the test provided for by s.117C(5) has been authoritatively established by two recent decisions: that of the Supreme Court in *KO (Nigeria) v Secretary of State for the Home Department* [2018] 1 WLR 5273; and the decision of this court in *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 117. It is sufficient to note the following without the need to quote the relevant passages:
>
> > (1) The unduly harsh test is to be determined without reference to the criminality of the parent or the severity of the relevant offences: *KO (Nigeria)* para 23, reversing in this respect the Court of Appeal's decision in that case, reported under the name *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA Civ 617, in which at paragraph 26 Laws LJ expressed this court's conclusion that the unduly harsh test required regard to be had to all the circumstances including the criminal's immigration and criminal history.
> >
> > (2) "Unduly" harsh requires a degree of harshness which goes beyond what would necessarily be involved for any child faced with deportation of a parent: *KO (Nigeria)* para 23.
> >
> > (3) That is an elevated test, which carries a much stronger emphasis that mere undesirability or what is merely uncomfortable, inconvenient, or difficult; but the threshold is not as high as the very compelling circumstances test in s. 117C(6): *KO (Nigeria)* para 27; *HA (Iraq)* paras 51-52.
> >
> > (4) The formulation in para 23 of *KO (Nigeria)* does not posit some objectively measurable standard of harshness which is acceptable, and it is potentially misleading and dangerous to seek to identify some "ordinary" level of harshness as an acceptable level by reference to what may be commonly encountered circumstances: there is no reason in principle why cases of undue hardship may not occur quite commonly; and how a child will be affected by a parent's deportation will depend upon an almost infinitely variable range of circumstances; it is not possible to identify a base level of "ordinariness": *HA (Iraq)* paras 44, 50-53, 56 and 157, *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 at para 12.
> >
> > (5) Beyond this guidance, further exposition of the phrase will rarely be helpful; and tribunals will not err in law if they carefully evaluate the effect of the parent's deportation on the particular child and then decide whether the effect is not merely harsh but unduly harsh applying the above guidance: *HA (Iraq)* at paras 53 and 57. There is no substitute for the statutory wording (*ibid* at para 157)."

56. The judge plainly had that approach well in mind in reaching his findings at paras 89–93, in particular in para 93.3 and at para 93.5 where he referred to the "elevated" level of harshness required to outweigh the public interest.

57. Turning now to Ms Pettersen's two main points. First, she criticised the judge for taking into account that the appellant was his daughter's "primary carer" when, on the evidence, it could be at best said that care was shared between him and his wife. In using the phrase "primary carer" the judge was not, in my judgment, falling into the error of adopting a definition relevant, perhaps, in other contexts such as under the Immigration (EEA) Regulations 2016 when dealing with derivative rights of residence by individuals who are primary carers of an EEA national child. The point being made by the judge was, as is clear in para 89, that the appellant was the person who looked after his daughter at relevant times during the day (remembering, given her age, that she would be at school for much of this time) because his wife worked as a solicitor. He did not work. The judge was, in my view, saying no more than the appellant, if he were deported, would deprive his daughter of the support that he alone was able to give her during the working day. That involvement with his daughter, and his removal if he were deported, was a relevant factor in assessing the impact upon her of his deportation and whether it fell within the "unduly harsh" test required by Exception 2. The judge did no more than take into account the substance of that loss whether he was characterised as being the "primary carer" or simply the person who provided any required care during working hours.

58. Secondly, Ms Pettersen criticised the judge's reliance upon the psychotherapist's report given that, in para 91, he described that report as an "unimpressive document". Further, the judge had failed to take into account that what it said must have been based upon the 'self-serving' statements of the appellant and his family.

59. As regards the latter point, no doubt the judge was well aware of the source of the information upon which the psychotherapist's report was based.

60. Even though the report was not, in the judge's view, in the form of a medico-legal report, it was nevertheless written by a professional who had, at least, prepared it following an interaction with the appellant's daughter. In para 92, the judge explained that he gave that report, nevertheless, "some weight" because it was the opinion of a professional and, in his judgment, he accepted that the separation of the appellant from his daughter had "negative psychological consequences" upon her. It may be that the report could not be said to be the most persuasive report emanating from a relevant professional that can be imagined. However, the judge was entitled to give it "some weight" as part of the overall assessment of the evidence as to the impact upon the appellant's daughter of separation from the appellant, including her own evidence as to that.

61. Having correctly self-directed on the appropriate test and approach to the issue of "unduly harsh" in Exception 2, the evidence was, in my judgment, capable of sustaining the judge's finding that that test was met. It cannot be said that every judge would necessarily have reached that finding but that, as MM (Lebanon) as set out above makes plain, that in itself does not mean that a "generous" finding is Wednesbury unreasonable or perverse in that no reasonable judge properly directing him or herself could reach such a finding. I am not persuaded that the judge's

finding fell outside the range of conclusions that a reasonable judge properly directing himself could reach. For these reasons, I also reject Ground 2.

Rule 24 Point

62. That then leaves the rule 24 point raised by Mr Karnik, namely that the judge's adverse credibility finding should, itself, not be sustained. As Mr Karnik pointed out, given that the appellant had succeeded on all grounds, it was not possible for him to appeal this factual finding and so it was properly raised in a rule 24 reply (see Binaku (s. 11 TCEA; s. 117C NIAA; para 399D) [2021] UKUT 34 (IAC)). As I understood Mr Karnik, however, this point was only pursued if a "material error" was found on the basis of the respondent's grounds. In my judgment, it is now academic whether the judge's adverse credibility finding was sustainable. The appellant has succeeded both in establishing his claim under the Refugee Convention and Art 8 of the ECHR. In particular, the appellant has succeeded on the former ground even given the adverse credibility finding made by the judge. In those circumstances, it is unnecessary for me to reach any conclusion on the challenge raised in para 8 of the rule 24 reply. I would say, however, that the ground based simply upon a contention that the judge failed to give any, or any proper, weight to the view of the appellant's wife that the appellant was a genuine Christian convert fails to take into account para 75.3 of the judge's determination where he considered both the evidence of the appellant and his wife as being "inconsistent". The judge identified significant issues with the appellant's own evidence and that of other witnesses in reaching his adverse credibility finding. Had the point not become academic, I would have rejected the challenge set out in para 8 of the rule 24 reply.

Decision

63. For the above reasons, the First-tier Tribunal's decision to allow the appellant's appeal on asylum grounds and under Art 8 of the ECHR did not involve the making of an error of law. That decision, therefore, stands.

64. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
14 May 2021

TO THE RESPONDENT
FEE AWARD

Judge Evans made no fee award. That decision has not been challenged and I see no basis to depart from it and so it also stands.

Signed

Andrew Grubb

Judge of the Upper Tribunal
14 May 2021