**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: PA/00053/2017**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 2nd February 2018** | **On 13th March 2018** |

**Before**

**UPPER TRIBUNAL JUDGE FRANCES**

**Between**

**A A**
(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 L Tarlow, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a 21 years old Kurdish national of Iran. He appeals against the decision of First-tier Tribunal Judge Telford, dated 20 August 2017, dismissing his appeal against the refusal of his protection claim on asylum, humanitarian protection and human rights grounds.

2. The Appellant appealed on the ground that the judge erred in law in his treatment of the expert evidence in relation to the risk as a failed asylum seeker of Kurdish ethnicity and, secondly, in his assessment of the Appellant's *sur place* activities in failing to properly apply BA (Demonstrators in Britain - risk on return) Iran CG [2011] UKUT 36 (IAC) and to take into account the reported decision of AB & Others (internet activity – state of evidence) Iran [2015] UKUT 0257.

3. Permission to appeal was refused on ground 1 and granted on ground 2. First-tier Tribunal Judge Kelly stated:

> "The Tribunal was not assisted by the inclusion in the appellant's bundle of a large number of unreported decisions (both FtT and UT) or by the fact that Professor Joffe himself referred to SSH and HR [2016] UKUT 00308 (IAC) as the recent country guidance case (paragraph 1 of his report dated 26 August 2016). Be that as it may, the Tribunal was in any event entitled to adopt the analysis of the relevant background country information in SSH and HR in preference to the critique of that analysis that was provided by Professor Joffe in his report. In those circumstances, any error concerning the question of whether Professor Joffe's conclusions were generic or fact-specific was not arguably material to its outcome (it is also noted that the grounds do not challenge the statement, at paragraph 4 of the Tribunal's decision, that both parties had agreed that the asylum case actually came down to the issue of credibility). Permission to appeal on the first ground is accordingly refused."

> "It is however arguable that the Tribunal erred in failing to consider whether the Facebook comments that had been posted in the appellant's name (whether or not he was fully aware of the detail of their contents) might place the appellant at risk on return. This ground is heavily reliant upon the findings in AB and Others [2015] UKUT 0257 which as with SSH and HR above is *not* designated as country guidance. This appeal may therefore provide a useful opportunity for the Upper Tribunal to give guidance to the First-tier Tribunal as to how it should approach the purely factual findings that were made in that appeal. Permission to appeal on the second ground is accordingly granted."

4. In the Rule 24 response, the Respondent opposed the Appellant's appeal and stated:

> "The First-tier Tribunal Judge was well aware of the Facebook posts but gave cogent reasons for finding this would not place the appellant at risk upon return. There can be no presumption the Iranian authorities would be aware of the posts, and if the appellant was questioned at the pinch-point of return he can be expected to tell the truth that he has no idea what his account is or what the posts say because he is not literate. Indeed, he could not assist the authorities with accessing his account even if he wanted to because of illiteracy."

## Submissions

5. Mr Spurling submitted that he would like the court to note his criticism of the refusal of permission on ground 1. The parties did not agree that the issue in relation to the asylum claim was one of credibility and it was clear from the Appellant's skeleton argument that was not the case. Mr Spurling acknowledged that the judge was entitled to prefer the country guidance

case to the expert report, however, he failed to consider the content of that report which was entirely generic. The country guidance case of SSH and HR did not specifically deal with the point of Kurdish ethnicity.

6. In relation to the *sur place* activities and risk on return, Mr Spurling submitted that it was clear from the country guidance case of SSH and HR that returnees would be questioned and if there were concerns about their activities there would be further questioning, detention and potential ill treatment. Although the Appellant would not be at risk purely because he was a failed asylum seeker, the panel in SSH and HR did not consider the consequences because there was no evidence before them as to what happened to returnees. Mr Spurling submitted that applying the country guidance case of BA, whether the Appellant was a high or low-level political activist was not relevant because if the government knew that he was anti-regime then this was sufficient to bring him to the attention of the authorities and potentially put him at risk. In BA the government was not aware of the Appellant's involvement in demonstrations until his face appeared on YouTube and it was at that point that it was decided the government would be able to identify him and therefore he would be put at risk. BA dealt with the mechanism by which the authorities would come to know of any activity in the UK.

7. However, there was also evidence in the case of AB that returnees would be asked about their activities on Facebook when they were questioned on return and if there was anything less than flattering in the posts, then the returnee would potentially be at risk. Mr Spurling submitted that the judge did not specifically deal with the content of the Facebook posts. The judge effectively found that the Appellant was re-posting matters that were on other Facebook pages and that the Iranian authorities were not likely to take his anti-regime activities seriously.

8. Mr Spurling submitted that, even assuming that the Appellant cannot answer questions about the Facebook posts because he cannot read, then looking at pages 12 and 15 of those posts it would be immediately obvious to his interrogators that the Appellant is making anti-regime comments and showing anti-government support. On page 12 the Appellant was holding a flag, which showed that he was clearly hostile to the government and on page 15 the Appellant is holding the PJAK flag. The Appellant did not need to be able to read to interpret these posts or for the authorities to be able to access his account. His account was a public one and could easily be found from a search on the internet by his interrogators. Having seen what is posted there it would be obvious that the Appellant was supporting what is considered to be a terrorist organisation in Iran.
9. Mr Spurling submitted that these Facebook posts express hostility and political opposition to the regime. If the authorities became aware of them, it was a clear example of the Appellant expressing dissent. It did not matter about his motivation or the fact that he was an opportunistic demonstrator. The judge erred in law in failing to refer to BA at all. The judge failed to recognise that mere expression of dissent was enough to get the Appellant into trouble.

10. Mr Spurling relied on AB and submitted that, although it was not country guidance, there was relevant evidence of the likely reaction of the Iranian Government. The decision had been reported and the evidence relevant to risk on return was more recent. The judge failed to deal with this case in his decision.

11. Further, the judge found that the Appellant's inability to provide evidence of his own Facebook identity, or online address, access passwords, codes or content, undermined any conclusion that he would be questioned and expected to reveal the truth about his own anti-regime activities. Mr Spurling submitted that this finding was incorrect and was not an accurate reflection of the evidence that was before the judge. The Appellant acknowledged that he was illiterate and explained that his friends set up his account. Some of the posts he had linked by himself and some he had written by dictating to literate friends who had written them for him. He knew how to accept friendship requests and he knew the difference between private and public posts. He had ensured that his were the latter because he wanted all Iran to see them. He did not know the specific details of the post, but he knew that they were against the regime. The judge failed to make a clear finding about whether the Facebook posts were critical or hostile to the Iranian regime. The Appellant's account on Facebook was not password protected and anyone could have access to it. The fact that the Appellant could not assist the authorities was not relevant. The cases of AB and BA were highly relevant and the judge failed to have regard to the findings therein or apply the country guidance.

12. Mr Spurling submitted that particular concerns were likely to arise if the Appellant's name was searched on the internet. He would be at risk because of his Facebook posts, together with the fact that he was a failed asylum-seeker, of Kurdish ethnicity, who had exited illegally. It was clear from paragraph 34 of SSH and HR that Kurdish ethnicity heightened the risk of harm on return. Accordingly, the judge did not 'join the dots' and he failed to properly apply SSH and HR. The Appellant would not be at risk as a Kurd, *per se*, but that, added to the other concerns, could create a risk. The judge failed to apply the country guidance of BA; any expression of opposition to Iran could put the Appellant at risk if it came to the attention of the authorities. The Appellant will be questioned on application for travel documents and on return to Iran. It must be assumed he will tell the truth and therefore the authorities will be aware of his Kurdish ethnicity, his asylum claim and that he has posted anti-regime comments on Facebook.

13. Although there was no evidence that the Appellant was currently known to the authorities, the Appellant was carrying a flag at the demonstration and photographs were posted on Facebook. It was apparent from paragraph 65 of BA, that this was enough to put him at risk. The fact that he had expressed his dissent was enough to give rise to a significant profile to be anti-regime. The anti-regime comments in the posts on Facebook were enough in themselves without the photographs.

14. Mr Tarlow relied on the Rule 24 response and submitted that the findings at paragraphs 25 to 27 were open to the judge on the evidence before him and the challenge was merely a disagreement. It was pointed out that there was no disagreement with the judge's factual findings that the Appellant was not credible and had set up his Facebook page to bolster his weak claim. Mr Spurling argued that this was sufficient to put him at risk because the country guidance showed that it was likely the Appellant would be questioned and that an internet search would be carried out. The Facebook posts would, therefore, come to the attention of the authorities. They were clearly hostile and, from what was said at paragraph 65 of BA, that was sufficient to put him at risk. At that point Mr Tarlow stated that he no longer relied on the Rule 24 response and would not make any further submissions.

15. In response, Mr Spurling relied on paragraphs 49 and 58 of SA (Iranian Arabs – no general risk) Iran CG [2011] UKUT 41 (IAC) and submitted that the judge had erred in law in failing to apply country guidance and failing to have regard to the factual findings in AB. His conclusion that the Iranian authorities would not take the Appellant seriously, because he had fabricated his Facebook account to bolster his claim, was an irrational finding when one considered the evidence in the cases of BA and AB; the motivation behind any dissent was irrelevant. Mr Spurling invited me to find an error of law.

## Relevant Case Law

16. BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 36 (IAC):

> "65. As regards the relevance of these factors to the instant case, of especial relevance is identification risk. We are persuaded that the Iranian authorities attempt to identify persons participating in demonstrations outside the Iranian Embassy in London. The practice of filming demonstrations supports that. The evidence suggests that there may well have been persons in the crowd to assist in the process. There is insufficient evidence to establish that the regime has facial recognition technology in use in the UK, but it seems clear that the Iranian security apparatus attempts to match names to faces of demonstrators from photographs. We believe that the information gathered here is available in Iran. While it may well be that an appellant's participation in demonstrations is opportunistic, the evidence suggests that this is not likely to be a major influence on the perception of the regime. Although, expressing dissent itself will be sufficient to result in a person having in the eyes of the regime a significant political profile, we consider that the nature of the level of the *sur place* activity will clearly heighten the determination of the Iranian authorities to identify the demonstrator while in Britain and to identify him on return. That, combined with the factors which might trigger enquiry would

lead to an increased likelihood of questioning and of ill-treatment on return."

17. SSH and HR (illegal exit – failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC):

> "25. We should say at this point that we have no hesitation in agreeing with the submissions of Mr Mills that the evidence shows a real risk of persecution/ill-treatment in breach of Article 3 for a person who is imprisoned in Iran. This appears to be common ground. In his skeleton, Mr Mills quotes from paragraph 3.17.13 of the Respondent's Operational Guidance Note: 'As conditions in prisons and detention facilities are harsh and potentially life-threatening in Iran, they are likely to reach the Article 3 threshold'."

18. The conclusions of SSH and HR can be summarised as follows:
    (i) At [22] - returnees without passports are likely to be questioned.
    (ii) At [23] - only if concerns arise about previous activities in Iran, or wherever they have returned from, would there be any risk of further questions, detention or ill-treatment.
    (iii) At [25] - anyone at risk of imprisonment in Iran is at risk of persecution.
    (iv) At [31] - a person guilty of another offence may additionally be imprisoned for illegal exit.
    (v) At [32] - the mere facts of illegal exit or having made an asylum claim abroad do not create a risk of ill-treatment. There are not enough examples of cases of ill-treatment about which sufficient is known.
    (vi) At [34] - Kurdish ethnicity may be an exacerbating factor for a returnee otherwise of interest.

19. AB and Others (internet activities – state of evidence) Iran [2015] UKUT 0257

> "451. It cannot be the case that a real risk of persecution is generated simply by making some unsavoury remark or mild criticism of the government of Iran. We make it clear that this is not because the government of Iran is tolerant of mild criticisms. There is evidence that it is not. Mild concerns can be enough as can association with western music or western ideas or western fashions. All of these things attract disapproval and, we are satisfied, might attract persecution.
>
> 455. We do reject Mr Rawat's submission that a high degree of activity is necessary to attract persecution. It is probably the case that the more active persons are the more likely they are to be persecuted but the reverse just does not apply. We find that the authorities do not chase everyone who just might be an opponent but if that opponent comes to their attention for some reason then that person might be in quite serious trouble for

conduct, which to the ideas of western liberal society seems of little consequence.

456. It was accepted that being resident in the UK for a prolonged period may lead to scrutiny and screening on arrival.

457. We accept the evidence that some people who have expected no trouble have found trouble and that does concern us. We also accept the evidence that very few people seem to be returned unwillingly and this makes it very difficult to predict with any degree of confidence what fate, if any, awaits them. There is clear evidence that some people are asked about their internet activity and particularly for their Facebook password. We can think of no reason whatsoever to doubt this evidence. It is absolutely clear that blogging and activities on Facebook are very common amongst Iranian citizens and it is very clear that the Iranian authorities are exceedingly twitchy about them. We cannot see why a person who would attract the authorities sufficiently to be interrogated and asked to give account of his conduct outside of Iran would not be asked what he had done on the internet. Such a person could not be expected to lie, partly because that is how the law is developed and partly because, as is illustrated in one of the examples given above, it is often quite easy to check up and expose such a person. We find that the act of returning someone creates a ‘pinch point’ so that returnees are brought into direct contact with the authorities in Iran who have both the time and inclination to interrogate them. We think it likely that they will be asked about their internet activity and likely if they have any internet activity for that to be exposed and if it is less than flattering of the government to lead to a real risk of persecution.

460. We find that our main concern is the pinch-point of return. A person who is returning to Iran after a reasonably short period of time on an ordinary passport, having left Iran legally, would almost certainly not attract any particular attention at all. However, very few people who come before the Tribunal are in such a category. At the very least people who would be before the Tribunal can expect to have had their ordinary leave to be in the United Kingdom to have lapsed and may well be travelling on a special passport. Nevertheless, for the small number of people who would be returning on an ordinary passport having left lawfully we do not think that there would be any risk to them at all.

464. We do not find it at all relevant if a person had used the internet in an opportunistic way. We are aware of examples in some countries where there is clear evidence that the authorities are scornful of people who try to create a claim by being rude overseas. There is no evidence remotely similar to that in this case. The touchiness of the Iranian authorities does not seem to

be in the least concerned with the motives of the person making a claim but if it is interested it makes the situation worse, not better because seeking asylum is being rude about the government of Iran and whilst that may not of itself be sufficient to lead to persecution it is a point in that direction.

467. The mere fact of being in the United Kingdom for a prolonged period does not lead to persecution. However, it may lead to scrutiny and there is clear evidence that some people are asked about their internet activity and particularly for their Facebook password. The act of returning someone creates a 'pinch point' so that a person is brought into direct contact with the authorities in Iran who have both the time and inclination to interrogate them. We think it likely that they will be asked about their internet activity and likely if they have any internet activity for that to be exposed and if it is less than flattering of the government to lead to at the very least a real risk of persecution."

**Background Material**

20. The Respondent's July 2016 CIG Iran Kurds and Kurdish Political Groups noted as follows:

"5.2.3 The activities that Kurds conduct that can be perceived as political activities include social welfare and solidarity activities."

"5.2.10 Asharq Al-Awsat reported in January 2016 that:

> 'Kurdish opposition sources in Iran have revealed yesterday that the executions carried out by the Iranian regime against the Kurds and other components are increasing annually, indicating that during the past nine months, according to the Iranian calendar, Iran executed more than 750 people, the majority of whom were Kurdish'."

"11.1.5 On 10 November 2015, International campaign for human rights in Iran reported on a Sunni Kurd who was facing execution. The report noted that:

> 'Shahram Ahmadi has been sentenced to death in Iran due to his activism as a Sunni Muslim and a Kurd. Members of ethnic or religious minorities in Iran who engage in criticism of the government are singled out by authorities for particularly harsh treatment, and there is a well-documented history of the Judiciary disproportionately meting out capital punishment to minority activists. Making speeches, distributing books and pamphlets, or

opposing the government are not capital offenses. Unfortunately Judge Moghisseh said that Shahram's first two crimes are that he's a Sunni and a Kurd. Therefore, he was presumed guilty from the start.'"

21. The Policy Summary of the Respondent's July 2016 CIG Iran Kurds and Kurdish Political Groups states:

> "2.3.3 The situation is different for those who become or are perceived to be involved in Kurdish political activities. The authorities have no tolerance for any activities connected to Kurdish political groups and those involved are targeted for arbitrary arrest, prolonged detention, and physical abuse. Even those who express peaceful dissent are at risk of being accused of being a member of a banned Kurdish political group. Those involved in Kurdish political activities also face a high risk of prosecution on vague charges such as 'enmity against God' and 'corruption on earth'.
>
> 2.3.4 Persons with a high political profile as well as human rights activists and those seeking greater recognition of their cultural and linguistic rights are targeted by the authorities because of their political opinion. However, even a person speaking out about Kurdish rights can be seen as a general threat. If the Iranian regime catches a perceived sympathizer carrying out an activity perceived to be against the government, the consequences for him and his family can be result in arbitrary arrest, detention and possible ill-treatment.
>
> 2.3.5 Family members of persons associated with a Kurdish political group are also harassed and detained. In pre-trial detention in Evin Prison, members of minority ethnicities, including Kurds reportedly were repeatedly subjected to more severe physical punishment or torture than other prisoners, regardless of the type of crime accused. The execution rate is disproportionately high among Kurds in Iran. A large proportion of these executions are based on accusations of drug smuggling, but sometimes political activists are executed under the pretext of being drug smugglers."

## Discussion and Conclusion

22. The relevant facts in this case are:
    (i) The Appellant was of no adverse interest to the authorities before he left Iran.
    (ii) There was no risk of persecution on account of his illegal exit or the fact that he was a failed asylum seeker.
    (iii) He is of Kurdish ethnicity.
    (iv) The Appellant was not a credible witness and had no political profile.

(v) He attended one demonstration and, with the assistance of others, he posted anti-regime comments and photographs on a Facebook page under his own name.

23. The First-tier Tribunal Judge made the following findings:
    (a) The Appellant had created his public profile on Facebook as a means to bolster his patently weak asylum claim.
    (b) The Appellant's *sur place* activities had been manufactured in order to support his claim.
    (c) The Iranian authorities would not have any adverse interest in the Appellant because it was clear that he had manufactured his Facebook account and therefore they would not take him seriously.

24. In BA, the Tribunal found that even low-level opportunistic activity was potentially dangerous if the authorities came to know of it. In SSH and HR, the Tribunal found that returnees will be questioned and will be at risk of further questioning, detention and potential ill-treatment if there are any particular concerns arising from their previous activities either in Iran or in the UK.

25. The Appellant left Iran about a year and a half ago and will be returned on an emergency or temporary travel document. Applying SSH and HR, he will be questioned on return. It is likely that he will be asked about what he was doing in the UK and he cannot be expected to protect himself by lying.

26. The authorities are reasonably likely to discover his anti-government activity on Facebook. Even if the Appellant is unable to explain how he posted comments on Facebook because he is illiterate, it is likely that the authorities would easily be able to access his Facebook account, without any of his instructions, and would be able to see the photographs and the comments, which are clearly anti-regime.

27. The judge's finding that the authorities would have no adverse interest in the Appellant on return was contrary to the country guidance in BA (even low level opportunistic activity could give rise to a risk on return) and against the weight of the evidence in AB, which makes factual findings on matters which were specifically argued before the judge and, as a reported Upper Tribunal decision, he should have taken it into account. I find that the judge erred in law in failing to refer to, or apply, either BA or AB. I set aside his decision to dismiss the appeal and remake it as follows.

28. I find that it is likely the Appellant would be questioned on return to Iran and it is reasonably likely that the authorities have the means and the inclination to carry out an internet search and access his Facebook account. The Appellant will be perceived as being anti-regime even though his motivation was to improve his chances of asylum and the posts do not necessarily represent his political opinion. This will put him at risk of further questions, detention and potential ill-treatment. The fact that he is of Kurdish ethnicity will exacerbate the situation.

29. I find that there is a reasonable degree of likelihood that the Appellant will be at risk of persecution, serious harm or treatment in breach of Article 3 on return to Iran.

30. Accordingly, I find that there is an error of law in the judge's decision to dismiss the appeal. I set the decision of 20 August 2017 aside and re-make: The Appellant's appeal against the refusal of his protection claim is allowed on asylum and human rights grounds.

**Notice of Decision**

Appeal allowed.

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

**J Frances**

Signed Date: 9 March 2018

Upper Tribunal Judge Frances

**TO THE RESPONDENT**
**FEE AWARD**

No fee is paid or payable and therefore there can be no fee award.

**J Frances**

Signed Date: 9 March 2018

Upper Tribunal Judge Frances