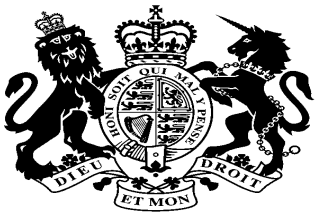

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12397/2018

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
on 15 August 2019	**on 21 August 2019**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

M

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: *Mr K Forrest, Advocate, instructed by Freedom Solicitors, Birmingham*
For the Respondent: *Mr A Govan, Senior Home Office Presenting Officer*

DETERMINATION AND REASONS

1. The appellant is a Kurdish citizen of Iran, aged 22 at the time of the hearing in the UT. Judge Mackenzie dismissed his appeal to the FtT by a decision promulgated on 28 January 2019.

2. In an application dated 21 May 2019, the appellant asked for extension of time to apply and for permission to appeal to the UT on 3 grounds.

3. On 24 June 2019 the UT extended time and gave permission on each ground, but in particular regarding:

> "… the FtT's consideration of risk on return as an insincere political activist. It is arguable that the authorities might not be as discerning as the Judge suggests at [56]."

4. In an application under cover of a letter dated 7 August 2019 the appellant seeks to adduce "evidence" under rule 15 (2A):

   (i) a witness statement by the appellant about his activities in the UK;

   (ii) documentary evidence of the appellant's online activities; and

   (iii) the report of *HB (Kurds)* Iran CG [2018] UKUT 00430.

5. Mr Forrest accepted that the further evidence would become relevant only if and when the decision fell to be remade, not at the error of law stage.

6. Case law is not evidence. *HB* was published on 12 December 2018. The FtT heard the case on 3 December 2018 and was actively considering its decision at least up to 3 January 2019 - see [16]. While this is to impose a high standard, it is the duty of the FtT to consider and apply country guidance even if not prompted by parties and even when published after a hearing but prior to finalising a decision. Mr Govan, realistically, did not argue against the FtT's decision being tested by reference to *HB*. He submitted that did not indicate another outcome.

7. Mr Forrest supplied a skeleton argument, which says that the judge erred in law for two reasons: firstly, taking grounds 1 and 2 together, on "the nature and extent of the appellant's political activity", and secondly, by failing to consider and apply country guidance.

8. Further to the first aspect, and to his skeleton, Mr Forrest noted that the claim based on activities in Iran had been exhausted, and that the remaining case was based on *sur place* activities only. He said that the judge recorded the evidence of Facebook activity in the UK, and said she gave it very careful consideration, but went on without any further comment to deal with the evidence of two witnesses, which she did not accept. She did not return to the Facebook evidence other than to say at [49] it was not clear how that was "in the public domain", which was the wrong approach. It was a misunderstanding that the appellant had to prove such evidence was in the public domain. The cases to which she referred indicated that risk arose from materials in the private domain. The pinch point of risk was return "in circumstances where the Iranian authorities were particularly sensitive to persons (such as the appellant) who have spent a long time outside Iran". *AB* [2015] UKUT 257, although not a CG case, indicated that such persons might have to disclose their internet history, i.e. matters such as Facebook postings which are in the private not the public domain, and so would be forced to disclose postings critical of the Iranian government and supportive of PJAK. In so far as it might be open to the appellant to delete his postings, he could not be expected to lie - *AB* at [457].

9. Turning to country guidance, Mr Forrest submitted that applying *HB*, the appellant was a national of Iran and a Kurd; he has been absent from Iran since 2015; on return, he is likely to be detained; he has engaged extensively on Facebook against the

authorities and in support of PJAK, or at least the FtT had given no reasons for finding that he had not engaged in such activity; applying *AB* and *HB*, he would be at risk; the decision of the FtT did not fall to be reversed outright, but there were errors which called for remittal.

10. Mr Govan submitted along these lines. The judge correctly applied *Devaseelan*. She did not fail to make findings about the appellant's Facebook. It was implicit, but clear, that she accepted he made the postings. There was no error in her finding that he had no genuine beliefs. That did not exclude protection, but the appellant did not benefit from any doctrine of not being expected to lie. Deleting posts was a different matter. There was nothing wrong with finding that he would do so. There was no reason to think that he would unnecessarily put himself in harm's way. Case law said that protection was needed when there were factors over and above ethnicity. Fabricated claims did not constitute such a factor. There was evidence that the authorities used sophisticated methods, knew about Facebook, and might ask a suspect to log in, but there was no evidence of ability to pick up on information within a private account, or which had been deleted. The appellant had not established where the "risky" photographs came from, or that they were now accessible to the authorities. There was no error in the FtT's findings on the facts, and applying country guidance to those findings, no entitlement to protection.

11. I reserved my decision.

12. The grant of permission was on the view that arguably the authorities on questioning the appellant might persecute him on a disclosure even of insincere political activism. That perhaps remains debatable ground, but the findings in this case do not bring the appellant to the pinch point of risky disclosure.

13. I accept, as Mr Govan said, that the FtT did find, clearly enough, that the appellant has made risky postings on Facebook. He did not establish, however, a real risk of those coming to attention of the Iranian authorities.

14. The FtT at [54] said there was no reason for the appellant not to delete his Facebook account.

15. That is a sound finding. Having been found to have set up the account in bad faith, there is no reason to think that he would not take that elementary precaution before return.

16. Mr Forrest accepted that the appellant did not in the FtT seek a finding about the manner of his exit from Iran, and that no such finding was made. He has been found generally not credible. He did not show that the only course available to him is return on a travel document marking him out as a failed asylum seeker, rather than on a passport. There is no presumption of enforced return. Refusal to return voluntarily, where available, does not contribute to a claim for protection: see *Macdonald's Immigration Law and Practice*, 9th ed., ¶12.24 & ¶12.28, and cases there cited.

17. If not marked out as a failed asylum seeker, it is not likely the Iranian authorities would ask the appellant for details of his history in the UK.

18. There is a general principle of not being expected to lie, by making false claims of political allegiance, or by denying religious convictions or sexual identity. However, the appellant cited no authority which would entitle him to a presumption that if asked, he would volunteer to his national authorities, against his own interests, details of activities he undertook in bad faith. That notion appears to be a considerable stretching of the case law.

19. There would be no sensible reason to find as a fact that the appellant would volunteer such information.

20. Somewhat similar arguments in cases of activities at low level and in bad faith were rejected by the UT and by the Court of Appeal in *SSH and HR* (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC) (see the headnote, and ¶23, 29-30, and 34) and in *AS* (Iran) [2017] EWCA Civ 1539 (¶32-33).

21. The FT found at [57] no risk on return on account of (insincere) political opinion and at [58] no risk even as a Kurdish returnee who had left illegally (if such are the facts about his exit and likely return). The grounds and submissions for the appellant do not show that those conclusions should be set aside for having involved the making of an error on a point of law. The decision of the FtT shall stand.

22. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his 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.

15 August 2019
UT Judge Macleman