Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06655/2016

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Decision promulgated**
on 15 August 2017	**on 17 August 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SA
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Barnfield instructed by Duncan Lewis & Co, Solicitors.
For the Respondent: Mrs Aboni Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Judge Hawden-Beal (the Judge) promulgated on 31 January 2017 in which the Judge dismissed the appeal on both protection and human rights grounds. The appellant sought permission to appeal which was granted by an acting resident judge of the First-tier Tribunal who found it was

arguable that in dismissing the appeal the Judge failed to consider whether upon return to Iran the appellant's online activity will come to the attention of those who are interrogating him at the airport. Permission was granted solely on this ground.

2. The Secretary of State in her Rule 24 response, dated 22 June 2017, accepts that the Judge has not adequately dealt with the potential risk to the appellant arising from his Internet activity notwithstanding her finding that it has been done simply to bolster the asylum claim.
3. The decision of the First-tier Tribunal is, therefore, set aside although all findings of the First-tier Tribunal other than those relating to any risk on return to Iran as a result of the appellant's online activities shall be preserved findings.
4. The advocates confirmed there was no need for any further oral evidence. Additional copies of posts placed upon the appellant's Facebook account were provided and admitted pursuant to Rule 15(2A) of the Upper Tribunal procedure rules. The Upper Tribunal proceeded with the hearing to allow it to remake the decision based on further submissions made by the advocates.

Background

5. The appellant is an Iranian national born in 1986 who claimed to have left Iran in November 2015. The appellant travelled through various European countries and was fingerprinted in Germany. The appellant arrived in the UK on 16 January 2016 and claimed asylum after he had been arrested.
6. The Judge considered the evidence with the required degree of anxious scrutiny and sets out findings of fact from [30] of the decision of the First-tier Tribunal. The preserved findings can be summarised in the following terms:

    i. It is not accepted the appellant is wanted by the Iranian authorities because of his involvement with the Workers Communist Party of Iran (WPI) [30].
    ii. The Judge did not accept the appellant was involved with the WPI in Iran as claimed, that his family home had been raided and his laptop and WPI leaflets confiscated by the authorities, or that he is wanted by the authorities [35].
    iii. The appellant is not at risk of persecution or serious ill-treatment upon his return to Iran because of his claimed involvement with this group [35].
    iv. Having considered the case of SSH [2016] UKUT 308, in light of the fact the appellant is an Iranian Kurdish ethnicity, and in light of the fact there has been no adverse interest in the appellant by the authorities, the Judge concludes the appellant would not be at risk on return as a failed asylum seeker who left Iran illegally of Kurdish ethnicity.

7. The appellant claimed a real risk on return, in addition to the above, as a result of his attending the 1st May demonstration in London and posting his photograph on what was described as a Facebook account of a well-known anti-Iranian government activist. The appellant has produced in his evidence a list of his eight Facebook friends including in the list WPI leaders and organs of the party as of 2007. The Judge noted the appellant has attended the 1st May event in London along with many thousands of other people which was not a demonstration against Iran but a Socialist demonstration in which many groups to part and not a demonstration solely against the Iranian regime which only took place outside the Iranian embassy. The Judge refers to a photograph with the leader of the WPI the following day of which there was no evidence it had been posted on Facebook and no evidence the Iranian authorities will be in the slightest bit interested in the appellant. The Judge noted the appellant claimed that his Facebook is public which means that anybody can see his photographs including the authorities in Iran which means he has to be at risk on return.
8. In the skeleton argument, prepared for the purposes of this hearing, it is claimed the appellant's case is that his activities online will be of note and interest to the authorities giving rise to a real risk on return. It is asserted the appellant will be interrogated on return.
9. The claim in the skeleton argument at [6] that the appellant has previously come to the attention of the Iranian authorities because of his political activities is contrary to the preserved finding set out above and is not accepted as having been proved.

Discussion

10. It is not disputed, as contended by the appellant, that the Tribunal in *AB and others (Internet activity- state of evidence) Iran [2015] UKUT 257 (IAC)* found:

    i. Iran is a country which persecutes some people who oppose it (para 449);
    ii. Mild concerns and/or evidence of 'westernisation' can be sufficient to attract disapproval and might attract persecution (paragraph 451);
    iii. Some monitoring of activities outside of Iran is possible and occurs (453);
    iv. It is probably the case that the more active the person the more likely they are to be persecuted, but the reverse does not apply. If an opponent comes to the authorities 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 (para 455);
    v. Some people are asked about their Internet activity and for their Facebook passwords (para 457);
    vi. The Iranian state is increasingly touchy and concerned by Internet activity (particularly blogging and Facebook posts) and

is very aware of the power of the Internet and determined to restrain it (paras 456, 457, 458);

vii. 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. It is likely they will be asked about their Internet activity and likely if they have Internet activity for that to be exposed and if it is less than flattering of the government to lead a real risk of persecution (para 457). This 'pinch point' was the main concern of the Upper Tribunal (para 470);

viii. Of particular concern as to this, are people returning after some time in the UK or for example on special travel documents (i.e. often those who have been before the tribunal) (para 460, 470 – 471);

ix. Claiming asylum may enhance the risk further (para 472).

11. Mr Barnfield accepted that the decision in *AB* is not a country guidance case but explains issues concerning the 'pinch point', which he claims will happen in any event.

12. The appellant is likely to be returned other than on a valid Iranian passport which may enhance the risk of questioning by the Iranian authorities.

13. The issue in this case is whether, if the appellant is questioned and asked about Internet activities on return, his responses will give rise to a real risk sufficient to entitle the appellant to a grant of international protection.

14. Mr Barnfield submitted the Iranian authorities are very concerned about their image abroad and not that concerned about the motivation for why an individual may have posted entries in their social media accounts. The First-tier Tribunal judge found "The fact that the appellant has left his Facebook page open to the world to see, when there are various privacy settings which he could utilise, such as allowing only friends to see his photographs, his timeline or tag him in photographs, suggests to me that this has been deliberate in an attempt to bolster his asylum claim". Such sur plas activities may be disingenuous but it is how they are viewed through the eyes of any potential persecutor that is the relevant issue. In this respect, if information is disclosed that the Iranian authorities consider to be sufficiently contrary to the interests of the Iranian State a real risk of ill-treatment may arise.

15. The claim to have attended a Labour Day rally on 1st May in the UK, International Labour Day, is noted. This occasion is celebrated throughout the world and is unlikely, per se, to create a real risk to the appellant. As the First-tier Judge noted this was a celebration attended by many groups not conducted in front of the Iranian embassy and not a specifically anti-Islam or anti- Iran demonstration. The writer has judicial knowledge that the Islamic Republic News Agency (IRNA) in an article published on 1 May 2015 carried a headline "Iranian workers hold rally on Labor Day after 8-year interruption". In many countries,

Labour Day" is synonymous with, or linked with, International Workers' Day, which occurs on 1 May.

16. Mr Barnfield was asked at the conclusion of his submissions and reply whether, even though the appellant had made the entries in his Facebook account detailed in the evidence, he could not simply delete such entries before his return, meaning that even if the Facebook account was accessed there would be nothing adverse to the Iranian authorities to discover. Mr Barnfield's reply can be summarised in terms:

    i. Although the appellant could delete some entries from his Facebook account there could be evidence of posts made which could be "out there".
    ii. The authorities could have seen the entries already as result of the fact they monitor Internet activities.
    iii. As the appellant's Facebook account shows he shares posts such as the May Day protest with others, this shows this has happened and so his activities are "out there".

17. When asked where the individuals the appellant is said to have shared his activities actually are, Mr Barnfield indicated that he believed that the people are politically active within Iran but there was insufficient evidence to support such a contention.
18. The relevance of social media in the field of immigration and asylum cases has grown considerably in recent years. Many asylum seekers, particularly from countries such as Iran, are "tech savvy" with access to devices enabling them to create social media accounts such as Facebook and to be able to operate those accounts recording, posting, and sharing information. Such activities have given rise to a further aspect of claims for international protection based upon a risk that may arise as a result of such activities.
19. I accept the submission that however disingenuous an activity may be, it is how such will be viewed through the eyes of any potential persecutor that must be considered.
20. In *AB,* the Upper Tribunal held that the material put before them did not disclose a sufficient evidentiary basis for given country or other guidance upon what, reliably, can be expected in terms of the reception in Iran for those returning otherwise than with a "regular" passport in relation to interest that may be excited from the authorities into Internet activity, as might be revealed by an examination of blogging activity or a Facebook account. The reason that decision was reported is solely to enable the evidence considered by the Upper Tribunal to be placed in the public domain.
21. The Court of Sessions, Outer House, in the decision in *EZ v Secretary of State for the Home Department [2017] CSOH 29* repeated that *AB* is not a country guidance case and that to say that a great deal of activity was not necessary for someone to become prominent, which was the import of the last sentence in paragraph 466 of *AB,* was not the same as saying that all one needs to show was that the applicant

carried on a little activity and that the risk could not be excluded that he had become known to the authorities. The onus was always on the applicant to establish his claim.

22. It is not disputed that the Iranian authorities operate a sophisticated Internet monitoring system which enables them to identify individuals accessing specific websites, using certain search terms in email correspondence or posting certain multimedia files and that such online use activity may be readily identifiable, the user traced, and/or the relevant online activity blocked. It is not suggested in this case that either the appellant's own Facebook account or those with whom he claims to have shared content with have been blocked, indicating they have not come to the attention of the Iranian authorities to the extent that such action had been deemed necessary, unlike many activists in Iran.

23. Recent news reports regarding companies such as Google and the Iranian authorities, in relation to privacy issues, informed the extent of Iranian data retention legislation mandating Internet service providers maintain logs of all user activities for three months, although it is also the case that due to security and privacy controls in place, as well as the sheer volume of data on the Facebook platform it must be extremely technically challenging to copy meaningful amounts of Facebook data. It was not established, even though it may be theoretically possible, that the Iranian government could have comprehensive copies of all Facebook content that has been generated or accessed globally or even within Iran. This finding is supported by the reference in *AB* to the need for an individual to provide their Facebook password to the Iranian authorities to allow the authorities to access the Facebook account in question to consider whether any of the content contained therein gives rise to a cause for concern. If the authorities had access to this information through their own internal controls, arguably, there would be no need for an individual's assistance in accessing such data.

24. The finding of the Judge that the appellant has not come to the adverse attention of the Iranian authorities, and no evidence of any adverse attention since, is of importance as it does not establish that the Iranian government are likely to have been more focused with data collection endeavours by targeting the appellant.

25. It is accepted some of those named by the appellant in his contact list may fall within a group of targeted individuals or groups using Internet inspection capabilities based upon websites and Facebook pages which could result in a broadening to include all members of a specific group or individuals that are friends of or have commented on content posted by a specific person. It is accepted that targeted groups can be monitored extensively and all online activity inspected in real-time and actively archived on the basis of previous decisions relating to this issue. No evidence was provided, however, that this is the case in relation to the named individuals in this appeal.

26. The reason the question was put to Mr Barfield relating to the ability of the appellant to delete Facebook entries was to provide him with the

opportunity to comment upon an issue of which this Tribunal has specific knowledge namely that a Facebook user can remove their account in its entirety, including all posts/comments made, articles saved, media uploaded etcetera via a dedicated page on the Facebook website and initiate an account deletion process. In this case, it was held by the Judge that the appellants claim to have an adverse political profile was not credible and so it is not made out that deleting the entries on the appellants Facebook account would infringe the *HJ (Iran)* principle as it would not be, in effect, asking the appellant to deny a fundamental aspect of his make-up, namely a genuinely held political belief.

27. The effect of deleting a post also has an impact upon whether a post can still be viewed. The reference to "post" on Facebook is a reference to user generated content, typically a picture, website link, and/or text. The effect of deletion is that the original Facebook post and any copies shared by other users cannot be viewed after being deleted.

28. It is accepted that Facebook retains data about accounts created on social network for analytical purposes but it is not made out that it retains accessible or publicly visible information for deleted or erased accounts. Data on Facebook held by Facebook is encrypted and it has not been made out that this information is available to either the public or law enforcement agencies or could be reconstructed into any meaningful form.

29. Whilst the appellant may have shared media made by a third party by clicking the "share" button or that media on the appellants Facebook account may have been labelled "like", upon the deletion of a Facebook account all comments such as "likes" and shared content is removed. This means the content is no longer visible to users of the Facebook service or members of the public and people references to content being shared is removed. Similarly, when a person deletes their account all references that may identify that person are no longer visible to Facebook users, the public or any lawful access by investigating agencies meaning names, comments, likes and user IDs are no longer available.

30. Similarly, it is known that if a person deletes a post that they originally created not only the first person but also subsequent persons who reviewed the post will no longer be able to view them for, in effect, the original post will have vanished from their respective timelines.

31. It is accepted that copies of posts printed for the purposes of these proceedings, and therefore in hardcopy, will not be affected by any electronic data removal but it is also not made out that any hard copies of such documents are likely to have come to the attention of the Iranian authorities.

32. The Judge was correct to refer to accessibility to the appellant's account and to have found that the fact no restrictions on access had been included supports the suspicions of the Judge that the adverse entries have been made solely for the purposes of bolstering an otherwise weak asylum claim. Users of Facebook will be aware of restrictions available to them in the following terms:

- Public anyone on or off Facebook
- Friends user's friends on Facebook
- friends except don't show some friends
- specific friends only show to some friends
- only me only the user can view

33. The restriction "friends" is the default setting on Facebook. It is also known that a person can be a member of a private group composed of approved membership by a group administrator in relation to which no content will be publicly visible as any posts and comments are only visible to members of that private group. Individuals of any party with an adverse political opinion could therefore create such a group.
34. It is accepted that a public post can be viewed using a search function on Facebook, through third-party services where the public Facebook post has been shared by news media outlets blogs or commercial websites, or using search engines such as Google to search for specific people groups on organisations, although for each of these methods once a Facebook post or account is deleted the content will not be visible/accessible to the public or any law enforcement agency.
35. This is clearly a complex issue but as recognised by the Courts, the onus is always upon the appellant to establish his claim. It has not been made out that the appellant is of any adverse interest to the Iranian authorities. It is not made out that it will be unlawful or improper for the appellant to delete his Facebook entries or delete his account in its entirety which will have the effect of making any previous entries not visible and not accessible to the public or any law enforcement agencies even if the same have been shared with others. It has not been made out that others named within the appellants list will have created copies of any entry made by the appellant or have any data that could be linked to the appellant that has been discovered by the Iranian authorities. Notwithstanding the activities of the Iranian authorities it has not been made out that every post has been copied or viewed or that this is physically possible considering the volume of data passing through Facebook. It is not made out, that the appellant has established any credible real risk of an adverse profile being attributed to him prior to any return to Iran. It has not been made out that there is any reasonable likelihood of the Iranian authorities being aware of monitoring the appellants Facebook entries.
36. The appellant will therefore return to Iran as no more than a failed asylum seeker of Iranian Kurdish ethnicity. The appellant will return on a special travel document and may be questioned by the authorities of return at what is described in *AB* as the 'pinch point'. The appellant is not expected to lie about any fundamentally held belief contrary to the *HJ (Iran)* principle but he would not be expected to do so as his claim to have an adverse political opinion was not found to be credible. The appellant may be asked, as he is returning from the UK, if he has a Facebook account. It is not a fundamental right for an individual to have a Facebook account the denial of which amounts to

any breach of the *HJ (Iran)* principle. Mr Barnfield's submission that if the authorities know the appellant has a Facebook account but he refuses to provide his password he may be damned by his lack of cooperation may have merit, but it is not made out that the authorities are where the appellant has a Facebook account on the evidence before this Tribunal. Whilst it is accepted there is nothing to stop the appellant opening a new Facebook account there is no reason why this should contain any adverse postings. Therefore, even if the appellant provides a password for a new account to the Iranian authorities there is no evidence there will be a need for anything to be on a new account which creates a real risk of ill-treatment. None of the existing case law goes as far as finding that merely having a Facebook account gives rise to a plausible real risk of persecution or entitlement to a grant of international protection. There is no evidence that opening a fresh account will cause previous entries to be linked to that account.

37. It has not been made out that the appellant will face a real risk of adverse treatment on return as a result the entries currently posted on his Facebook account once they have been deleted. It has not been established on the evidence that is not reasonable in all the circumstances to expect the appellant to delete such entries.

38. The appellant will be no more than a failed asylum seeker of Kurdish ethnicity in relation to whom it has not been established a real risk of ill-treatment sufficient to amount to persecution or a breach of the appellant's article 3 rights is made out.

39. On the evidence and submissions made available to this tribunal, the appellant has failed to discharge the burden of proof upon him to the required lower standard of proof applicable to protection appeals to establish he is entitled to a grant of international protection. Accordingly, the appeal is dismissed.

Decision

40. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

41. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……

Upper Tribunal Judge Hanson

Dated the 16 August 2017