



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/06426/2017

THE IMMIGRATION ACTS

**Heard at Birmingham
On 5 December 2018**

**Decision & Reasons Promulgated
On 11 January 2019**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

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(ANONYMITY DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Woodhouse (of HS Immigration Consultants)
For the Respondent: Mr D Mills (Senior Home Office Presenting Officer)

DECISION AND REASONS

Introduction

1. The claimant is a national of Iran. He was born on 11 May 1984. He entered the United Kingdom (“UK”) for the first time on 9 October 2015, having obtained leave to do so for the purposes of study. So, he left Iran lawfully travelling on a lawfully obtained Iranian passport. He returned to Iran for temporary purposes in December 2015 but came back to the UK in January 2016. He again returned to Iran for temporary purposes in May 2016, before coming back to the UK in June 2016. He was due to complete his studies and return to Iran in January 2017 but, on 22 December 2016, he claimed asylum and has remained in the UK ever since. On 21 June 2017 the Secretary of State made a decision to refuse to grant him international protection. He appealed

to the First-tier Tribunal (“the tribunal”) and his appeal was heard on 3 August 2017. On 7 August 2017 the tribunal decided to dismiss his appeal and its decision was sent to the parties on 10 August 2017. The claimant then obtained permission to appeal to the Upper Tribunal. That led to a hearing before the Upper Tribunal (before me) and, thereafter, to my decision of 8 August 2018 in which I set aside the tribunal’s decision, whilst preserving the bulk of its findings, and directed a further hearing before the Upper Tribunal (again before me) so that the decision could be remade. That hearing took place on 5 December 2018. Representation was as stated above and I am grateful to each representative. What follows is an explanation as to why, in remaking the decision, I have decided to allow the claimant’s appeal from the Secretary of State’s decision of 21 June 2017.

2. I have directed anonymity in this case. The tribunal did not do so but it does seem to me that publication of this decision in a form which would enable persons other than the parties to identify the claimant might lead to some risk to him resulting. No contrary view was expressed before me.

The law in brief

3. In order to demonstrate entitlement to international protection the claimant must show that, upon return to his home country, he would face a real risk of:

- “(a) being persecuted for one of the five reasons set out in the 1951 Refugee Convention;
- (b) being treated in such a way as to give rise to entitlement to a grant of humanitarian protection;
- (c) being treated in such a way as to bring about a breach of Article 3 of the European Convention on Human Rights (ECHR).”

4. Matters are to be assessed as at the date of the hearing (5 December 2018).

The claimant’s case and what is left of it.

5. The claimant, in pursuing his original claim to be entitled to international protection, told the Secretary of State and subsequently the tribunal, that he is gay. He claimed to have had a lengthy gay relationship and another shorter such relationship, whilst in Iran. Nevertheless, he says that in July 2012 he married a female Iranian national but that he only did so for reasons of social and family pressure. The marriage failed. He says that since coming to the UK he has had a gay relationship with a man I shall call H and another gay relationship with a man I shall call T. He says that H is also an Iranian national and that when H returned to Iran in November 2016 he was stopped by the authorities at the airport and footage showing H and the claimant having sexual relations with each other was discovered on his mobile telephone. He says that the authorities in Iran are seeking him out as a result of that. He also says (and this has been the main focus of this hearing) that he has posted items on Facebook which shows that he is gay and that he has also entered into other internet activity which also supports that proposition.

6. The tribunal decided that he is not gay, that he had lied about being gay, that he did not have a relationship with H and that he did not have a relationship with T. It accepted that he had posted items on gay social media but thought that had been done merely to artificially bolster what was essentially a false claim.

7. The reasons why I set aside the tribunal’s decision, whilst preserving the bulk of its findings, are contained in my written decision of 8 August 2018 which the parties already have. But, put

simply, I took the view that the tribunal's credibility findings were sustainable and free of legal error but that it had erred in failing to consider whether the claimant's internet activity, notwithstanding the dishonest motive for it, might come to the attention of the Iranian authorities such as to put him at risk on return. So, in consequence of my decision, the claimant only has such an argument now available to him. He pursues it.

The respondent's position

8. The respondent, with respect to the claim as originally put, comprehensively disbelieved the claimant's account. As to the remaining part of the claim still outstanding, the respondent (through Mr Mills) accepted that if the Iranian authorities have viewed the claimant's Facebook postings and in consequence have perceived him as being gay or as having promoted a gay lifestyle, that would result in his being ill-treated. However, Mr Mills argued that it would be unrealistic to conclude that the Iranian authorities would monitor internet activity to such an extent that they would have already detected the claimant. As to any risk which might arise on return on the basis that he would not be already known to the authorities, he would be able to delete his own Facebook account prior to travelling. He could be expected to do that as that would not amount to his lying (asylum claimants cannot be expected to lie) since he would only be deleting material which constituted an untruthful facade. There was no Country Guidance decision which suggested that everyone returning or returned to Iran would be questioned and asked for their Facebook password so that Facebook activity could be checked on arrival in Iran.

The evidence and what it tells me

9. It will be obvious, from what I have said already, that I am not revisiting the question of whether or not the claimant is gay or has had gay relationships. The tribunal made an authoritative decision that none of what he had said as to that was true. The soundness of its findings has been accepted by the Upper Tribunal and those findings have been preserved. I am concerned with the evidence concerning risk resulting from the claimant's internet activity notwithstanding his false motive in pursuing such activity.

10. I have, before me, all of the documentation which was before the tribunal when it heard the appeal. That includes the standard Home Office bundle and a bundle which had been filed on behalf of the claimant. Contained within those documents are the claimant's witness statements of 16 January 2017 and 26 January 2017 and some photocopied documents evidencing his Facebook activities and his use of a quite well known, I think, gay dating website known as "Grinder". There is also some background country material. In addition to that I was provided with an additional bundle of documents on behalf of the claimant which contained, amongst other things, a copy of his witness statement of 27 November 2018 and some further documents concerning his internet activity. Also included was an expert report prepared for the purposes of this case by Dr. Mohammad Kakhki ("the expert") and which is dated 26 November 2018. In addition to that I heard oral evidence from the claimant though that was very brief indeed. In evidence-in-chief he did nothing more than adopt his most recent witness statement and he was not cross-examined.

11. I shall focus, first of all, upon what the evidence tells me about the nature of the claimant's internet activity. The bundle which was submitted on his behalf for the purposes of the appeal to the tribunal contains a number of pages which are, essentially, extracts from on-line discussions it appears he has had with gay males. I am satisfied from the content of the exchanges (and such was not disputed and I think cannot sensibly be disputed) that a reader of those extracts will readily realise that they are reading exchanges on a gay dating website. There are, in addition to the

conversational content, some pictures of the claimant. His nationality is ascertainable (see page 59 of the bundle) from a reading of the extracts which have been produced as is his first name (see page 43). There is a page which has his picture in part superimposed over a picture of a number of naked males with his full name below his picture. I am not sure whether that is an extract from his Facebook entries or whether it relates to something he has posted elsewhere on the internet. There are then what appear to be extracts from his Facebook page and those demonstrate an interest in gay related issues and there are a few further photographs of a similar nature to that I have just referred to.

12. There are then, some further documents in the claimant's bundle prepared for the hearing before me, described as "Facebook screen shots". Essentially, they give a similar impression to the other documents I have just referred to but there is an additional element which suggest the claimant has an association with an Iranian Christian community in the UK. It is important to stress, though, that it has never been part of the claimant's case that he is, in fact, a Christian.

13. I now turn to the evidence concerning the manner and intensity with which the Iranian authorities check internet activity on the part of its citizens. That sort of evidence is potentially important because it is argued on behalf of the claimant that his internet activity will already have been detected by the Iranian authorities.

14. The pivotal evidence here is what is contained in Dr. Kakhki's report. Actually, a good deal of that report is given over to what sort of treatment might be meted out to those who are gay or who have been seen to be promoting a gay lifestyle. It is understandable that the expert has focused upon that but it is not a central issue before me given Mr Mills acceptance as noted above. So my focus, for the purposes of this appeal, is largely upon what is said by the expert about the nature of internet surveillance carried out by the Iranian authorities.

15. As to that, it is stated at page 29 of the report that the Iranian authorities have been known to monitor internet activity and engage over the internet with people who are gay "in order to entrap them via on-line chat/messenger". At page 30 of the report reference is made to a person described as "a British woman" (though it seems she is a dual British-Iranian national) who had been arrested when returning to Iran for a visit on the basis of her Facebook activity and imprisoned. It is said that it is thought that she had "described the Government as being 'again too Islamic' ". Reference is made at page 32 to an organisation known as the "Cyber Police of Islamic Republic of Iran" which it is said was established in 2011 for the purposes of preventing, investigating and combating Cybercrime. Examples are then given of other persons who have found themselves in difficulties with the Iranian authorities in consequence of social media/internet activity. At page 41 of the report Dr. Kakhki observes that it is clear that the Iranian Security Forces "are very active in monitoring on-line activities, particularly social media sites". Dr. Kakhki then goes on to express his opinion as to the likelihood of the claimant's activities having come to the attention of the authorities. He says this:

"82. Therefore it is, in my opinion, likely that the details of [the claimant's] activities whilst in the UK, including his social media activities as well as his participation in Persian LGBT activities would have come to the attention of the Iranian authorities through various means including use of informants as well as surveillance of his Facebook contacts and connected groups. He would likely be investigated on return to Iran for homosexuality and promoting beliefs which are contrary to the State religion policies/general beliefs of Iranian citizens. The risk of harm facing [the claimant] stems from punishments as set out in the Penal Code as well as the likelihood of extremely harsh investigative techniques and extra judicial violence at the hands of conservative vigilante groups.

83. It is important to note in this regard that [the claimant's] Facebook account identifies him by his real name and by a profile picture. He is connected to a large network of people (262 friends) and groups who share pro-homosexual messages and materials through their network. Depending on the subjective interpretation of the damage these materials would have caused to the Islamic society of Iran, legal liability would also be applied. The motivation behind [the claimant's] Facebook posts, from the point of view of the Iranian authorities, is immaterial. He will be considered to have committed criminal offences and accordingly be liable for punishment as a result of the objective facts. In other words, the existence of these homosexually charged materials on his public Facebook page (which are against the general beliefs of the Iranian public/Islamic society) is sufficient in and of itself to lead to criminal investigation and liability regardless of [the claimant's] motive for publishing this material via social media."

16. So, all the above is really the key evidence for the purposes of this appeal given the narrow issues with which I am now concerned.

Conclusion

17. I have decided that there is a real risk (which I have interpreted as a risk which is more than fanciful) that the claimant's internet activities will have come to the attention of the Iranian authorities. I have concluded, though that is uncontroversial because Mr Mills accepts this is so, that such will result in a real risk that the claimant will be persecuted for reasons of perceived (not actual) sexual orientation upon return to Iran. My having reached those conclusions, it is not necessary for me to go on to consider whether, as a person not already known to the authorities, he is likely to be questioned upon return at the airport and if so what is likely to be disclosed and whether that is likely to lead to a real risk of persecution. But I shall say something about certain of those matters below in recognition of Mr Mills careful and thoughtful submissions on those points.

18. I accept that the Iranian authorities determinedly seek to monitor internet activity by its citizens. I accept that they are concerned, in doing so, to see whether they are able to detect evidence of what they might perceive to be anti-Islamic views and activities by such citizens. I largely base my conclusions as to that upon the content of the expert's report. Mr Mills did not say anything, in submissions to me, to place any of that in issue.

19. The above does not mean, of course, that the Iranian authorities are capable of detecting all internet activity of a type they would disapprove of. Mr Mills makes the point that there must be very many Iranian citizens who are active on the internet and that it would be a huge undertaking to attempt to monitor more than a fraction of that activity. As he put it the authorities "can't monitor everyone in the world on Facebook". No doubt that is right. But they do seek to do what they can in that regard and, as the examples given by Dr. Kakhki in his report indicate, they do sometimes detect activity by Iranians located abroad and that does sometimes lead to persecutory ill-treatment being subsequently meted out to them. The question is whether, in the circumstances of this particular case, there is a real risk that the authorities will have detected the internet activity of this particular claimant. In considering that key matter, his motivation (which has been found to be dishonest) is not relevant. It is the authority's perception which is relevant. But neither is it relevant that, if he has been detected, he will in all probability (according to the expert and the background country material) receive persecutory ill-treatment. It is only the risk, and whether it is more than fanciful, which I need to address.

20. I have not found this an easy task. The Iranian authorities are obviously determined, indeed zealous, but cannot hope to monitor all internet traffic, or anything approaching that, generated by its citizens either within Iran or overseas. On the preserved findings the claimant did not come to

the attention of the authorities through the footage said to have been contained on H's mobile telephone. All of that was a fiction. Nor does it seem to me that there is anything in his profile, absent his internet activity, which would have excited the adverse interest of the Iranian authorities. So really it comes down to whether they might have happened upon him, as a result of the use of surveillance techniques, by chance. As to that, whilst I am not able to make a precise finding, it appears that the claimant's internet activity designed to artificially enhance or create an asylum claim would have commenced around the time he actually made his claim or possibly, if he had thought things through and planned ahead, slightly before then. As I have noted, he made his claim on 22 December 2016. So, potentially, he has had two years to attempt to lay down an artificial internet imprint. What is said in Dr. Kakhki's report does suggest a particular interest in Facebook pages and postings. As is pointed out by Dr. Kakhki and Mr Woodhouse, his Facebook account identifies him by way of his real name and by a profile picture. Thus, his Facebook account is, essentially, a public one. Presumably taking steps to keep it private or to limit its accessibility would have run counter to his purpose in manufacturing an untruthful but accessible internet profile. Although the expert has not set much store by this, his activity has not been limited to Facebook and he has exchanged messages on Grindr. That sort of activity is capable of increasing the risk of detection. In broad terms, I suppose, the greater the activity the greater the risk of detection.

21. I do note Dr. Kakhki's own view that it is likely the appellant's activities will have come to the attention of the authorities. I am not, though, so sure that I should attach any weight to that as it is only an opinion which is not necessarily of more value than any other person's view on the matter. Dr. Kakhki is a relevant expert and I acknowledge his expertise and knowledge of the Iranian authorities and the ways in which they do monitor internet traffic. But it seems to me that the decision as to whether, given all of that, the risk this claimant will have been detected is, essentially, a judgment call rather than something which might authoritatively be assessed by an expert. Accordingly, I have made my own unfettered decision on the point albeit noting the expert's view. Whilst taking account of Mr Mills submissions, I have concluded that bearing in mind the resources and effort put in by the Iranian authorities, bearing in mind that the claimant's Facebook activities have been public, bearing in mind that his internet activity is not limited to Facebook, bearing in mind that he has been active via the internet for some considerable time, the risk of detection has albeit I think narrowly, become something which ought properly to be characterised as being more than fanciful.

22. My above conclusion means, in my judgment, that the authorities will have an adverse interest in the claimant and will, to the real risk standard, detain him at the airport once he returns to Iran. Dr. Kakhki has set out what he feels is likely to happen if he has come to the adverse attention of the authorities. I accept his expert view that, in such circumstances, it is likely that he would be detained, ill-treated and punished by various means including flogging. As I say, I do not think Mr Mills takes a different view. Accordingly, I conclude, with a full appreciation that the outcome might in the circumstances seem unattractive to some, that the claimant is a refugee.

23. I could stop there but I would like to deal with a couple of points which do not now have relevance to my decision but which were the subject of quite interesting argument before me. As to those matters, reliance had been placed, on the claimant's behalf, upon what was said in *AB and Others (Internet Activity - State of Evidence) Iran* [2015] UKUT 0257 (IAC) concerning the risk of persons returning or being returned to Iran, being questioned by the authorities upon return and being asked about internet activity which they might have been involved in. Indeed, the grounds of appeal to the Upper Tribunal (not drafted by Mr Woodhouse) appeared to treat *AB and Others* as if it was a Country Guidance decision. Mr Mills pointed out that it was not. He also pointed out that,

according to its own headnote, the view had been taken that the material put before the Upper Tribunal did not disclose a sufficient evidential basis for giving country or other guidance as to what might be expected by those being returned to Iran other than with a “regular” passport in relation to whom interest may be excited from the authorities via internet activity. It seems to me that since this claimant does appear to possess an Iranian passport (he acknowledged he had one which was still valid at the time of his asylum interview) it may be that had he not previously come to the attention of the authorities via internet activity he would have had no difficulty in passing through the airport in any event. But I agree with Mr Mills that it would be wrong to elevate *AB* to a status it does not have. It is clear from the headnote that the only reason it has been reported is to place the evidence which it considered in the public domain. So, it does seem to me that, whilst it may be open to claimants to rely upon the evidence which happens to have been considered in *AB* it is not appropriate to rely upon its reasoning as if it were a Country Guidance decision or to assume that reasoning is somehow binding or perhaps even persuasive. But that is just a non-essential expression of my own judicial opinion.

24. Further, an interesting issue was raised as to whether or not the claimant could be expected, in the circumstances of this case, to delete his Facebook entries before returning to Iran. The matter is not material to the outcome given my finding that his internet activity has already come to the attention of the Iranian authorities. So, again, what follows is simply non-essential opinion. Mr Woodhouse argued that expecting him to delete his Facebook entries would be tantamount to expecting him to lie. He pointed out the by now well established principle that an asylum seeker cannot be expected to lie. Mr Mills argued that deleting the Facebook entries would not amount to lying because those entries had themselves been dishonest anyway. I agree with Mr Mills. It is right to say that in *RT and KM v SSHD* [2012] UKSC 38, it was accepted that, when asked questions, asylum claimants could not be expected to lie and that that extended not only to persons who had strong convictions they might have to disown but also persons who had no convictions at all. The relevant factual circumstance was a claimant who might have to mislead by asserting a commitment to a particular ruling party in circumstances where that claimant had no political affiliations or preferences at all. But in the instant case, there is a distinction because the claimant is not, at the point of deleting the content of his Facebook account, being asked a question at all. Additionally and in any event, deleting the Facebook entries would not amount to lying because the relevant indications concerned in them with respect to the claimant being gay are, themselves, deliberately false. It is right to say a claimant cannot be expected to lie. But it is not right to say that a claimant who has lied is required to continue to maintain that lie. However, none of that now matters.

25. The claimant’s appeal is allowed on asylum grounds. I have also decided to allow it under Article 3 of the ECHR for the same reasons.

Decision

The decision of the First-tier Tribunal involved the making of an error of law. In remaking the decision, I allow the claimant’s appeal on asylum grounds and on human rights grounds (Article 3 only) against the Secretary of State’s decision to grant international protection.

Signed:

Date: 27 December 2018

Upper Tribunal Judge Hemingway

Anonymity

I grant the claimant anonymity pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Accordingly, no report of these proceedings shall either directly or indirectly identify him or any member of his family. This applies both to the claimant and to the Secretary of State. Failure to comply may lead to contempt of court proceedings.

Signed:

Date: 27 December 2018

Upper Tribunal Judge Hemingway