Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09608/2016

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 10th January 2019	**On 6th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DEANS

Between

HAMID [N]
(No anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Ms H Cosgrove, Latta & Co, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision by Judge of the First-tier Tribunal Juliet Grant-Hutchison dismissing an appeal on protection and human rights grounds.

2. The appellant is a national of Iran of Kurdish ethnicity. His appeal was originally heard before the First-tier Tribunal in March 2017 but

the resulting decision was set aside on appeal by the Upper Tribunal and the appeal was remitted to the First-tier Tribunal.

3. According to the appellant, in Iran he became involved in KDPI activities. He was detained and mistreated. After being released on bail he left Iran to avoid a long prison sentence. In the UK he has been involved in KDPI activities and has posted information about his involvement on Facebook.

4. The Judge of the First-tier Tribunal did not find credible the appellant's evidence of his activities in Iran for the KDPI or of his alleged detention there. The judge found the authorities in Iran had no adverse interest in the appellant before he left. Her findings in this regard are not challenged.

5. The judge further found that there was no reasonable likelihood the appellant would come to the attention of the authorities on his return to Iran due to his *sur place* activities in the UK on behalf of KDPI.

6. A challenge has been brought against this finding. Permission to appeal was granted on several grounds. It was arguable that the judge had failed to consider the totality of the appellant's evidence relating to his *sur place* activities and, in particular, his explanation for not producing up-to-date letters from the KDPI about his support for this organisation. It was arguable that the judge had failed to consider the appellant's evidence with reference to the decisions in SSH & HR (illegal exit: failed asylum seeker) [2016] UKUT 00308 and AB & Others (internet activity – state of evidence) [2015] UKUT 257.

Submissions

7. Mr Govan referred to the respondent's rule 24 response dated 12th September 2018. He was prepared to acknowledge that the Judge of the First-tier Tribunal erred in law as contended in the second ground of the application for permission to appeal. This ground relied upon AB & Others in relation to the possible examination of Facebook material by the authorities at the airport on return to Iran. Mr Govan referred to the "pinch point" at the airport where a returnee is brought into contact with the authorities. According to the decision in AB & Others, at paragraph 467, if questioned a returnee was likely to be asked about their internet activity and, if they had any, it was likely to be exposed and, if critical of the government, to lead to a real risk of persecution. Mr Govan submitted that although the judge had failed to address this issue, if it was the only error the decision might be re-made before the Upper Tribunal.

8. For the appellant, Ms Cosgrove pointed out that all the grounds of the application related to the appellant's *sur place* activities. She indicated her intention to pursue them all. The first ground related to the appellant's attendance at demonstrations outside the Iranian Embassy. The appellant had attended four such demonstrations, although the judge referred to only one in her decision. The appellant's evidence was that these demonstrations were photographed and filmed from inside the Embassy. The appellant had posted on Facebook photographs of him demonstrating. The judge did not take this evidence into account.

9. The third ground concerned the two letters of support from KDPI officials relied upon by the appellant. These were referred to by the judge at paragraphs 21 and 22 of her decision. The judge referred to a lack of specificity in the first letter about the appellant's activities and pointed out that according to the appellant's supplementary statement the first activity in which he claimed to have participated post-dated the letter by nine months. It is contended that the judge failed to have regard to the appellant's first statement, where he stated that his KDPI participation in the UK started more than a year earlier, in October 2016. The judge failed to take into account the appellant's evidence in his first statement about when his KDPI participation in the UK began.

10. The fourth ground referred to paragraph 23 of the decision, where the judge questioned why the appellant had not produced up-dated letters of support from KDPI. It is contended that the judge failed to take into account the appellant's explanation that the office-bearers who had written the letters produced no longer held their posts within the KDPI and the UK branch of KDPI had taken a decision no longer to provide letters of support in this form.

11. Ms Cosgrove further submitted that the appellant had no passport and was likely to be questioned on his return. It was not disputed that the appellant left Iran illegally. The questioning on return would include questions about his Facebook account and his activities in the UK and would therefore give rise to a real risk of persecution. Reliance was placed upon paragraphs 114 and 117 of HB (Kurds) Iran CG [2018] UKUT 00430. As discussed at paragraph 472 of the decision in AB & Others, the authorities would not distinguish between someone who was posting in an opportunistic manner to bolster an asylum claim and someone who was following a genuine conviction.

12. Mr Govan responded to the matters pursued by Ms Cosgrove. The first ground of the application contended that the judge ignored evidence of surveillance by the Iranian authorities. Mr Govan submitted that the judge considered the relevant facts, which were that the appellant had attended demonstrations and provided

letters of support from the KDPI. The approach to *sur place* activities set out in BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 36 had not changed. There was not a real risk on the basis of illegal exit and there was no reason for the authorities to have any interest in the appellant prior to his arrival at the airport. In terms of HB, Kurdish ethnicity would not create a risk of persecution. The Judge of the First-tier Tribunal found at paragraph 20 of her decision that the appellant did not have a high profile which would bring him to the attention of the authorities on return. He had little role at the demonstrations apart from mere attendance.

13. Turning to the third ground of the application, Mr Govan submitted that the point about the dates of the appellant's *sur place* activities was only one of a number of issues and did not give rise to a material error. In relation to the fourth ground and the lack of up-to-date letters from the KDPI, the judge noted at paragraph 23 the appellant's explanation that no further letters of support were being provided.

14. Mr Govan observed that unlike the appellant in HB, this appellant's evidence about his political activities in Iran was rejected. Mr Govan submitted that even without a passport the appellant's Kurdish ethnicity would not put him at risk. It seemed to be the appellant's case that if he had put information on Facebook then he would be identified and questioned by the authorities as a matter of course but this did not follow from the decision in HB. If he was questioned the authorities would have to ask the appellant for his Facebook password. Mr Govan acknowledged that if the appellant refused to provide a password this might give rise to suspicion. However, the Judge of the First-tier Tribunal did not accept that the appellant was a genuine supporter of KDPI. If the appellant was acting in bad faith then he could delete his Facebook account. The appellant had acknowledged having a passport in Iran and he could ask his family to send him this to avoid being targeted as someone returning on a *laissez-passer*. The authorities would have no knowledge of the appellant's *sur place* activities if the proper approach was taken to his attendance at demonstrations and the letters of support from KDPI.

15. Ms Cosgrove pointed out that the issue was the attention the authorities would give to the appellant. They had the time to make inquiries and were interested in Kurds. Even if the appellant had been disbelieved about his activities in Iran, it did not necessarily follow from this that he should be disbelieved about his activities in the UK or his motives for undertaking them. Reliance was placed upon TF & MA [2018] CSIH 58 at paragraphs 59 and 60.

16. I informed the parties that I was satisfied that the Judge of the First-tier Tribunal had erred in law in her consideration of the risk arising from the appellant's *sur place* activities. I would proceed to re-make the decision as no further fact-finding was required. In response Mr Govan stated that he relied upon the submission he had already made, to which he had nothing to add. He submitted that the evidence should be considered holistically.

Discussion

17. The parties are agreed that the Judge of the First-Tier Tribunal erred by not properly considering the risk to the appellant arising from his Facebook activities in the event that he were to be questioned about these at the airport on his return to Iran. Mr Govan's submission, to which I will return, was that even though the judge did not consider this as she should have, the appeal would not succeed upon its merits. Ms Cosgrove submitted that having regard to the risk factors arising from the appellant's illegal exit, his Kurdish ethnicity, and his *sur place* activities, including his Facebook posts, the appeal should succeed.

18. I consider that the Judge of the First-tier Tribunal made a further error of law, identified in the third ground of appeal. The judge did not take account of the appellant's evidence in his first statement as to when his activities in the UK on behalf of KDPI first began. If the judge had considered this, she could not have recorded at paragraph 21 of her decision that these activities began in December 2017 instead of October 2016.

19. At paragraph 20 of her decision the Judge of the First-tier Tribunal considered the appellant's Facebook posts. She noted that according to the printout of these posts only 8 people had commented online that they liked the posts. The judge questioned how the Iranian authorities would be able to pick out the appellant from these posts when Facebook was used by millions of people. The judge further stated that as the appellant cannot read or write he could do no more than "like" or "share" photographs or other materials.

20. The Judge of the First-tier Tribunal assessed the risk to the appellant from his Facebook posts on the basis that the Iranian authorities were unlikely to find these among the millions of others posting on Facebook. The judge failed to consider how a risk might arise for the appellant from being questioned at the airport on his return about his online activities. The judge accordingly neglected to take into account a relevant consideration or to direct her mind to the material issue and thus erred in law, as the parties are agreed.

21. Mr Govan's submission was that even though the judge had erred in law in this manner, the appellant was not reasonably likely to be picked out for questioning at the airport on his return. He had no prior political profile and neither his Kurdish ethnicity nor his having exited Iran illegally were sufficient to trigger questioning by the authorities. Mr Govan further submitted that the appellant's *sur place* activities were not undertaken out of genuine conviction but were undertaken in bad faith to bolster his asylum claim. The appellant could ameliorate any risk by deleting his Facebook account and asking his family in Iran to send him his passport so that he would not be returning on a *laissez-passer* as someone who was clearly a failed asylum seeker and who had left Iran illegally.

22. The Judge of the First-tier Tribunal did not make a clear finding on the appellant's motives for his *sur place* activities. The judge seems to have accepted at paragraph 20 of the decision that the appellant had attended four demonstrations outside the Iranian Embassy in London and had posted pictures on Facebook showing his participation. At paragraphs 21 and 22 the judge questioned the reliability of the two letters of support provide for the appellant by KDPI office bearers in the UK. At paragraph 23 she questioned why there were no up-to-date letters before her and observed that the lack of such letters adversely impacted upon the appellant's claim to be a "genuine supporter". The judge stopped short of making a finding that the appellant's *sur place* activities were undertaken only to bolster his asylum claim.

23. Of course, a person may act with more than one motive. It would not be contradictory for the appellant both to be a supporter of Kurdish rights and to have sought to bolster his asylum claim. The position is that findings have been made that the appellant participated in demonstrations and posted evidence of his participation on Facebook.

24. In principle a person may establish a *sur place* claim for protection even if the person has acted entirely in bad faith. Mr Govan suggested that if the appellant acted in bad faith he could take action to reduce any risk to him on return, such as, for example, deleting his Facebook account. If the Judge of the First-tier Tribunal had made a clear finding that the appellant was acting in bad faith, Mr Govan's suggestion might have carried more weight. As matters stand, however, the position is that as an Iranian Kurd the appellant demonstrated in the UK for Kurdish rights, as well as against other policies or actions of the Iranian authorities, as found by the judge at paragraph 20.

25. The position of the appellant has many similarities to the position of the appellant in HB (Kurds) Iran CG [2018] UKUT 00430. It is unfortunate that the Judge of the First-tier Tribunal had to make

her decision without having the advantage of seeing this decision, the hearings for which were held before the most recent hearing of this appeal before the First-tier Tribunal. Although in HB the appellant's evidence was accepted as credible and he was found to be a supporter of Kurdish rights, it was also found that he had never had any involvement in Iran in political activities, although his parents had been so involved 23 years earlier. This was so long ago there was no real likelihood the authorities would have an adverse interest in the appellant on this account.

26. At paragraph 114 of HB the Tribunal stated: "However, we noted at [97] above that it is not disputed that a returnee with no passport is likely to be questioned on return, confirmed in the expert evidence before us and recognised in existing country guidance, for example *SSH and HR*. Ms Enayat's evidence was that it is part of the routine process to look at an internet profile, Facebook and emails of a returnee. A person would be asked whether they had a Facebook page and that would be checked. When the person returns they will be asked to log onto their Facebook and email accounts. That is also the effect of her evidence given in *AB and Others* which was accepted by the Tribunal in that case (see [457])."

27. The Tribunal in HB went on to find that the content of the appellant's Facebook page would become known to the authorities on return as part of the process of investigation of his background. It was no step from here to the conclusion that this would give rise to a real risk of persecution or of Article 3 ill-treatment. The Facebook material was not only critical of the regime but showed support for Kurdish rights. The Tribunal considered the question of what the appellant would reveal under questioning and concluded, though this was not essential to the decision, that the appellant could not be expected to lie about his support for Kurdish rights, about which it was reasonably likely he would be directly questioned.

28. The circumstances of the present appellant are not wholly identical to the circumstances of the appellant in HB but they are sufficiently close to enable a direct comparison to be made. Were this appellant to return to Iran it is reasonably likely he would face the same inquiries as the appellant in HB and would be required to give access to his Facebook account. The photographs he has posted on Facebook showing his support for Kurdish rights and his opposition to the Iranian regime would give rise to a real risk of persecution or ill-treatment. On this basis his appeal will succeed on protection grounds.

Conclusions

29. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

30. The decision is set aside.

31. The decision is re-made by allowing the appeal.

Anonymity

The First-tier Tribunal did not make a direction for anonymity. I have not been asked to make such a direction and see no reason of substance for doing so.

Fee Award (N.B. This is not part of the decision)
No fee has been paid or is payable so no fee award is made.

M E Deans
31st January 2019
Deputy Upper Tribunal Judge