**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/06816/2018

**THE IMMIGRATION ACTS**

| **Heard at Bradford** | **Decision & Reasons Promulgated** |
|---|---|
| **On 2 December 2019** | **On 17 January 2020** |

**Before**

**UPPER TRIBUNAL JUDGE LANE**

**Between**

**R**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms Bracaj, instructed by Iris Law Firm
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant was born in 1990 and is a male citizen of Iran. He is of Kurdish ethnicity. By decision promulgated on 25 September 2019, Upper Tribunal Judge Hemingway found that the First-tier Tribunal had erred in law is such that its decision falls to be set aside. His reasons for reaching the conclusion were as follows:

> "1. This is the claimant's appeal to the Upper Tribunal, brought with the permission of a Judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (the tribunal) which it made on 15 February 2019 (the date of its written reasons) following a hearing of 11 February 2019. The tribunal decided to dismiss the claimant's appeal against a

decision of the Secretary of State of 18 May 2018, refusing to grant him international protection.

2. The tribunal also granted the claimant anonymity. Nothing was said about that before me but I have concluded it is appropriate to continue that grant.

3. Shorn of all but essential detail, the background circumstances are as follows: the claimant is a Kurdish citizen of Iran and he was born on 1 October 1990. He entered the United Kingdom (the UK) illegally on 25 October 2017, having passed through Turkey, Italy and France during the course of his journey from Iran. In claiming international protection and then in presenting his case before the tribunal he asserted that he had previously been involved in smuggling alcohol and other goods but had ceased to do that in consequence of those activities having come to the intention of the Iranian authorities. He also claims to have been a supporter of the Kurdish oppositionist group known as PJAK. He would, he says, store flags and leaflets belonging to PJAK at a shop he used to conduct business from. He says he also permitted PJAK members to gather at his shop on two occasions. But in 2017 the authorities raided the shop and although the claimant escaped, pro-PJAK materials were found. Fearing for his safety he fled Iran. He says that since coming to the UK he has attended oppositionist demonstrations and has posted anti-regime material on the internet including via his Facebook page.

4. The Secretary of State did not think the claimant had told the truth and concluded he would not be at risk upon return. It is fair to say that the tribunal having heard his oral evidence at a hearing at which both parties were represented, comprehensively disbelieved the account involving alleged support for PJAK. The tribunal did, though, accept that the claimant had attended demonstrations at various locations in the UK from January 2018 and that he had "posted materials to that effect on the internet" (see paragraph 49 of the written reasons). But it thought that such activity had been opportunistic and was not indicative of the holding of genuine political views.

5. Nevertheless, the tribunal recognised that even if the account of events in Iran was untrue and even if his UK based activity had been opportunistic, it was still necessary to consider whether the claimant might face risk upon return in consequence of how his activity, if it was known or was to become known by the Iranian authorities might be perceived.

6. As to the above matter the tribunal said this:

> "53. In considering the significance of the appellant's activities in the United Kingdom, I find that the appellant has failed to bring forward evidence showing that such involvement has come to the attention of the authorities. Nor do the background materials show that the Iranian authorities in the United Kingdom monitor such events. As Mr Walker [the claimant's representative before the tribunal] accepted, there is an absence of evidence in this regard. I remind myself, at this point, that the burden of proof lies with the appellant, whilst accepting that the standard of proof is the lower standard that applies in asylum cases.

> 54. In these circumstances, I find that there is insufficient evidence before me to support the view that the appellant's activities in the United Kingdom have come to the adverse attention of the authorities in Iran."

7. The tribunal then, by reference to the country guidance decision in SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308, said it was concluding that the claimant would not be at risk simply as a returning Kurdish asylum seeker. It then went on to say as follows:

> "57. I also take account of the guidance in HB (Kurds) Iran CG UKUT 00430 to the effect that the authorities take a hair trigger approach to those of Kurdish origin who are perceived or suspected as being involved in Kurdish political activities or support for Kurdish rights; and that Kurdish ethnicity is a risk factor to be taken into account on return where they are reasonably likely to be subject to heightened scrutiny.
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> 58. In following the guidance of the Upper Tribunal, I find that the appellant is a single male of Kurdish origin in respect of whom no adverse interest has previously been manifest. I find that the appellant on return would not generate heightened suspicion and scrutiny because of his activities in the United Kingdom nor because of the length of time he has been out of Iran, which is not unduly lengthy.
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> 59. I find that there is reasonable likelihood for there to be heightened scrutiny of the appellant on return, due to the authorities becoming increasingly suspicious of Kurdish political activity. However, the mere fact of being such a returnee does not create a risk of persecution. Further, whilst a genuine supporter or activist cannot be expected to lie if questioned by the authorities on return, in the present case, where there are adverse credibility findings as noted above, the appellant would be able to say that he was not a committed supporter of PJAK if so questioned, and, in addition, the degree of candour that could reasonably be expected of him is thereby diminished.
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> 60. Accordingly, on return the appellant would not face a real risk of serious harm as a failed Kurdish asylum seeker or as a person who had exited Iran illegally".

8. So, the appeal failed. However, that was not the end of the matter because, as noted above, permission to appeal to the Upper Tribunal was given to the claimant. The granting judge relevantly said this:

> "2. The grounds of appeal state that the First-tier Tribunal Judge erred in his application of the decision in HB (Kurds) Iran cg [2018] UKUT 00430. The grounds state that the First-tier Tribunal Judge found that the appellant had been involved in low-level political activity in the UK and that he had posted materials about these activities on the internet. The grounds assert that the First-tier Tribunal Judge has erred in finding that these activities would not lead to a risk to the appellant on return to Iran.
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> 3. The First-tier Tribunal Judge makes reference to the relevant case law at paragraph 56 and 57 of the decision. He finds that

there is a reasonable likelihood of "heightened scrutiny" of the appellant on return to Iran [59] because of the Iranian authorities suspicion of Kurdish political activity. The First-tier Tribunal Judge finds that the appellant would be able to say that he was not a committed supporter of PJAK when questioned by the authorities in Iran [59]. It is arguable that the First-tier Tribunal Judge has failed to assess the likely response of the Iranian authorities to the appellant's activities in the UK and whether that would give rise to a risk notwithstanding the finding that the appellant engaged in those activities in "bad faith".

4. Permission to appeal is granted".

9. Permission having been granted the matter was listed for a hearing before the Upper Tribunal (before me) so that it could be decided whether the tribunal had or had not erred in law and, if it had, what should flow from that. Representation at that hearing was as stated above and I am grateful to each representative. Although it is apparent to me, notwithstanding the various criticisms offered of it, that the tribunal's decision is a careful and considered one, I have concluded that it did err in law in a way which was material in the sense that had it not done so the outcome of the appeal might (I do not say would) have been different. I shall now explain why I have taken that view.

10. Part of the claimant's case was that he had been active over the internet in putting forth his Kurdish oppositionist views. That raised two potential issues. The first of those was whether it was reasonably likely that his internet activities had already come to the attention of the Iranian authorities. The second was whether, if questioned upon return, the claimant might reveal details about his internet activity (against a background that he could not be expected to lie) or whether checks would be made upon return anyway which would lead to his internet activity including the content of his Facebook page being discovered. I am not wholly clear as to the extent to which those issues were pursued before the tribunal. A skeleton argument which had been sent to the tribunal did not clearly raise those issues. But in a witness statement of 14 June 2018, the claimant said that (as I understand it) footage of the demonstrations he had attended had been uploaded on YouTube and that some footage and some photographs of the demonstrations had been posted on the Facebook page of a Kurdish activist who is monitored by the Iranian authorities. The claimant also said (though on my reading he was disbelieved about this) that he had been assisting with marshalling at the demonstrations so would have appeared to be prominent.

11. The tribunal does not appear to have asked itself whether the internet activity of the claimant might already have come to the attention of the Iranian authorities. What it said at paragraph 53 of its written reasons seems to relate more to the issue of whether attendance at demonstrations might be monitored by the Iranian authorities. But the question of monitoring of internet activity is not specifically addressed. It might be that the tribunal thought it unnecessary to do so because of the obvious difficulties, however assiduous the members of the authorities might be, of monitoring something so large and with so much content as the internet. But there

was the reference in the witness statement to material having been uploaded onto the Facebook page of a claimed known activist and there was the claimant's own indication that he had posted materials or anti-Government sentiment (as I understand it) on his own Facebook page. In these circumstances I am quite narrowly persuaded that, although very probably the tribunal would not have needed to have said very much, it was required to consider and make a finding about whether the internet activity which the claimant says he has undertaken (and it does seem to me that there is currently only limited evidence of it) might have come to the attention of the authorities such that they will be aware of it upon return.

12. The tribunal accepted, following guidance contained in the decision of the Upper Tribunal in HB (Kurds) Iran CG UKUT 00430 (IAC), that the authorities take a "hair trigger approach" with respect to Kurdish oppositionists. It seemed to accept that the claimant would probably be questioned upon return as a result of that (paragraph 59 of the written reasons) but it found he would be able to truthfully say he was not a committed supporter of PJAK if questioned. It seemed to accept at this point in its analysis, that the claimant "cannot be expected to lie" (see paragraph 59 once again). Given the "hair trigger" point, whilst ultimately it might well be open to a decision-maker including a tribunal to conclude the Iranian authorities will be prepared to accept assurances given as to the lack of genuine commitment to pro-Kurdish oppositionist causes despite attending demonstrations and posting material on the internet, the tribunal's reasoning was, in my judgment, required to be fuller and more detailed than it was with respect to that particular issue.

13. The tribunal having said it took the view that the claimant could not be expected to lie, then went on to suggest, on my reading, that since adverse credibility findings had been made the degree of candour expected of him in response to any questions that might be asked of him by the authorities upon return would be reduced (paragraph 59 again). That does seem, on the face of it, to conflict a little with what the tribunal had previously said. Further, whilst it might have been open to the tribunal to simply take the view that a dishonest claimant could be expected to lie in circumstances where doing so would not represent a denial of genuine political commitment, the reasoning underpinning it had to be explained.

14. For the above reasons I would accept various of the contentions made by Ms Wilkins on behalf of the claimant. I accept that the tribunal did err in law with respect to its consideration as to what risk the claimant might face upon return notwithstanding its clear and cogently explained findings with respect to credibility.

15. In light of the above I have concluded that I must set aside the tribunal's decision. However, its adverse credibility findings were not the subject of any serious challenge before me and in any event, are very clearly sound. With that in mind I have decided that the proper course is for the decision to be re-made in the Upper Tribunal after a further hearing. I have also decided that the adverse credibility findings as set out from paragraph 32 to paragraph 50, in relation to claimed events in Iran are to be preserved. I have also decided that I should preserve the tribunal's conclusion to the effect that the

claimant's UK-based activity does not show him to be a genuine PJAK supporter (paragraph 52 of the written reasons).

16. As to the rehearing it will, of course, be up to the representatives as to how they would wish to argue their respective cases. But there are some aspects which they may wish to cover in argument which I have set out below.

17. First of all, there may be an issue as to the extent to how I should approach the reasoning as contained in the Upper Tribunal's reported decision in AB and Others (internet activity – state of evidence) Iran [2015] UKUT 00257 (IAC). Ms Wilkins argued that, in consequence of paragraph 13 of Guidance Note 2001 No 2 concerning reported decisions I should regard the reasoning as being persuasive. But there may be a counter argument because the Upper Tribunal itself made it clear that the decision was only being reported in order to place the evidence which it had heard in the public domain. It may be that such a specific and express indication means that whilst regard can be had to the evidence which was supplied to the Upper Tribunal there is no basis to regard its reasoning as being even persuasive. But I have no settled view as to this.

18. Secondly, assuming the claimant's UK-based activity has not come to the attention of the Iranian authorities but assuming he is likely to be questioned by those authorities upon return, there may be arguments to be had as to how candid he is required to be if, for example, he is asked specific questions as to whether he has attended Kurdish oppositionist demonstrations and whether he has posted anti-regime material on the internet. Perhaps the lead case in the field is RT (Zimbabwe) v SSHD [2012] UKSC 38. Does the reasoning contained therein support the proposition (as sometimes appears to be assumed) that an unsuccessful returned asylum seeker should not be expected to tell untruths in any circumstances? The judgment in RT seems to me, on the face of it, to be concerned with the protection of a right to have no opinions or allegiances and the associated right not to have to deny such a lack of allegiance. Does that extend to a person in the situation of the claimant such that he could not be expected to simply deny his none genuine UK based activity. Again, I have no settled view but it may be a matter which should be explored in argument.

19. To be clear, I am not anticipating my making authoritative or binding decisions of a general nature with respect to the above matters. I am simply saying it might (but then again it might not) be necessary for me to reach a view about such matters for the purposes of remaking the decision in this appeal.

20. Finally, I have set out some directions which will hopefully assist with the remaking process. They appear below.

**Directions for the remaking hearing**

A. The tribunal's decision of 15 February 2019 having been set aside, there shall be a further hearing before the Upper Tribunal for the purposes of the remaking of the decision. That hearing shall, if practicable, take place before Upper Tribunal Judge Hemingway, at the Bradford Hearing Centre, on or prior to 31 December 2019.

B. The time estimate for the remaking hearing shall be three hours. The claimant shall be provided with a Kurdish Sorani speaking interpreter.

C. The Upper Tribunal, at the remaking hearing, will have, as its starting point, the various findings made by the First-tier Tribunal which it has specifically preserved above.

D. The Upper Tribunal appears to have all of the documentation which was previously before the First-tier Tribunal. Either party may supply further written material in the form of evidence or argument. However, any such material should be supplied to the Upper Tribunal's administrative staff at Field House (with a copy simultaneously sent to the opponent) in sufficient time for it to arrive at least ten days prior to the date which will be fixed for the remaking hearing.

E. As noted, certain findings have been preserved. Nevertheless, the claimant may give oral evidence or call witnesses at the remaking hearing with respect to other matters of evidence which it is thought might be relevant. However, if there is to be oral evidence, witness statements setting out that evidence must be provided (with a copy simultaneously sent to the opponent) in accordance with the above timescale.

**Decision**

The decision of the First-tier Tribunal involved the making of an error of law and is set aside. The decision shall be remade by the Upper Tribunal after a further hearing."

2. I draw attention in particular to [15] of Upper Tribunal Judge Hemingway's decision and to the findings of fact of the First-tier Tribunal which have been preserved.

3. Following the making of a transfer order, I have remade the decision. At the resumed hearing at Bradford on 2 December 2019, I heard oral evidence from the appellant. The burden of proof is on the appellant. It is for the appellant prove that there are substantial grounds for believing it to be a real risk to him upon return to Iran for one of the grounds recognised in the Refugee Convention and/or serious harm under paragraph 339C of HC 395 (as amended).

4. The appellant gave evidence with the assistance of a Kurdish Sorani interpreter. The appellant said that he had had a new Facebook account for the past year. He has 446 friends on this current Facebook account. Cross-examined, the appellant said that he was not himself familiar with the technicalities of Facebook. When he encountered problems with the account, he would ask a friend to assist him. The appellant said that he knows only how to sign in to the account and to make postings on it. He does not know how to close or to modify the account in any way. Re-examined, the appellant said that friends sometimes reposted information about him on their own Facebook accounts. He referred to photographs of himself at demonstrations in the United Kingdom. He said that to have his

friends who are PJAK members would sometimes post photographs of him at demonstrations.

5. I reserved my decision.

6. This appeal proceeds on the basis of the preserved findings (see above). This appellant is not a member or supporter of PJAK. Insofar as the appellant attends meetings or demonstrations of that organisation in the United Kingdom, he does so not out of any commitment to the cause which it espouses but for other reasons. The same is true of his Facebook account. He does not maintain that account because he is committed to the Kurdish separatist cause in Iran as advanced by PJAK or any other similar organisation. Having said that, the appellant's *sur place* activities may nevertheless be found to expose him to risk and return despite his having no political commitment to those activities.

7. The appellant has produced evidence of postings and his new Facebook account. These include photographs of Iranians leaders with red crosses across their faces and slogans including, 'Stop executions of Iranian people'. The appellant's own evidence is that he is not an expert in the management of his own or any other Facebook account. He is able to sign into the account and to make postings on it but that is the limit of his knowledge and skill.

8. I find that the appellant's present intention is to do anything to avoid exposing himself to risk if he were to be returned now to Iran. I find that he would, if faced with return to Iran, seek the assistance of friends to help him delete his Facebook account. By doing so, he would not compromise elements of his core personality or beliefs because he has no commitment to the Kurdish separatist cause. Furthermore, because I find he would have deleted his account before he reached Iran, he would be unable to open the account if required to do so when questioned at the airport by Iranian officials. As regards the appellant's claim that friends may refer to him and his postings on their own Facebook accounts, I find that it is not reasonably likely that the Iranian authorities would link such postings to the appellant; given that the appellant has no profile whatever is a Kurdish separatist, the risk that the authorities would link the Facebook accounts of third parties to the appellant is simply too remote. As regards any interrogation of the appellant on return, I note Upper Tribunal Judge Hemingway's comments at [18]. I find that the appellant would not be expected simply to deny 'non-genuine UK-based activity.' The only potentially aggravating factor in the appellant's profile is that he is a Kurd. There is no evidence to show that that factor alone, absent any evidence of involvement in separatist politics, would expose the appellant to a real risk.

9. In the circumstances, the appeal is dismissed.

**Notice of Decision**

This appeal is dismissed.

Signed Date 31 December 2019

Upper Tribunal Judge Lane

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

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