Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10138/2019 ('V')

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th November 2020	**On 19th November 2020**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

'AK'
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

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 their family. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the appellant: Dr S Chelvan, instructed by Primus Solicitors
For the respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which were given orally at the end of the hearing on 9th November 2020.

2. Both representatives attended the hearing via Skype and I attended the hearing in-person at Field House. The parties did not object to the hearing being via Skype and I was satisfied that the representatives were able to participate in the hearing.

3. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Buckley (the 'FtT'), promulgated on 6th February 2020, by which he dismissed the appellant's appeal against the respondent's refusal on 26th September 2019 of his further submissions, which the respondent had treated as a fresh claim, seeking asylum and asserting that his removal would breach his rights under articles 2, 3 and 8 of the European Convention on Human Rights ('ECHR').

4. In essence, the appellant's claims involved the following issues:

   4.1. whether, as an Iranian national of Kurdish ethnic origin, he was perceived by the Iranian authorities as having political affiliations to a Kurdish opposition group, the 'KDPI,' as a result of helping wounded people to hospital; and '*sur place*' activities in the UK. He claimed that he was forced to flee Iran and had been convicted and sentenced to imprisonment, in his absence, because of his perceived loyalties;

   4.2. to what extent the new evidence justified departing from an earlier FtT decision (Judge Siddiqi) promulgated on 12th December 2017;

   4.3. the nature of the appellant's '*sur place*' activities, attending demonstrations and posting material on 'Facebook'.

The FtT's decision

5. The FtT considered and applied the well-known authority of Devaseelan v SSHD [2002] UKIAT 00702. The FtT noted the absence of any reference to any Facebook material in the earlier case, despite the appellant having a Facebook account at the time (§31); the FtT noted the vagueness of the appellant's evidence about multiple Facebook accounts (§§33 to 34; 36 to 39); the vagueness of his evidence about demonstrations he had attended (§35); the FtT considered a letter purporting to be from the KDPI in Paris, whose provenance the FtT did not accept (§41) and the FtT considered what he regarded as the implausibility of the issuing of a court order (§42) in the appellant's absence. At §43, the FtT saw no reason to depart from the previous findings of an FtT about the appellant's credibility. He then went on to consider Country Guidance on attendance at demonstrations and other *sur place* activity and considered that even though it was accepted that the appellant had attended demonstrations and had a Facebook account, which he could delete, the appellant did not have a genuinely well-founded fear of persecution (§§47 to 49). The FtT therefore dismissed his appeal.

The grounds of appeal and grant of permission

6. The appellant lodged grounds of appeal, without legal representation at the time, asserting that his lack of memory for details of attendances at demonstrations or Facebook posts were not relevant to the risk he faced, and his letter from the KDPI in France had been ignored.

7. First-tier Tribunal Judge Simpson, noting the lack of legal representation, identified the following arguable errors, not limiting the scope of her grant of permission:

   7.1. Ground (1): the FtT had placed too much weight on the appellant's inability to recall the dates of demonstrations he had attended, and Facebook posts;

   7.2. Ground (2): the FtT's reference to Country Guidance cases arguably appeared as an afterthought, after he had already made findings on the appellant's credibility;

   7.3. Ground (3) the FtT had arguably failed to consider that the appellant may be at risk, even on the basis of opportunistic *sur place* activities, on the "hair-trigger" principle as set out in HB (Kurds) Iran CG [2018] UKUT 00430 (IAC).

The hearing before me

The appellant's submissions

8. The appellant elaborated on submissions in response to a late served Rule 24 response, in a Rule 25 response submitted on 6th November 2020. Very broadly speaking, it identified the grounds set out by Judge Simpson and went on to elaborate that the approach to the Facebook posts had been flawed. In particular, the respondent's case, as recorded at §24(c) of the FtT's decision, had been that there were ways of manipulating Facebook entries that could be deleted or altered. For example, a post could be made, a snapshot of it made, and the post promptly deleted. In essence, there was an allegation of deception. Despite this being part of the respondent's case, the FtT had gone on to say at §39 that while he was unable to attach any weight to the Facebook posts, it was unnecessary to make any findings regarding manipulation of the Facebook entries, because of existing credibility concerns relating to the appellant. The FtT had erred in failing to address a key allegation of deception, where the burden was upon the respondent, see the authority of RP (proof of forgery) Nigeria [2006] UKAIT 00086

9. Next, Dr Chelvan reiterated that the FtT had been obliged to consider the risk of persecution on return at the date of the hearing - see the authority of Ravichandran v SSHD [1995] EWCA Civ 16. Crucially, the FtT had erred, at §48 of his decision, in finding that while the appellant had made posts on Facebook, he could delete his Facebook account before returning to Iran and this would not offend the principles set out in HJ (Iran) v SSHD [2010] UKSC 31. This implied that there was a real risk on returning from the Iranian authorities but that effectively those risks could be mitigated. However, the FtT's reasoning was based on an assumption for which there was no legal authority, namely requiring a refugee to take a step after the date

of the hearing, in order to evade persecution on return. To the extent that it might be argued, this was contrary to §464 of AB and Others (internet activity – state of evidence) Iran [2015] UKUT 00257, which had stated clearly that it was not relevant that a person had used the internet in an opportunistic way, as the Iranian authorities did not seem in the least concerned as to the motives of the person making the claim. The FtT should have applied AB.

10. In addition, the reasoning effectively amounted to a forced modification of behaviour in response to the risk of persecution, which was unlawful: see the authorities of Danian v SSHD [1999] EWCA Civ 3000; Iftikhar Ahmed v SSHD IATRF1999-0490-C; and HJ (Iran). Moreover, to the extent that SSHD v MSM (Somalia) [2016] EWCA Civ 715 might be relied upon, this was with respect to conduct following return, rather than prior to return. The respondent had never engaged with the flaws in §48 of the FtT's decision, in her Rule 24 response. It had never been put to the appellant that he could delete any Facebook posts, which was an additional error of law.

The respondent's submissions

11. Mr Melvin relied upon the respondent's Rule 24 response. The FtT had considered all of the Facebook evidence, after detailed submissions and had reached these findings in the backdrop that the evidence had been taken into account as a whole.

12. The FtT had considered three new pieces of evidence: Facebook screenshots; the letter from the KDPI in Paris; and the court order; they were considered in detail at §§31 to 39 and the FtT had explained why he had placed limited weight on them in the context of wider concerns about the appellant's credibility. The FtT had considered all three new sources of evidence in the context of current Country Guidance cases.

13. The respondent disputed that the FtT had concluded that, as appeared to be argued before this Tribunal, any failed asylum seeker, whose credibility was rejected, could open a Facebook page and expect to be granted asylum.

Discussion and conclusions

14. On the one hand, I am conscious that an assessment of credibility is one that is nuanced, evidence-specific and one that I should be slow to interfere with, for example, by taking particular comments in a decision, in isolation. Nevertheless, I accept first, the difficulty in the structure of the decision, identified by Judge Simpson, when she granted permission, that the FtT assessed and reached conclusions on the appellant's credibility at §§31 to 43, by reference to the Facebook posts and the court order document. §43 states:

> "*In conclusion, I have considered the additional/new evidence provided by the appellant and do not attach any weight to such evidence, and have made further adverse credibility findings against the appellant, dismissing his claim in relation to the genuineness of his political beliefs, sur place activities and support for the*

> *KDPI. I find no reason to depart from the findings of Immigration Judge Siddiqi's determination."*

§44 continues, "*I have considered and had regard to the case law submitted*" and there is then a recitation of the case law, specifically the relevant Country Guidance.

15. The practical difficulty is that the FtT had reached his conclusion on the appellant's credibility at §43, and then went on to consider the Country Guidance authorities, including passages relevant to credibility of the appellant's claimed fear of persecution, such as the 'hair-trigger' approach of the Iranian authorities to those suspected or perceived to support Kurdish rights, at §§44 to 46 onwards. I accept the force of the criticism that the FtT has effectively compartmentalised two sources of evidence, i.e. specific documents and oral evidence; discounted it and then gone on to consider objective country evidence, which is potentially relevant to the genuineness of the appellant's fear. That compartmentalisation is analogous to the 'Mibanga' trap (relating to expert evidence), see: Mibanga v SSHD [2005] EWCA Civ 367. Bearing in mind that the appellant's credibility is central to this case, I accept that the FtT's approach amounts to a material error of law.

16. I also accept Dr Chelvan's submissions that there are also linked flaws in the three paragraphs of the FtT's decision: §§24(c), 39 and 48. At §24(c), the FtT recorded the respondent's case as including that the appellant had manipulated Facebook entries, namely that he posted or altered them, took snapshots of them and deleted them on the day of posting. The FtT was invited to place no weight on the Facebook posts.

17. The FtT sought to resolve the respondent's challenge to the reliability of the Facebook evidence at §39, stating:

> *"In relation to the Facebook posts, I am unable to attach any weight to them. I do not find it necessary to make any finding regarding the manipulation or otherwise of the Facebook entries. The appellant's claim regarding his social media activity lacks any credibility. I do not accept that the appellant had a second Facebook account, nor do I accept what the appellant tells me in relation to why he is posting anti-regime sentiment. I make this finding also in the context of the appellant confirming in his original asylum interview that he was an ordinary man and had no political profile ..."*

18. I accept Dr Chelvan's challenge that the FtT's decision not to make any findings about whether the appellant had manipulated Facebook entries, first, fails to engage with an allegation of deliberate deception, the determination of which clearly has potential relevance to the appellant's credibility. Second, whether the Facebook posts have or have not been deleted, on the day in question, or still exist, is also particularly relevant to the risk to the appellant on return to Iran, even if the material has been posted in an opportunistic way - see §464 of AB:

> *"464. We do not find it at all relevant if a person had used the internet in an opportunistic way. We are aware of examples in some countries where there is clear evidence that the authorities are scornful of people who try to create a claim by being rude overseas. There is no evidence remotely similar to that in this case.*

> *The touchiness of the Iranian authorities does not seem to be in the least concerned with the motives of the person making a claim but if it is interested it makes the situation worse, not better because seeking asylum is being rude about the government of Iran and whilst that may not of itself be sufficient to lead to persecution it is a point in that direction."*

19. I also accept the final part of Dr Chelvan's challenge, to §48 of the FtT's decision, which states:

> *"Although it is accepted that the appellant has attended some demonstrations, he has not demonstrated even a low-level political profile or involvement in such demonstrations, over and above mere attendance. I have found that the appellant does not have any genuinely held political beliefs and as such he can delete his Facebook account before returning to Iran and this will not offend the HJ principles."*

20. The flaw here is that on the one hand, the FtT had already considered, but expressly declined to make a finding at §39 regarding the manipulation of the Facebook entries; on the other hand, at §48, there appears to be the suggestion that there is such Facebook material that still exists, but the appellant can be expected to delete it on his return. I accept that first, the conclusion and reasoning as to the continuing existence of Facebook entries is not clear; and second, it is contrary to the authority of AB, already referred to, that even those having taken part in opportunistic *sur place* activities may well have a well-founded fear of persecution. While the 'hair trigger' approach was cited by the FtT, I accept the criticism that the FtT has not gone on to adequately explain why the appellant's fear would not be well-founded, in that context, other than the reference to his ability to delete the Facebook material, which, it may be argued, have been viewed by the Iranian authorities in the meantime. I also regard this gap in the FtT's reasoning as a material error.

21. For the above reasons, I conclude that the FtT's decision is not safe and cannot stand.

Decision on error of law

The decision of the First-tier Tribunal contains material errors of law and I set it aside.

I remit this appeal to the First-tier Tribunal for a complete rehearing.

Disposal

22. With reference to paragraph 7.2 of the Practice Direction and the necessary fact-findings on credibility, this is clearly a case that has to be remitted to the First-tier Tribunal for a complete rehearing, without preserved findings.

Directions to the First-tier Tribunal

This appeal is remitted to the First-tier Tribunal for a complete rehearing with no preserved findings of fact.

The remitted appeal shall not be heard by First-tier Tribunal Judge Buckley, with an interpreter in Kurdish Sorani.

The anonymity directions continue to apply.

Signed *J Keith* Date: 16th November 2020

Upper Tribunal Judge Keith