Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00818/2020

THE IMMIGRATION ACTS

Heard at Manchester via Skype	**Decision & Reasons Promulgated**
On 17 December 2020	**On 12 January 2021**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

EAHA
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Pipe instructed by Jasvir Jutla & Co Solicitors.
For the Respondent: Mr Tan Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Hollings-Tennant ('the Judge') promulgated on the 17 August 2020 in which the Judge dismissed the appellant's appeal on protection and human rights grounds.

2. Permission to appeal was granted by another judge of the First-tier Tribunal on 28 August 2020.

Background

3. The appellant is a citizen of Iraq, born on the 14 January 1981, who entered the United Kingdom lawfully on 6 July 2009 with leave to remain as a student valid to 30 June 2010. The appellant's leave was extended to 25 July 2014.

4. Following further unsuccessful applications, in different categories, the appellant claimed asylum on 7 August 2015 which was refused by the respondent and that refusal upheld on appeal. The appellant lodged further submissions on 16 October 2018 which although initially refused pursuant to paragraph 353 of the Immigration Rules, were reconsidered leading to a further refusal with a right of appeal which was the decision subject to the appeal before the First-tier Tribunal.

5. Having considered the written and oral evidence the Judge sets out findings of fact from [22] of the decision under challenge.

6. The Judge noted, pursuant to Devaseelan, that the appellant now relied upon new matters that were not part of his earlier claim, namely sur place activities in the United Kingdom involving his posting comments on Facebook which are critical of the Kurdish political parties. The Judge noted that the earlier asylum claim was brought on the basis of an alleged fear of persecution on return because the appellant sold alcohol and cigarettes as part of his business and that the appellant had been found to be an unreliable witness.

7. The Judge considered the Facebook posts in the current appeal from [26]. At [27] the Judge writes:

> 27. Having heard oral evidence from the Appellant and considered the content of his Facebook posts, I am prepared to accept that he has strong opinions about what he believes to be corruption within the IKR. He has provided a significant amount of documentary evidence, by way of printout from Facebook, the content of which indicates that he has both an awareness of political issues and events in the IKR and that he can articulate opinions about such matters. It seems to me that the catalyst for such opinions was his failure to secure employment in 2006 because he was not affiliated to the PUK, rather than any specific interest in politics per se. This is because he mentioned several times in evidence the fact that he lost a job because of political issues. As such, there is perhaps some merit in the Respondent's assertion that the Appellant does not genuinely hold political beliefs. It is, of course, possible that his criticism arises out of personal frustration rather than reflective of any moral duty to speak out, and I note that several posts are of a personal nature, including a post on 12 May 2018 about the incident in 2006, a post about his mother receiving poor treatment from a doctor, and another about the education sector and a friend being sacked. That said, the Appellant does not claim to have been involved in political activities and whatever his motivation for posting comments, I find that it is reasonably likely that his criticism reflects genuine views about corruption, that such views can properly be categorised as a political opinion and would likely be perceived as such by those reading his posts.

8. The Judge thereafter considers whether in light of the finding made the appellant will face a credible real risk on return. At [31-32] the Judge writes:

31. The Respondent accepts that the content of the Facebook adduced are critical of the Kurdish political parties but argues there is no evidence to substantiate the Appellant's assertion that the posts are set to public view. Mr Scholes referred to evidence from Facebook with regards to privacy settings and argued that posts can be made private, content changed, and that it is easy to manipulate posts. There does not appear to be any specific indication on any of the Facebook screenshots provided to suggest that such posts are set to private view. Even if there was an indication, the privacy settings on Facebook can be changed at any time to make such posts, or indeed an entire profile, private or visible to just friends on Facebook. As such, I find that the screenshots, in themselves, are not sufficient to establish that such posts are publicly available to a wider audience.

32. An indication as to whether Facebook posts are publicly available may be derived from the number of 'likes' or 'comments' such posts receive, with greater numbers at least suggesting the posts have been viewed by a wider audience. In the Reasons for Refusal Letter (RFRL), the Respondent refers to the fact that there is minimal engagement with the Appellants posts, with very few 'likes' or 'comments' from other Facebook users. This is reflected in the evidence presented - the maximum number of 'likes' received on any of the Appellants posts is 38 (relating to a post on 15 December 2019) and the maximum number of 'comments' on any one post is 19 (relating to a post on 6 November 2018). I have considered the extent of engagement with the Appellants posts in the context of the expert evidence from Dr Rebwar Fatah, who explains that Facebook has become a battleground for political activists [at paragraph 75]. I find that the level of engagement with the Appellants posts particularly when considering the inflammatory nature of some of his comments on subjects that people have strong opinions about and thus more likely to provoke a reaction, strongly suggests that such posts are not publicly available and are instead only visible to those who he has accepted as friends on Facebook.

9. The Judge examined the evidence in relation to an alleged threat to the appellant's brother by unknown masked men in his summerhouse outside Sulaymaniyah city on 27 May 2008, in which it was alleged the appellant's brother was told he will be killed if the appellant continued to post comments on Facebook, but noted at [36] that despite the appellant continuing to post comments on Facebook neither his brother nor any other member of his family had been since threatened by these men or any other person directly or indirectly. The Judge also considered the appellant's evidence of having received threats via Facebook Messenger from a Hawker Ramazan on 11 October 2018. In assessing this evidence at [37] the Judge writes "*However, I find that I can place little weight on the evidence relating to this threat. First, the translation of the conversation starts with Hawker Ramazan indicating that he has sent an 'add request' and asking why the Appellant has not accepted it, with the Appellant following that up by asking who he was, with threatening responses received thereafter. The conversation suggests they were not on Facebook 'friends' and that the Appellant wanted to ascertain the person was before accepting any such request. In contrast, the screenshot of the messages (Appellants bundle, page 201), indicates that he 'added' Hawker on 11 October 2018 and accepted the request. I do not find it credible that the Appellant would accept a request from an individual he did not know only four months after his brother was allegedly attacked because of*

the Appellants Facebook activity. In addition, had the Appellant received what amounts to a death threat from another Facebook user he would surely at least have reported that threat to Facebook, if not the police, and blocked the individual but there is no evidence to suggest he has done that.

10. The Judge summarises the credibility findings between [39-40] in the following terms:

> 39. Having carefully considered all the evidence in the round, as I must do, I accept that the Appellant has strong opinions about corruption in the IKR and that this amounts to a political opinion. Bearing in mind the lower standard of proof that applies in such matters, I do not consider that he has deliberately manufactured Facebook posts for the purposes of seeking asylum (see Danian v SSHD [2002] Imm AR 96) nor can he be expected to delete posts that relate to genuinely held opinions to avoid persecution on return (see RT (Zimbabwe) [2010] EWCA Civ 1285 and HJ (Iran) [2010] EWCA Civ 172.
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> 40. However, given my findings as set out above, I do not accept that he has posted such comments publicly, that he has been threatened as a consequence, or that the incident involving his brother was related to the Appellants Facebook activities as claimed. I do not accept that he has a strong moral conviction to raise awareness, if he did then he would surely have posted comments at some point between his arrival in the United Kingdom in 2009 and 2013, notwithstanding that he was focusing on his studies. He claims to have been aware of the risks involved and uses that to explain why he did not post comments whilst he was in Iraq, yet if he was aware of the risks as claimed, he would surely have mentioned his Facebook posts in his appeal against the refusal of his previous asylum claim in 2016, some three years after having started to make such comments. When these factors are considered in conjunction with the lack of evidence that his posts are, and continue to be, publicly available, and the lack of wider public engagement with those posts, despite the inflammatory nature of some comments, I do not accept the Appellant's assertion that the posts are available to others beyond his friends and family on Facebook.

11. The Judge considered the position in the alternative, as if the Facebook posts were available in the public domain, from [41] leading to an alternative conclusion at [47] in the following terms:

> 47. As such, I find that the Appellant has not established that he faces a real risk of persecution or serious harm on return to the IKR. Even if his Facebook posts are publicly available he has not established that such posts have come to the attention of the Kurdish political parties, and even if they did there is no real risk of him being targeted directly as a result on the evidence presented. In addition, he would be returning to his home area of Sulaymaniyah, where his family still reside. In his expert report, Dr Fatah comments (at paragraph 174) that the Appellants Facebook posts are primarily critical of the KDP. This further fortifies my conclusion that, even to the lower standard of proof, he would not face a real risk of persecution in Sulaymaniyah, an area controlled by the PUK.

12. The appellant relied on five grounds of appeal. The respondent in the Rule 24 response dated 12 October 2020 opposes the application.

Error of law

13. The appellants first ground asserts the Judge erred at [44] in considering the expert report of Dr Fatah after making adverse credibility findings and in failing to consider the report as a whole.

14. [44] falls within the Judges alternative findings as demonstrated above. The primary finding is that it was not made out anybody within the IKR other than appellant's friends and family were aware of the appellant's Facebook posts. The report of Dr Fatah specifically confirms at [52] that he was instructed to address the issue of risk to the appellant due to his criticising the KRG authorities which is not relevant to the issue of whether the Facebook posts could be viewed within the public domain.

15. The Judge was correct to consider the question of the accessibility of the appellant's Facebook posts as being the core of his case, as it as a result of such comments being posted in the public domain that the appellant claims a real risk arises.

16. A Facebook account has a number of restrictions available in relation to who the account holder wishes to view his or her posts, as follows:

- 'Public': meaning anyone on or off Facebook can view the posts
- 'Friends': restricting those who can view the posts to a user's friends on Facebook
- 'Friends except': preventing some added as 'friends' from viewing the posts.
- 'Specific friends': only show to some friends
- 'Only me': only the user can view

17. The restriction "friends" is the default setting on Facebook.

18. The Reasons for Refusal letter at [73] raised the issue of the Facebook posts where it is written at [73]:

> 73. Regarding your Facebook posts themselves, you have submitted numerous screenshots of numerous posts featuring on your Facebook profile spanning dates of 2013 – 2018. These consist of both your own and shared posts, including photos and videos. It is accepted that the content of the posts are criticising the Kurdish political regime. However it is noted that there is minimal engagement with your posts. There is no more than 10 'likes' on any picture provided and many have no 'likes' or comments. There is also no indication provided as to whether such posts are set to public view, so that they are available to and have been viewed by a wider audience and people in Iraq. Overall, it has not been evidenced that people in Iraq have seen any such posts on your Facebook. Additionally, it is noted that you did not leave Iraq with a political profile. Activity on Facebook is all sur place and therefore, there is no indication that you have already raised the concern of the Iraqi authorities or would do so on arrival. You have provided no evidence that you have carried out any additional or activities in the UK which would enhance your risk of being adversely known to those you claim to fear. There is also nothing to show that these posts have originated in Iraq or how of the people you claim to fear would locate your page. Ultimately, it is not demonstrated that the parties you claim to fear would have any knowledge of your posts, or if they did, considering the very minimal engagement on your private Facebook posts, it is not accepted that you are at risk of persecution for your political opinion.

19. I accept there is merit in Mr Pipe's submission that the number of 'likes' or 'comments' is not an indicator of how many people have read the Facebook post – see ground 3, paragraph 5(c). Entries under either category arise as a result of an individual(s) clicking the 'like' link which records the cumulative number of such activities or the 'comment' which enables them to enter text in response. It is not irrational for Mr Pipe to have submitted that others may view posts who would not necessarily have undertaken either action, especially if they did not want to reveal their own identity or location.

20. This submission does not, however, assist the appellant for even if the Judge was wrong to find the number of 'likes' or 'comments' was relevant, this does not of itself demonstrate that the appellant's claim that his posts are in the public domain and could be viewed by others is credible. The core finding is that the appellant had not shown by adducing suitable evidence that the posts are or were in the public domain.

21. Whether a Facebook post is public or private is a setting that can be changed. A Facebook user will be aware that the default setting for all posts is that they are private and therefore only viewed by those to whom the appellant gives permission. There was no evidence before the Judge to show that the appellant had changed the setting on his Facebook account from private to public or provided a printout of the timeline which will have clearly recorded relevant information concerning individual posts, including the date of creation and whether the same have been manipulated, despite the lack of any such evidence having been noted as being of concern in the refusal letter.

22. The onus is upon the appellant to establish his claim. It has not been shown the Judge's finding there was no evidence to show the Facebook posts were publicly available to a wider audience is one infected by arguable legal error.

23. In relation to the comments posted in response to the appellant's own postings, it was not made out these were from individuals who have the capacity to access the same in the public domain or are from those the appellant specifically claims he faces a real risk from.

24. The appellant asserts in Ground 2, paragraph 5(b), that at [27] the Judge finds the appellant's activities are genuinely motivated and can be categorised as a political opinion yet imports the notion of a moral duty which is used as a yardstick by which to assess the credibility of the appellant's activities. The appellant asserts the use of such amounts to legal error due to applying an erroneous test to the consideration of the claim.

25. As Mr Tan submitted, it is important to read the determination as a whole. [27] is set out above. At [28] the Judge writes:

> 28. However, it does not necessarily follow that an individual holding such opinions would consider it their moral duty to express those views publicly on social media. In evidence before me, the Appellant was clear that he felt it was his duty to speak out and raise awareness about corruption and that Facebook was the best way to do so. He went as far as to say that he

> considered the risks to his family but preferred to do his duty by writing about such matters publicly. However, this strong moral stance did not compel him to undertake any political activities or post critical comments whilst in Iraq, even though he claims to have been using Facebook at the time. When asked about this, the Appellant says that he did not post in Iraq due to the risks of being tortured or killed and that he said no to them in other ways, which is why he lost an employment opportunity is 2006. This suggests that his moral convictions are not as strong as to take such risks himself, which casts some doubt on his assertions that it is his duty to post on Facebook regardless of the consequences. That said, Facebook was only created in 2004 and I accept Mr Pipe's submission that it was not such a big thing in Iraq before the Appellant came to the United Kingdom in 2009. However, whilst it is fair to say that Facebook has become more prominent as a means to express political views in recent years, the Appellant's oral evidence was that he did use Facebook in Iraq but did not post because of the risks involved.

26. I find there is merit in the written submission of Mr Tan that rather than applying an impermissible test the Judge was assessing whether a claim put forward by the appellant, that he had published critical material on social media publicly, was true. If the issue in the case was whether the appellant could be expected to hide his political beliefs and a suggestion the existence of a moral duty may have impacted upon the application of established caselaw, that may be relevant, but that was not the finding of the Judge. The Judge did not accept that this was a case in which the appellant would choose to hide a genuinely held political belief for the purposes of avoiding persecution, contrary to established caselaw, but rather found that even if the evidence had come into the public domain, he failed to make out he will face a real risk on return (the alternative finding in which the report of Dr Fatah was properly considered). The Judge noted the appellant had not posted inflammatory comments whilst in Iraq or mentioned that he faced a real risk for the matters now relied upon, even though the posts pre-dated the earlier claim, in the initial asylum appeal. It is not made out on the facts this case is similar to those in cases such as RT (Zimbabwe) or HJ (Iran) where it was made out on the evidence that the core activity was likely to lead to a real risk of persecution in the individual's home state. I find the Judges findings on this point have not been shown to be irrational or ones not reasonably open to the Judge on the evidence.

27. Ground 4 - paragraph 5 (d) asserts the Judge failed to consider material evidence by reference to statements made by the appellant's father and late mother referring to threats, which are in the appellant's bundle.

28. It is not disputed the Judge did not view the DVD, but I find this is not a legal error as it was accepted that the transcripts set out the text of what had been said in the DVD recordings by the appellants parents.

29. The Judge at [36] specifically refers to letters and video evidence provided by the appellant's parents indicating that this material was clearly taken into account. Mr Tan in his submission stated the transcripts when read were almost in the form of a note or letter to the appellant. I find having considered the documents that the evidence from the parents made no reference to any direct threat that

they had received as a consequence of the appellants activities. The Judge fully considered the evidence of the attacks which was not found to be credible and found an inconsistency between the evidence provided by the parents, a letter from the brother, and a standard newspaper article at [34]; which is said by Mr Tan to be a finding which is not challenged, or the finding of posting of further material by the appellant soon after the alleged attack when he had knowledge of an alleged risk to his family in doing so. The Judge was not required to set out findings in relation to each and every aspect of the evidence, and I do not find it made out the Judge failed to consider material evidence sufficient to amount to a material error of law.

30. Ground five -paragraph 5 (e) assert the Judge failed to consider the evidence of the witness Karzan Karim. The appellant accepts the Judge refers to the evidence but asserts he failed to consider the reason the witness blocked the appellant was because he was worried that the appellant's posts may cause him problems.

31. Having considered this evidence, the Judge gives adequate reasons for why limited weight was placed upon it as corroborating the appellant's account. The weight to be given to the evidence was a matter for the Judge. This material does not undermine the Judge's core findings that the appellant had not made out that his Facebook posts could be viewed by members of the public. Mr Karim had the status of being a 'friend' on the appellant's Facebook and so may have been able to view the appellant's posts but that creates no real risk for either the appellant or the witness. Mr Tan's Rule 24 response also submits that the witness did not confirm that the posts were public.

32. While some of the points raised by Mr Pipe have merit, all have been carefully taken into account, as have those of Mr Tan and the decision read as a whole. Having done so, I find the appellant fails to establish that the core findings of the Judge that the appellant had provided no evidence that his Facebook posts could be viewed in the public domain is a finding infected by legal error. I do not find the Judge's assessment of risk on return to be affected by arguable legal error sufficient to warrant the Upper Tribunal interfering any further in relation to this matter. It was, in particular, not made out that in light of the fact the appellant will be returning to Sulaymaniyah, where he has family, even if he continued to post his views, this will expose him to a real risk of serious harm from representatives of the PUK, or that anything is made out that warrants the decision being set aside for any other reasons.

33. The Judges findings have not been shown to be irrational or outside the range of those reasonably available to the Judge on the evidence.

Decision

34. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

35. 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 18 December 2020