Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-000672
On appeal from PA/51541/2021
[IA/03748/2021]

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
On the 15 September 2022

Decision & Reasons Promulgated
On the 27 October 2022

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

RS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Joseph instructed by Tann Law Solicitors
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

Introduction

2. The appellant is a citizen of Iran. He is Kurdish and was born on 1 January 1993. He comes from Marawi in the Sina Province.

3. The appellant arrived in the United Kingdom on 5 May 2011 and claimed asylum. That claim was refused on 31 May 2011 and an appeal against that decision was dismissed by the First-tier Tribunal (Judge Robson) on 29 July 2011. The appellant was refused permission to appeal to the Upper Tribunal and he became appeal rights exhausted on 28 September 2011.

4. The appellant lodged further submissions in 2012 and 2013 which were refused. Then, on 5 September 2019, the appellant made further submissions which were refused by the Secretary of State on 21 January 2021 with a right of appeal.

5. The appellant appealed to the First-tier Tribunal and, in a decision sent on 14 January 2022, Judge Pinder dismissed the appellant's appeal on all grounds.

6. The appellant sought permission to appeal which was initially refused by the First-tier Tribunal (Judge J K Swaney) on 10 February 2022. However, on renewed application to the Upper Tribunal, UTJ Pitt granted the appellant permission to appeal on 19 April 2022.

7. The appeal was listed for hearing on 19 September 2022 at the Cardiff Civil Justice Centre. The appellant was represented by Mr Joseph and the respondent by Ms Rushforth. I heard oral submissions from both representatives.

The Judge's Decision

8. Before Judge Pinder, the appellant relied upon two bases for his claim to be a refugee.

9. First, he claimed that he had been active in Iran for the Kurdish Democratic Party of Iran ("KDPI"). The appellant claimed that on 17 June 2018, he had been convicted in his absence by the Islamic Republic Court of Sanandaj of two counts of membership of a banned democratic and socialist party and crimes against the internal security of the country. In support of that claim, the appellant relied upon court documents which, the appellant said, had been sent to him by his uncle in Iran. One document, the appellant claimed, was a decision or judgment of the court sentencing the appellant to five years' discretionary imprisonment on the two counts of membership in a banned democratic and socialist party and with committing offences against the internal security of Iran. The second document, the appellant claimed, was a request by the appellant for an appeal against the verdict. In addition, the appellant relied upon his own evidence and a letter of support from the Democratic Youth Union of Iranian Kurdistan.

10. Secondly, in claiming that he was a refugee, the appellant relied upon *sur place* activities in the UK including attending a number of pro-Kurdish (and anti-Iranian) demonstrations and his Facebook profile including posts and photographs of him at demonstrations.

11. Judge Pinder, in relation to the two court documents, having considered them at [54]–[60], concluded at [61] that:

> "I do not consider that I can attach much weight, if any at all, on the Appellant's court documents".

12. Having considered all the evidence, Judge Pinder rejected the appellant's claim that he had been involved with the KDPI in Iran and that he was at risk, as a consequence, on return. In addition, although Judge Pinder (unlike the respondent) accepted that the appellant was an Iranian citizen of Kurdish ethnicity, applying the country guidance cases, in particular HB (Kurds) Iran CG [2018] UKUT 430 (IAC) ("HB (Kurds)") did not accept that the appellant would be at risk on return on the basis of his Kurdish ethnicity.

13. Further, Judge Pinder rejected the appellant's claim based upon his *sur place* activities in the UK. Applying the country guidance decision in BA (Demonstrators in Britain - risk on return) Iran CG [2011] UKUT 36 (IAC) ("BA (Iran)"), the judge concluded that the appellant had not established that he was someone with a "significant political profile" or would be perceived as such and as a consequence would be at risk on return as a result of his activities in the UK.

14. Finally, the judge dismissed the appellant's appeal under Art 8 of the ECHR.

The Appellant's Submissions

15. The appellant's grounds are essentially two-fold as developed by Mr Joseph in his helpful oral submissions. I will refer to them as Ground 1 and Ground 2 although they are not so enumerated in the grounds of appeal.

16. Ground 1 challenges the judge's adverse finding in relation to the appellant's claimed political activity in Iran on behalf of the KDPI. In particular, it challenges the judge's consideration of the court documents relied upon by the appellant.

17. First, Mr Joseph submitted that the judge had failed to make a clear finding on whether the documents were genuine. He submitted that, particularly in light of the fact that the judge accepted the appellant's nationality, he should have made a finding one way or another in that regard. Instead, Mr Joseph submitted that at [61], the judge said, somewhat ambiguously, that he could not attach "much weight, if any at all" to those documents.

18. Secondly, Mr Joseph submitted that, in any event, the judge failed to give adequate reasons at [54]–[61] for reaching his conclusion in respect of the court documents.

19. Thirdly, Mr Joseph submitted that the judge had been wrong in [60] to rely upon the lack of evidence from Iran from the appellant's uncle when assessing what, if any, weight to give to the court documents. Mr Joseph submitted that the judge had failed to take into account that it was unlikely that open communication could take place in relation to these documents without putting the appellant's family in Iran at risk.

20. Finally, Mr Joseph initially raised the point (not dealt with in the written grounds themselves) by reliance upon the Home Office *CPIN*, "Iran: Kurds and Kurdish political groups" (May 2022) (version 4.0) at para 7.5.1 that, contrary to the judge's reasoning in [60], an individual (such as the appellant) could be convicted in his absence. However, Mr Joseph accepted that he could not pursue this point as the relevant *CPIN* upon which he relied dated from May 2022 and was not in existence (let alone before Judge Pinder) at the hearing in November 2021. Mr Joseph accepted, that the relevant *CPIN* at the time, (version 3) made no reference to the points raised at para 7.5 of the most recent document. He, therefore, placed no further reliance upon this point.

21. Ground 2 challenges the judge's adverse finding in relation to the appellant's *sur place* activities in the UK. Mr Joseph accepted that the issues raised before the First-tier Tribunal had to be approached in accordance with the country guidance in BA (Iran) and HB (Kurds) and that the most recent country guidance in relation to *sur place* activities, in particular in relation to Facebook activity, dealt with in XX (PJAK - sur place activities - Facebook) Iran CG [2022] UKUT 23 (IAC) would only become relevant if the judge's decision was set aside and was re-made.

22. Nevertheless, Mr Joseph submitted that in accordance with BA (Iran), the judge was required to consider the risk to the appellant of being monitored or recorded at demonstrations as well as obtaining access to the appellant's Facebook activity. Mr Joseph submitted that the judge had failed to do that. Indeed, the judge had failed to make a clear finding as to precisely what was the appellant's activities in the UK, in particular in relation to demonstrations, and whether or not he had attended between seven and eight demonstrations. Mr Joseph submitted that the judge had, instead, moved directly to conclude that the appellant could not succeed because he was not someone with a "significant political profile" whether perceived or not. Mr Joseph submitted that that characterisation of the level of political profile failed properly to have regard to HB (Kurds) which recognised that even a "low-level" of political activity (or activity that was perceived to be political) which was pro-Kurdish would expose the appellant to a real risk of persecution.

23. Mr Joseph invited me to find that the judge had erred in law on both Grounds 1 and 2 and to set aside his decision.

The Respondent's Submissions

24. On behalf of the respondent, Ms Rushforth submitted that in relation to Ground 1 the judge had correctly approached the assessment of the court documents, not on the basis of whether they were genuine or false but

rather whether they were reliable applying the well-known approach set out by the IAT in Tanveer Ahmed* [2002] Imm AR 308. Further, Ms Rushforth submitted that the judge was entitled to take into account, in his reasons for not accepting the reliability of the documents, that there were no supporting documents from his uncle as to how his uncle had been able to obtain them. Ms Rushforth relied upon TK (Burundi) v SSHD [2009] EWCA Civ 40.

25. Secondly, Ms Rushforth submitted that the judge had not erred in law in his approach to the *sur place* activities. Relying upon BA (Iran), Ms Rushforth submitted that the judge was required to take into account the level of activity in determining whether the authorities would be aware of the appellant's activities. She relied upon headnote para (1). Here, although the judge had taken the appellant's activities in the form of demonstrations and Facebook activity together, the judge had been right to look to whether he had a "significant political profile" and having concluded that he did not, in accordance with BA (Iran), the judge was entitled to find that the appellant would not be at risk on return. Ms Rushforth submitted that what was said by the Upper Tribunal in HB (Kurds) about the risk to Kurds, in particular in relation to "low-level" political activity, was concerned with activity in Iran rather than outside the country such as in the UK.

26. Ms Rushforth invited me to find that the judge had not materially erred in law either in respect of Ground 1 or Ground 2 and to uphold his decision.

Discussion

27. I will take each of the grounds in turn.

Ground 1

28. At [54]–[57], the judge set out the two documents claimed to emanate from the Iranian court and to demonstrate that he had been convicted in his absence on two counts of membership of a banned democratic and socialist party and of committing crimes against internal security for which he had been sentenced to five years' and one year discretionary imprisonment respectively. At [58]–[60], the judge considered the evidence in relation to these documents as follows:

> "58. When cross-examined by Ms Edwards on the court documents and how these were obtained or received by the Appellant, the Appellant responded that his uncle *'knows some people, he asked someone to find those documents for me'* and that he did not know who these other persons were as he was based in the UK and it was his uncle who knew them. Again in answer to questions from Ms Edwards, the Appellant thought that he had first became aware of the warrant against him through his uncle in 2018 and his family had not been able to do anything about this situation. When specifically asked as to whether the Appellant was aware of an appeal lodged against the guilty verdict, the Appellant confirmed that he did not have any awareness of this. In re-examination, the Appellant said that he did not know who had

lodged the appeal, that it could have been his uncle or his party or *'they could have asked someone else'*.

59. It was clear in my view that the Appellant had very little knowledge, if any, as to how it came about that he was charged and a verdict was issued against him in 2018. The Appellant deferred to his uncle's involvement but then had little detail as to the steps taken by his uncle to obtain copies of these documents and the Appellant said himself that he was not aware of the appeal. I can understand to a certain extent that the Appellant would have been isolated from events taking place in Iran in 2018 but I find the extent of the Appellant's lack of awareness and his lack of interaction about any of this with his family in Iran, in order at the very least to obtain more information, concerning.

60. I do not have any evidence from the Appellant's family or his uncle in Iran and I do not find the court documents easy to understand. The Appellant was not able to assist with any of this in evidence and there are no other background or expert materials to assist with these documents either. There does not appear to be any acknowledgment in these documents that the Appellant was not present in Iran at the time of the verdict and appeal judgment being issued and had not been for some time since he left Iran in 2011. Whether there should be such an acknowledgment in such verdicts and/or appeal judgments is not clear to me either".

29. Then, at [61], the judge reached the following conclusion in relation to those documents:

> "61. I have considered these two documents in the round, as is required of me by the relevant case-law, alongside the Appellant's evidence before me as part of these proceedings and the adverse credibility findings on the Appellant's claimed political activities in Iran from FTT J Robson's determination, and for the reasons set out above, I do not consider that I can attach much weight, if any at all, on the Appellant's court documents".

30. Mr Joseph's principal submission was that the judge should have decided whether he accepted that these documents were genuine or not, particularly given that he had accepted aspects of the appellant's claim, such as his nationality and ethnicity, which had been rejected by the respondent.

31. I do not accept that submission. It runs, in my judgment, counter to the approach set out by the IAT in the starred decision of Tanveer Ahmed. A tribunal, in considering documents relied upon by a party, is not required necessarily to determine whether they are genuine or false and a forgery but rather, considering the evidence in the round, can determine whether they are documents upon which reliance can be placed. At [33]–[35], the IAT said this in Tanveer Ahmed:

> "33. It is for the individual claimant to show that a document is reliable in the same way as any other piece of evidence which he puts forward and on which he seeks to rely.
>
> 34. It is sometimes argued before Adjudicators or the Tribunal that if the Home Office alleges that a document relied on by an individual

> claimant is a forgery and the Home Office fails to establish this on the balance of probabilities, or even to the higher criminal standard, then the individual claimant has established the validity and truth of the document and its contents. There is no legal justification for such an argument, which is manifestly incorrect, given that whether the document is a forgery is not the question at issue. In only question is whether the document is one upon which reliance should properly be placed.
>
> 35. In almost all cases it would be an error to concentrate on whether a document is a forgery. In most cases where forgery is alleged it will be of no great importance whether this is or is not made out to the required higher civil standard. In all cases where there is a material document it should be assessed in the same way as any other piece of evidence. A document should not be viewed in isolation. The decision maker should look at the evidence as a whole or in the round (which is the same thing)."

32. At [38], the IAT summarised the principles as follows:

> "38. In summary the principles set out in this determination are:
>
> 1. In asylum and human rights cases it is for an individual claimant to show that a document on which he seeks to rely can be relied on.
>
> 2. The decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round.
>
> 3. Only very rarely will there be the need to make an allegation of forgery, or evidence strong enough to support it. The allegation should not be made without such evidence. Failure to establish the allegation on the balance of probabilities to the higher civil standard does not show that a document is reliable. The decision maker still needs to apply principles 1 and 2."

33. In my judgment, that is precisely the approach which was adopted by Judge Pinder at [54]–[61] of his decision. At [58]–[60], Judge Pinder gave a number of reasons why he doubted the reliability of these documents. At [61], mirroring the approach in Tanveer Ahmed, the judge said that he had considered those two documents "in the round" in accordance with the relevant case-law. Although he made no direct reference to Tanveer Ahmed, he did refer to that case at [11] and [13], when setting out the respondent's case in the refusal letter. I have no doubt that that is precisely what the judge in [61] did in reaching a finding, in effect, that the documents were unreliable and that therefore, in a phrase often used by judges, he could not attach "much weight, if any at all," to the appellant's documents. Providing his reasons for reaching that conclusion are sustainable, the judge did not err in law in failing to reach a conclusion as to whether they were genuine or were false and forgeries.

34. As regards the judge's reasoning, as I have already indicated, Mr Joseph did not seek to challenge one aspect of the judge's reasoning in [60], in relation to whether or not the reliability of the documents was impugned by the fact that they did not contain an acknowledgment that the verdict and appeal judgment were reached in the absence of the appellant.

35. The only point relied upon by Mr Joseph concerns the judge's comment in [60], that there was no evidence from the appellant's family or his uncle.

36. It is trite law that a judge may have regard, in determining whether an individual has discharged the burden of proof upon them, to the fact that evidence (including documents) which it would be reasonable to expect to be produced in support of that individual's case were, in fact, not produced. That is recognised by the Court of Appeal in TK (Burundi) at [20]–[21] where Thomas LJ (as he then was) said this:

> "20. The importance of the evidence that emerged in this Court is to demonstrate how important it is in cases of this kind for independent supporting evidence to be provided where it would ordinarily be available; that where there is no credible explanation for the failure to produce that supporting evidence it can be a very strong pointer that the account being given is not credible. …..
>
> 21. The circumstances of this case in my view demonstrate that independent supporting evidence which is available from persons subject to this jurisdiction be provided wherever possible and the need for an Immigration Judge to adopt a cautious approach to the evidence of an appellant where independent supporting evidence, as it was in this case, is readily available within this jurisdiction, but not provided. It follows that where a Judge in assessing credibility relies on the fact that there is no independent supporting evidence where there should be supporting evidence and there is no credible account for its absence commits no error of law when he relies on that fact for rejecting the account of an appellant."

37. Mr Joseph relied on the fact that the judge failed to take into account that it might have been dangerous for the appellant's family or his uncle in Iran to provide supporting documents. The difficulty with that submission is that the appellant's uncle had no difficulty in, on the appellant's case, providing him with the court documents themselves. If he could do that, one could ask rhetorically, why could he not reasonably provide supporting evidence as to how they were obtained and in relation to them. To the extent that this reason featured as part of the judge's reasons for finding the documents not to be shown to be reliable, I see no error of law in his approach.

38. It is, however, important to note that what the judge actually said in [60] appears to have little material impact upon his overall reasoning at [58]–[61]. He simply referred to there not being any evidence from the appellant's family or his uncle in Iran and that he did not "find the court documents easy to understand". In that, the judge was not referring to his inability to read and know the contents of the documents but rather whether the contents of the documents once read made sense.

39. In my judgments, the judge's reasons were adequate to sustain his finding. At [60], the judge referred to the absence of any background or expert evidence, in particular in relation to the issue of whether these documents would make reference to the fact that the verdict and appeal judgment was reached and made in the absence of the appellant. Mr Joseph did not pursue any challenge to this aspect of the judge's reasoning (see para 20

above). At [58]–[59], the judge gave a number of reasons why he doubted the reliability of the court documents, in particular the appellant's lack of knowledge concerning the circumstances of the charge against him, the verdict or appeal. These were matters which the judge was properly entitled to take into account in assessing whether the court documents were reliable evidence.

40. For these reasons, I reject Mr Joseph's submissions in relation to Ground 1. The judge did not err in law in that regard and his adverse credibility finding in relation to the appellant's claimed political activities in Iran is legally sustainable and stands.

Ground 2

41. It was common ground before me that the issues raised in relation to the appellant's *sur place* activities had to be resolved applying the country guidance in BA (Iran) and HB (Kurds) without regard to the most recent decision in XX which post-dated the judge's decision.

42. At [72]–[76] the judge said this in relation to the appellant's *sur place* activities:

> "72. I have considered the documentary evidence that the Appellant has submitted in support of his 'sur place' claim and I am satisfied that these depict the Appellant at demonstrations. Save for confirming that the photographs at AB/37-38 and other pages as well depict different demonstrations and that these take place once a month (having also been affected by the public health restrictions due to the pandemic) I again consider that the Appellant has provided very little detail regarding this aspect of his claim. Save for stating that he is anti-regime, I have little if any evidence as to why attending demonstrations is important to the Appellant, why he needs to post on FaceBook and what his intentions would be upon return.
>
> 73. For these reasons, I do not consider that the Appellant's FaceBook posts and photographs of him at demonstrations, as exhibited as part of the Appellant's bundle, are sufficient to support a *sur-place* claim. Ms Edwards rightly raises that I have very little evidence from the Appellant himself or from those who know him on why he created his FaceBook account, why he has posted the messages that have been included in the bundle and how these would bring him to the attention of the authorities. I am also concerned that the Appellant's attendance at demonstrations and FaceBook posts did not feature at all within the Appellant's fresh claim made in 2019. This is despite the Appellant now saying that he has been attending such demonstrations and despite the Appellant, being free to do so, having resided in the UK for a long period of time since 2011.
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> 74. Following the steps set out by the Upper Tribunal in *BA (Iran)*, I have considered the level of political involvement raised by the Appellant as part of his claim and appeal but I do not consider that his claimed activity, for which I have very little detail as set out above, is sufficient to raise the Appellant's profile and to demonstrate that he is a committed opponent, someone with a

significant political profile (or perceived as such) and/or that he falls within a category which the regime regards as especially objectionable, pursuant to the country guidance extracted above. Neither is the Appellant's ethnicity as a Kurd and/or his illegal exit from Iran sufficient in itself, according to the country guidance, to place the Appellant at risk of ill-treatment/persecution contrary to the Refugee Convention and/or Articles 2 and 3 ECHR.

75. Similarly, I do not consider that the extracts from the more recent CPINs on Kurds in Iran establish that the Appellant would be at risk upon in return due to his Kurdish ethnicity since these are predicated on Kurds being involved in political activities, or having other 'risk factors', which has not been accepted as addressed above.

76. For the above reasons, I do not consider that the Appellant's *sur place* claim takes the Appellant any further in seeking to depart from the adverse findings of FTT J Robson and in seeking to establish his asylum or human rights claim. I do not find that the Appellant's claim, both subjectively and objectively, engages the UK's obligations under the Refugee Convention nor under Articles 2 and 3 ECHR".

43. In BA (Iran) the country guidance is summarised in paras (1)–(4) of the judicial headnote as follows:

"1 Given the large numbers of those who demonstrate here and the publicity which demonstrators receive, for example on Facebook, combined with the inability of the Iranian Government to monitor all returnees who have been involved in demonstrations here, regard must be had to the level of involvement of the individual here as well as any political activity which the individual might have been involved in Iran before seeking asylum in Britain.

2 (a) Iranians returning to Iran are screened on arrival. A returnee who meets the profile of an activist may be detained while searches of documentation are made. Students, particularly those who have known political profiles are likely to be questioned as well as those who have exited illegally.

(b) There is not a real risk of persecution for those who have exited Iran illegally or are merely returning from Britain. The conclusions of the Tribunal in the country guidance case of **SB** (risk on return -illegal exit) Iran CG [2009] UKAIT 00053 are followed and endorsed.

(c) There is no evidence of the use of facial recognition technology at the Imam Khomeini International airport, but there are a number of officials who may be able to recognize up to 200 faces at any one time. The procedures used by security at the airport are haphazard. It is therefore possible that those whom the regime might wish to question would not come to the attention of the regime on arrival. If, however, information is known about their activities abroad, they might well be picked up for questioning and/or transferred to a special court near the airport in Tehran after they have returned home.

3 It is important to consider the level of political involvement before considering the likelihood of the individual coming to the attention of the authorities and the priority that the Iranian regime would give to tracing him. It is only after considering those factors that the issue of whether or not there is a real risk of his facing persecution on return can be assessed.

4 The following are relevant factors to be considered when assessing risk on return having regard to sur place activities:

(i) Nature of sur place activity

- Theme of demonstrations – what do the demonstrators want (e.g. reform of the regime through to its violent overthrow); how will they be characterised by the regime?
- Role in demonstrations and political profile – can the person be described as a leader; mobiliser (e.g. addressing the crowd), organiser (e.g. leading the chanting); or simply a member of the crowd; if the latter is he active or passive (e.g. does he carry a banner); what is his motive, and is this relevant to the profile he will have in the eyes of the regime>
- Extent of participation – has the person attended one or two demonstrations or is he a regular participant?
- Publicity attracted – has a demonstration attracted media coverage in the United Kingdom or the home country; nature of that publicity (quality of images; outlets where stories appear etc)?

(ii) Identification risk

- Surveillance of demonstrators – assuming the regime aims to identify demonstrators against it how does it do so, through, filming them, having agents who mingle in the crowd, reviewing images/recordings of demonstrations etc?
- Regime's capacity to identify individuals – does the regime have advanced technology (e.g. for facial recognition); does it allocate human resources to fit names to faces in the crowd?

(iii) Factors triggering inquiry/action on return

- Profile – is the person known as a committed opponent or someone with a significant political profile; does he fall within a category which the regime regards as especially objectionable?
- Immigration history – how did the person leave the country (illegally; type of visa); where has the person been when abroad; is the timing and method of return more likely to lead to inquiry and/or being detained for more than a short period and ill-treated (overstayer; forced return)?

(iv) Consequences of identification

- Is there differentiation between demonstrators depending on the level of their political profile adverse to the regime?

(v) Identification risk on return

- Matching identification to person – if a person is identified is that information systematically stored and used; are border posts geared to the task?"

44. It is axiomatic, of course, that in relation to political activity, in particular *sur place* political activity, the issue of risk on return has to take into account whether the Iranian authorities would be aware of an appellant's activities in the UK. Only if they would be aware, either through monitoring in the UK or because at the "pinch point" at Tehran Airport (see AB and others (internet activity – state of evidence) Iran [2015] UKUT 257 (IAC)) the activities would be disclosed by the appellant or otherwise discovered, should the further question asked whether those activities would give rise to a real risk of persecution or serious ill-treatment.

45. BA (Iran) provides guidance on both issues including, noting in para (1), that in relation to monitoring of demonstrations (and Facebook activity) given the large number of those who demonstrate and are involved in such activities, the level of involvement of the individual has to be taken into account in determining whether there is a real risk that the authorities in Iran will become aware of those activities. At para (4)(iii), the guidance goes on to identify factors "triggering enquiry/action on return" which includes "profile" and then poses the following question(s): "*Is the person known as a committed opponent or someone with a significant political profile; does he fall within a category which the regime regards as essentially objectionable?*" (my emphasis). There was some discussion before me as to whether or not that set out three potential triggering factors, namely whether "(1) the person was known as a committed opponent or (2) had a significant political profile or (3) fell within a category that the regime regarded as essentially objectionable" or whether those first two phrases were simply illustrations of the only category identified, namely (3), whether the regime would regard the individual as especially objectionable. In his decision, Judge Pinder at [74] essentially paraphrases para (4)(iii) of the headnote in BA (Iran) as setting out three distinct categories of triggering factors.

46. In the result, it is not necessary for me to reach a concluded view on this issue. Although, I see no reason to doubt the breadth of the categories and essential feature of what interest the authorities in Iran as set out in para 4(iii). Mr Joseph's submission was that the category of "significant political profile" which the judge relied upon was incorrect in the case of the appellant because as a Kurd, the country guidance decision in HB (Kurds) set the level of political involvement which would put an individual at risk as even "a low-level" political activity.

47. It would be helpful, therefore, at this point to set out the country guidance in paras (1)–(10) of HB (Kurds) which is as follows:

> "(1) SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 308 (IAC) remains valid country guidance in terms of the country guidance offered in the headnote. For the avoidance of doubt, that decision is not authority for any proposition in relation

to the risk on return for refused Kurdish asylum-seekers on account of their Kurdish ethnicity alone.

(2) Kurds in Iran face discrimination. However, the evidence does not support a contention that such discrimination is, in general, at such a level as to amount to persecution or Article 3 ill-treatment.

(3) Since 2016 the Iranian authorities have become increasingly suspicious of, and sensitive to, Kurdish political activity. Those of Kurdish ethnicity are thus regarded with even greater suspicion than hitherto and are reasonably likely to be subjected to heightened scrutiny on return to Iran.

(4) However, the mere fact of being a returnee of Kurdish ethnicity with or without a valid passport, and even if combined with illegal exit, does not create a risk of persecution or Article 3 ill-treatment.

(5) Kurdish ethnicity is nevertheless a risk factor which, when combined with other factors, may create a real risk of persecution or Article 3 ill-treatment. Being a risk factor it means that Kurdish ethnicity is a factor of particular significance when assessing risk. Those "other factors" will include the matters identified in paragraphs (6)-(9) below.

(6) A period of residence in the KRI by a Kurdish returnee is reasonably likely to result in additional questioning by the authorities on return. However, this is a factor that will be highly fact-specific and the degree of interest that such residence will excite will depend, non-exhaustively, on matters such as the length of residence in the KRI, what the person concerned was doing there and why they left.

(7) Kurds involved in Kurdish political groups or activity are at risk of arrest, prolonged detention and physical abuse by the Iranian authorities. Even Kurds expressing peaceful dissent or who speak out about Kurdish rights also face a real risk of persecution or Article 3 ill-treatment.

(8) Activities that can be perceived to be political by the Iranian authorities include social welfare and charitable activities on behalf of Kurds. Indeed, involvement with any organised activity on behalf of or in support of Kurds can be perceived as political and thus involve a risk of adverse attention by the Iranian authorities with the consequent risk of persecution or Article 3 ill-treatment.

(9) *Even 'low-level' political activity, or activity that is perceived to be political, such as, by way of example only, mere possession of leaflets espousing or supporting Kurdish rights, if discovered, involves the same risk of persecution or Article 3 ill-treatment. Each case however, depends on its own facts and an assessment will need to be made as to the nature of the material possessed and how it would be likely to be viewed by the Iranian authorities in the context of the foregoing guidance*.

(10) The Iranian authorities demonstrate what could be described as a 'hair-trigger' approach to those suspected of or perceived to be involved in Kurdish political activities or support for Kurdish rights. By 'hair-trigger' it means that the threshold for suspicion is low and the reaction of the authorities is reasonably likely to be extreme." (my emphasis)

48. The relevant part of the guidance relied upon by Mr Joseph was principally para (9) where it is stated that even "low-level" political activity or activity which is perceived to be political is likely to give rise to a risk of persecution or ill-treatment contrary to Art 3 although each case must necessarily depend upon its own facts. Paragraph (10) highlights the "hair-trigger" approach of the Iranian authorities to Kurdish political activities.

49. In my judgment, Ms Rushforth was wrong to seek to confine the guidance in HB(Kurds) to activities by pro-Kurdish individuals in Iran itself. Of course, the guidance does apply in that context. However, in my judgment, it equally applies to *sur place* activity. First, there is no reason to think that the UT was only concerned with Iran-based activity. It does not seek explicitly to restrict the guidance in this way. Secondly, the UT itself applied the guidance at [108]–[121] in relation to the appellant's social media activity in the UK. At [99], the UT specifically said it was assessing the appellant's circumstances in accordance with the guidance it had set out. Thirdly, in any event, I see no basis for interpreting the UT's guidance and the evidence it considered as being restricted to the Iranian authorities' response to pro-Kurdish activity limited to such activity within Iran itself. The thrust of the evidence and the UT's reasoning deals with their response to this form of political activity without restriction to the location of that activity once the individual, and that activity is discovered, is in Iran. Finally, it is worth noting that the UT in BA(Iran) was not concerned with pro-Kurdish political activity. The appellant, in that appeal, was not a Kurd although his political activity was anti-government.

50. I accept Mr Joseph's submissions on Ground 2 that the judge failed properly to apply the country guidance decisions in BA (Iran) and HB (Kurds) in his consideration of the risk, if any, to the appellant as a result of his *sur place* activity in the UK, including demonstrations and posts and photographs on his Facebook pages.

51. In [72]-[76], the judge erred in law by failing to consider the extent to which the appellant's activity would be *known* to the Iranian authorities on return applying BA (Iran). Of course, that error would not be material if the appellant's activity could not conceivably give rise to any real risk of persecution or serious harm. However, in setting the threshold for engaging such a risk on return as, principally, a "significant political profile (or perceived as such)" at [74], the judge failed, in my judgment, to apply the approach in HB (Kurds) at paras (9) and (10) of the headnote that, depending upon all the circumstances, even a "low-level" of political activity of a pro-Kurdish nature is capable of giving rise to a real risk of persecution or serious harm. Whilst the judge appeared to accept that the appellant was involved in "between 7-8 demonstrations in the UK" (see [71]), the judge because of his approach in [74] failed to determine whether that, in particular, would amount to a "low-level" of political activity of a pro-Kurdish nature which, if it came to the attention of the authorities, would expose the appellant to a real risk of persecution.

52. On the basis of Ground 2, I am satisfied that the judge erred in law in his assessment of the appellant's claim based upon his *sur place* activities in the UK.

Decision

53. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of a material error of law. That decision cannot stand and is set aside.

54. The decision must be re-made solely in relation to whether the appellant is at risk because of *sur place* activities in the UK. To that extent none of the judge's findings in [69]–[76] are preserved. The judge's adverse credibility finding together with his findings that the appellant is an Iranian national of Kurdish ethnicity do, however, stand.

55. Having regard to the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal (to be heard by a judge other than Judge Pinder) in order to re-make the decision to the extent indicated above.

Signed

Andrew Grubb

Judge of the Upper Tribunal
26 September 2022