IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-004924
UI-2023-005059

First-tier Tribunal No: PA/50060/2023
LP/01401/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17 September 2024

Before

UPPER TRIBUNAL JUDGE GLEESON
UPPER TRIBUNAL JUDGE NEVILLE

Between

A R
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Agata Patyna, counsel instructed by Wimbledon Solicitors
For the Respondent: Ms Susana Cunha, Senior Home Office Presenting Officer

Heard at Field House on 19 August 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant is an Iranian national of Kurdish ethnicity born on 12 May 2004. He entered the United Kingdom on 21 August 2021 and claimed

asylum on the following day. He claimed that while working as a kolbar (smuggler), carrying goods on foot across the Iran-Iraq border, his convoy was ambushed by the Iranian authorities. He escaped, but a few days later was told by his uncle that the authorities were looking for him. The appellant fled Iran, travelling through several other countries on his way to the UK.

2. Refusing the claim on 22 December 2022, the respondent accepted that the appellant is a Kurd, that he worked as a kolbar, exited Iran illegally, and that he was only 17 years old on arrival in the UK. The respondent did not accept the appellant's account of the ambush, nor that he would be at risk on return on account of any active interest by the authorities or by reason of his ethnicity or (actual or imputed) political views.

3. An appeal against that decision was dismissed by First-tier Tribunal Judge Cary on 26 October 2023. Judge Cary's decision was set aside by Deputy Upper Tribunal Judge Black on 6 March 2023, on the basis that the judge had erred when deciding whether the appellant's perceived political views would put him at risk of persecution on return to Iran. DUTJ Black directed that the appeal would be remade in the Upper Tribunal, with the findings of fact made by Judge Cary being preserved. We take those preserved findings to be as follows:

a. The appellant's age, nationality, ethnicity and work as a kolbar continue to be accepted;

b. The appellant had fabricated his account of the ambush, which was "riddled with inconsistencies and differing explanations";

c. The authorities had no specific interest in the appellant, and did not wish to arrest or detain him on suspicion of smuggling political materials;

d. The appellant and his family had never been supporters or members of any political groups in Iran;

e. The appellant had not been politically active in the UK;

f. The appellant is illiterate and uneducated but on return would have family support by which to avoid destitution; and

g. There was no basis upon which return to Iran would be a disproportionate interference with the right to respect for the appellant's family and private life afforded by Article 8 ECHR.

4. As made clear in DUTJ Black's decision at [10], Judge Cary's finding that the appellant would not be required to disclose his work as a kolbar on return was not upheld. That factual issue remains at large.

The hearing

Hearing on 29 April 2024

5. The appeal was first listed for remaking before Upper Tribunal Judge Gleeson on 29 April 2024. The morning of the hearing, the appellant's solicitors submitted a bundle of fresh evidence claiming that the appellant faced additional risk on return because he had, since the hearing before Judge Cary, made comments critical of the Iranian regime on Facebook and in person at demonstrations in London.

6. The late filing of the new evidence was in breach of the Upper Tribunal's directions, with the consequence that the respondent had not been given an opportunity to consider it, and further that no interpreter had been arranged so the evidence could be tested in cross-examination. Judge Gleeson adjourned the hearing, requiring the respondent to consider the new evidence and confirm whether the appeal was still opposed. Late, and only after being chased, the respondent confirmed on 7 August 2024 that the refusal decision was maintained. One working day before the adjourned hearing on 19 August 2024, again in breach of directions, the appellant's solicitors provided a further supplementary bundle.

7. Breach of the Upper Tribunal's directions causes delay and expense to the parties and to the public. In future cases, the parties' representatives should be mindful of the Upper Tribunal's powers to issue sanctions where appropriate.

Hearing on 19 August 2024

8. We had regard to the evidence that was before the First-tier Tribunal, in addition to the appellant's supplementary witness statement and the attached printouts from his Facebook account. The appellant gave oral evidence with the assistance of a Kurdish Sorani interpreter. Following the representatives' closing submissions, our decision was reserved.

Relevant country guidance and information

9. In HB (Kurds) Iran (illegal exit: failed asylum seeker) CG [2018] UKUT 430 (IAC), the Upper Tribunal relevantly held 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.

[omitted]

(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.

10. In XX (PJAK, sur place activities, Facebook) Iran (CG) [2022] UKUT 23 (IAC), the Upper Tribunal confirmed that the guidance given in SSH and HB continued to accurately reflect the situation for returnees to Iran. It then gave further guidance specifically concerning the issue of risk on return

arising from a person's social media use (in particular, Facebook) and surveillance of that person by the authorities in Iran. The parts of the headnote relevant to this appeal are as follows:

> Surveillance
>
> (1) […] The evidence fails to show it is reasonably likely that the Iranian authorities are able to monitor, on a large scale, Facebook accounts. More focussed, ad hoc searches will necessarily be more labour-intensive and are therefore confined to individuals who are of significant adverse interest. The risk that an individual is targeted will be a nuanced one. Whose Facebook accounts will be targeted, before they are deleted, will depend on a person's existing profile and where they fit onto a "social graph;" and the extent to which they or their social network may have their Facebook material accessed.
>
> (2) The likelihood of Facebook material being available to the Iranian authorities is affected by whether the person is or has been at any material time a person of significant interest, because if so, they are, in general, reasonably likely to have been the subject of targeted Facebook surveillance. In the case of such a person, this would mean that any additional risks that have arisen by creating a Facebook account containing material critical of, or otherwise inimical to, the Iranian authorities would not be mitigated by the closure of that account, as there is a real risk that the person would already have been the subject of targeted on-line surveillance, which is likely to have made the material known.
>
> (3) Where an Iranian national of any age returns to Iran, the fact of them not having a Facebook account, or having deleted an account, will not as such raise suspicions or concerns on the part of Iranian authorities.
>
> (4) A returnee from the UK to Iran who requires a laissez-passer or an emergency travel document (ETD) needs to complete an application form and submit it to the Iranian embassy in London. They are required to provide their address and telephone number, but not an email address or details of a social media account. While social media details are not asked for, the point of applying for an ETD is likely to be the first potential "pinch point, " referred to in AB and Others (internet activity - state of evidence) Iran [2015] UKUT 257 (IAC). It is not realistic to assume that internet searches will not be carried out until a person's arrival in Iran. Those applicants for ETDs provide an obvious pool of people, in respect of whom basic searches (such as open internet searches) are likely to be carried out.
>
> Guidance on Facebook more generally
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> (5) There are several barriers to monitoring, as opposed to ad hoc searches of someone's Facebook material. There is no evidence before us that the Facebook website itself has been "hacked," whether by the Iranian or any other government. The

effectiveness of website "crawler" software, such as Google, is limited, when interacting with Facebook. Someone's name and some details may crop up on a Google search, if they still have a live Facebook account, or one that has only very recently been closed; and provided that their Facebook settings or those of their friends or groups with whom they have interactions, have public settings. Without the person's password, those seeking to monitor Facebook accounts cannot "scrape" them in the same unautomated way as other websites allow automated data extraction. A person's email account or computer may be compromised, but it does not necessarily follow that their Facebook password account has been accessed.

(6) The timely closure of an account neutralises the risk consequential on having had a "critical" Facebook account, provided that someone's Facebook account was not specifically monitored prior to closure.

Guidance on social media evidence generally

(7) Social media evidence is often limited to production of printed photographs, without full disclosure in electronic format. Production of a small part of a Facebook or social media account, for example, photocopied photographs, may be of very limited evidential value in a protection claim, when such a wealth of wider information, including a person's locations of access to Facebook and full timeline of social media activities, readily available on the "Download Your Information" function of Facebook in a matter of moments, has not been disclosed.

(8) It is easy for an apparent printout or electronic excerpt of an internet page to be manipulated by changing the page source data. For the same reason, where a decision maker does not have access to an actual account, purported printouts from such an account may also have very limited evidential value.

(9) In deciding the issue of risk on return involving a Facebook account, a decision maker may legitimately consider whether a person will close a Facebook account and not volunteer the fact of a previously closed Facebook account, prior to application for an ETD: HJ (Iran) v SSHD [2011] AC 596. Decision makers are allowed to consider first, what a person will do to mitigate a risk of persecution, and second, the reason for their actions. It is difficult to see circumstances in which the deletion of a Facebook account could equate to persecution, as there is no fundamental right protected by the Refugee Convention to have access to a particular social media platform, as opposed to the right to political neutrality. Whether such an inquiry is too speculative needs to be considered on a case-by-case basis.

11. In PS (Christianity - risk) Iran CG [2020] UKUT 46 (IAC), the Upper Tribunal found that all returnees arriving on an emergency travel document would be subject to interrogation on arrival, including about the

reasons for their asylum claim. This was held to be consistent with the findings made in SSH. There, the Upper Tribunal had held that returnees:

> 23. … will be questioned, and that if there are any particular concerns arising from their previous activities either in Iran or in the United Kingdom or whichever country they are returned from, then there would be a risk of further questioning, detention and potential ill-treatment […] a person with no history other than that of being a failed asylum seeker who had exited illegally and who could be expected to tell the truth when questioned would not face a real risk of ill-treatment during the period of questioning at the airport.

12. There are no country guidance cases concerning kolbars. The respondent's *'Country policy and information note: smugglers, Iran, February 2022'* states that:

> 2.4.3 Actual numbers of arrests of kolbars is limited, but reports indicate that the number of detentions are numerous, with one report suggesting 'thousands each year' (see Arrest and detention). There are frequent reports of border officials beating, or shooting kolbars with impunity and without warning, causing deaths and injuries. Between 2020 and 2021, an estimated 370 kolbars were killed or injured by border officials. These reports should be seen in the context of up to 170,000 kolbars regularly working the Iraq-Iran border. Injuries and deaths are often caused by the hazardous terrain on the steep sides of mountains along with poor weather conditions (see Kolbars, Excessive use of force).

13. The CPIN then records the guidance in HB to conclude as follows:

> 2.4.6 Evidence continues to support the findings in HB in that a person will not be at real risk of persecution or serious harm based on their Kurdish ethnicity alone, though when combined with other factors, such as involvement in smuggling, may create a real risk of persecution or Article 3 ill-treatment. Each case must be considered on its facts and decision makers must take into account additional factors, such as actual or perceived political activity, when assessing risk.
>
> 2.4.7 Persons who have been involved solely in smuggling are likely to face prosecution. It is lawful for the authorities to prosecute those engaged in smuggling illegal items, or goods which would be subject to import tariffs. However, those prosecuted for such crimes may face a trial which does not meet international standards of fairness. Smuggling can incur a range of penalties, from fines to flogging, or the death penalty (see Penalties and prosecution).

14. Specifically concerning Kurds, the CPIN later cites the following:

> 4.2.10 A joint report published in June 2020 by the Ceasefire Centre for Civilian Rights and Minority Rights Group International (MRG) noted in relation to the penalties for smuggling that:

> '… couriers can expect to face charges relating to the illegal importation of the goods in question, with varying, additional charges, depending on the item and whether it may be, itself, illegal in Iran. As Iran's judicial system routinely falls short of international fair trial standards, some caught may face torture or ill treatment, including forced confession, unfair trial in which they may be denied legal representation or other requirements of due process. Punishment for smuggling, depending on the items, ranges from fines to flogging or, in the case of proscribed drugs, the death penalty.
>
> 'On account of their identity or social origin, couriers may face politically motivated trials. As Kurds, the authorities may charge them with national security-related offences, including in relation to civic activism or membership of a Kurdish political party. As a result, socially vulnerable couriers may have faced execution for alleged national security offences applied in a discriminatory fashion…'

Issues

15. The burden is on the appellant to establish a well-founded fear of persecution for a Convention reason (or a real risk of serious harm) on return to Iran. The applicable standard of proof is 'a reasonable likelihood' or 'real risk'. We can summarise the way in which Ms Patyna argued the appellant's case as follows:

a. In light of the country evidence and information, the following facts as they stood before Judge Cary are sufficient to cumulatively establish risk on return:

i. The appellant's Kurdish ethnicity;

ii. His illegal exit;

iii. The respondent would detect that he had worked as a kolbar from his age, ethnicity, and social and geographic origins.

b. If necessary to establish risk on return, then a further factor can be added: the political beliefs expressed in the asylum interview. Judge Cary made no finding that they were not genuinely held, and we should accept them as such. The appellant cannot be expected to conceal his beliefs in order to avoid persecution: HJ (Iran) v SSHD [2010] UKSC 31. In any event, if the Iranian authorities become aware that they have been expressed then this may create a reasonable likelihood of persecution; it is the perception of the Iranian authorities that matters.

c. If the appellant has still not established risk on return, his recent activity on Facebook and at demonstrations should be taken into account. It either has or would be detected on return, or if he were to conceal or

cease such activity on return in order to avoid persecution, then he should be treated as a refugee.

16. We agree that the appeal can be approached according to that structure, subject to one qualification. Ms Patyna's case at (b) is that the appellant cannot be expected to suppress his political views in response to questioning on return in order to avoid persecution: RT (Zimbabwe) v SSHD [2012] UKSC 38 at [25]. But if the appellant does not actually hold those views then he has nothing to suppress and, as held in XX at [99], the Iranian authorities do not punish neutrality. To determine whether the appellant actually holds those views, we must look at all the evidence in the round. This includes the new evidence concerning Facebook activity and attendance at demonstrations.

Risk arising from Kurdish ethnicity, illegal exit and work as a kolbar

17. No issue of credibility arises in relation to these factors, which stand as common ground. We find that on return to Iran the appellant would undergo the interrogation described in SSH. Being Kurdish, he would attract the heightened scrutiny described in HB at (3). As held at (4), his Kurdish ethnicity alone, even when combined with illegal exit, would be insufficient to establish the necessary risk. Nonetheless, they provide an elevated interest and motivation for the questioner when other factors are considered.

18. We find that the appellant's work as a kolbar would be detected. The respondent rejected this in the refusal decision because the authorities are not currently aware of it. This ignores the questioning that would take place on return. The CPIN confirms that many young men from the appellant's home area perform that work. Together with the scale of smuggling operations on the Iran / Iraq border, the authorities' response, the heightened interest arising from appellant's Kurdish ethnicity, and the work's central place in his asylum claim, it is reasonably likely that he would be questioned about it. The appellant is uneducated and illiterate and there is no reason to think that he would be able to deceive the questioner.

19. Each case is fact sensitive. Applying the relevant country guidance, including the 'hair-trigger' approach, we find that the appellant's personal circumstances, his ethnicity, illegal exit and work as a kolbar are sufficient to cumulatively establish a reasonable likelihood that he would face persecution on return. The appeal must therefore be allowed on protection grounds.

Political opinion

20. In case we are wrong, we turn to the appellant's political views and Facebook activity. Arising from the heightened scrutiny of the appellant arising from the agreed risk factors, we find to the relevant standard that he would be asked questions about his political views and activity.

21. In approaching the genuineness of the appellant's political views, we have taken into account all the evidence. Importantly, this includes the preserved finding that the appellant fabricated the account of events put forward in claiming asylum. He has a proven record of lying in support of his claim.

22. In the appellant's asylum interview, there was the following exchange:

> 80. Question: How are Kurdish people treated in Iran?
>
> Answer: Kurds are in general poor, they have no rights. They don't get opportunities in life.
>
> 81. Question: Have you had any experiences personally where you have been mistreated for being a Kurd?
>
> Answer: Yes, poverty. Not being treated as equal. Not being offered any job opportunities. We are treated like second class citizens.

Then later:

> 169. Question: Since being in the UK have you been politically active at all?
>
> Answer: No I have not been able to get involved in any political activity because I don't want to put my family in danger, specifically my sister and my maternal uncle. I was worried that if I appear at a demonstration or if I get involved in any activity that would put them in danger no matter how much I would wish to at least protest against the Iranian regime.

23. It is noteworthy that after his asylum appeal was dismissed the appellant chose to do just that, opening a Facebook profile on which he posted material critical of the Iranian regime and attending demonstrations in London. He provides no explanation as to how he overcome the fear that his family in Iran will suffer reprisals. Given, however, that he was not cross-examined on the point we attribute it no meaningful weight in our analysis.

24. Despite some vagueness and self-contradiction in his oral evidence, we do accept that the appellant has taken part in several well-attended demonstrations against the Iranian regime in London. Photographs are provided, and the appellant was able to explain the causes to which the demonstrations related and the nature of his pro-Kurdish views and his grievances with the Iranian regime as it relates to them. We nonetheless found his explanation of how protesting the well-known death of Mahsa Amini supported his pro-Kurdish political beliefs to be unconvincing, and find that this was an opportunistic way of generating further visibility online and in person.

25. Contrary to Ms Cunha's submissions, we accept that the appellant is identifiable from the Facebook profile. It bears his name and several photographs of him. We are unable to accept that the Facebook evidence shows the appellant to fit into a "social graph" likely to come to the attention of the Iranian authorities. While he has over 600 friends, there is scant evidence as to who they are and how they are connected. When asked, the appellant answered that he receives friend requests from other people who are critical of Iran and accepts them without any real scrutiny. He likewise sends friend request to others he sees online. Some of the friends are those he has met at protests. However, the appellant has not provided the full 'Download Your Information' data referred to in XX at (7). We are unable to afford significant weight to the printouts provided, for the reasons stated in XX.

Conclusion

26. Considering all the evidence, we find that the views expressed in the asylum interview are genuinely held. They were given in response to a direct question and were not put forward as forming part of his claim in either the Statement of Evidence Form or in the witness statement subsequently prepared for the First-tier Tribunal. Rather than being contrived, we consider the answers to be an honest answer to an unanticipated question. They constitute political opinion, being criticism of the authorities' treatment of Kurds sufficient to activate the "hair-trigger" response in accordance with HB.

27. If the appellant were asked about his views on return, he would suppress them to avoid persecution. This provides a second basis for finding that he is entitled to refugee protection.

28. Were it material to the outcome, we would have found that the appellant's Facebook activity and attendance at demonstrations was entirely done to bolster his claim following the dismissal of his appeal by the First-tier Tribunal. He has not established that his online activity has been recorded by Iran, and provided that the profile were deleted at least 30 days before any application for an ETD any risk arising from it would be neutralised. We would likewise reject that the appellant's presence at a small number of highly attended demonstrations is sufficient for him to be identified or recognised on return. This is immaterial however, the appellant having established risk on return without reliance on activity *sur place*.

Notice of Decision

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

(2) We remake the decision by allowing the appeal on protection grounds.

J. Neville

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 27 August 2024