Upper Tribunal
(Immigration and Asylum Chamber)

HB (Kurds) Iran CG [2018] UKUT 00430 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20-22 February and 25 May 2018	

Before

UPPER TRIBUNAL JUDGE MARTIN
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

HB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Ms S Naik QC and Mr R Spurling, Counsel instructed by Barnes Harrild & Dyer Solicitors
For the Respondent:	Mr E Metcalfe, Counsel instructed by the Treasury Solicitor

COUNTRY GUIDANCE

(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.*

© CROWN COPYRIGHT 2018

(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.*

TABLE OF CONTENTS

DECISION AND REASONS

INTRODUCTION

1. The appellant is a citizen of Iran, born in 1988, and is of Kurdish ethnicity. This decision gives country guidance in relation to the following question, namely "whether a failed asylum seeker of Kurdish ethnicity will be at risk of persecution on return".

2. Although in the parties' various written submissions there were mildly different iterations of the country guidance issue, the country guidance question was and is as expressed in the preceding paragraph, as agreed by the parties at the hearing before us.

3. There was before us a statement of agreed facts which was, ultimately, confirmed by the parties as agreed between them at the hearing on 25 May 2018.

4. The statement of agreed facts is reproduced here in full, with the only editing being that in relation to the appellant's full date of birth. The agreed facts are as follows:

> "1. The appellant is of Kurdish ethnicity. He was his parents' only child, born [in] 1988 in Betoosh, Sardasht, Iran. His father was a shepherd, his mother a housewife. In 1994 his parents disappeared. The appellant believes that this is because they were arrested by the authorities for involvement in Kurdish nationalist activities. At or around the same time there was a fire at his family home, during which the appellant suffered burns injuries.
>
> 2. The appellant was taken by his uncle to Iraq, where he grew up undocumented. He was bullied and harassed by others in the village due to a disability in his legs and the fact that he was an outsider. When he reached adulthood he returned to Iran, where, with his uncle's assistance, he raised money to pay for his journey abroad by the sale of his family land. He left Iran illegally on 1 September 2015, reaching the United Kingdom in early July 2016.
>
> 3. The appellant claims he cannot live undocumented and discriminated against in Iraq – where he does not have citizenship or right to reside – and he cannot return to Iran given his family's claimed involvement with pro-Kurdish separatist groups."

5. The appellant's appeal against the respondent's decision dated 19 December 2016 to refuse his protection claim, came before First-tier Tribunal Judge Nicholls ("the FtJ") at a hearing on 27 January 2017 whereby his appeal was dismissed. In a decision promulgated on 31 May 2017 Upper Tribunal Judge Storey found an error of law in Judge Nicholls' decision and set his decision aside, for the decision to be re-made in the Upper Tribunal ("UT"). Judge Storey's error of law decision is included as an annex to our decision.

6. The agreed facts reflect the findings made by the FtJ, subject of course to the matters that remain in dispute, and subject to further specific reference to the FtJ's findings. However, the FtJ found that the evidence did not show that the appellant had been

involved in any *sur place* political activity which had drawn him to the adverse attention of the authorities in Iran. Thus, the anti-Iranian government messages that he had claimed to have posted on Facebook would not expose him to risk. Further, permission to appeal was granted only on the issue of whether a failed asylum seeker of Kurdish ethnicity would be at risk of persecution on return.

7. We heard oral evidence from two expert witnesses, Anna Enayat and Professor Emile Joffé. They each provided written reports and written answers to questions in writing from the respondent. Professor Joffé's report is dated 14 October 2017 and that of Ms Enayat is dated 22 January 2018. Although their evidence is summarised at Annex B, it essential to a full understanding of this decision that full reference is made to the summarised expert evidence. We make further reference to aspects of their written and oral evidence in our conclusions.

8. We give a summary of the parties' submissions which is to be found at Annex C. We make further reference to the submissions as appropriate in our conclusions. So far as the written submissions are concerned, these are in the parties' skeleton arguments provided in advance of the hearing, and written submissions provided in advance of closing oral submissions. It is the closing written submissions which we summarise since they crystallise the parties' arguments with necessary references to the skeleton arguments.

9. Before hearing the oral evidence we considered an application made pursuant to rule 15(2A)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to admit additional evidence. That evidence was of Facebook posts made by the appellant both prior to and after the hearing before the First-tier Tribunal ("FtT").

RULE 15(2A) APPLICATION

10. The documents which were the subject of the application are contained in a bundle of 59 pages. They are posts under the appellant's name and are accompanied by translations of posts between 24 December 2016 and 16 January 2017. The date range for the posts is 24 December 2016 to 16 January 2017 (pre-FtT hearing) and 23 February 2017 to 23 October 2017 (post-FtT hearing), the latter not being accompanied by translations. The written application to admit the evidence, dated 19 February 2018, refers to the appellant having given evidence before the FtT of posting material on Facebook, a matter referred to by the FtJ at [16] of his decision. The application states that the posts had been translated on 26 January 2017 for the purpose of the FtT hearing but were not served and only came into the possession of the appellant's representatives on 19 February 2018, the date of the application. The application to admit the evidence was supported by a witness statement of counsel employed at the appellant's solicitors, but not counsel who appeared before the FtT on behalf of the appellant.

11. Summarising counsel's witness statement, it says that counsel had not seen any Facebook evidence in the files that were passed to him when he took over conduct of the appeal "although there was an attendance note pre-dating the First-tier Tribunal hearing in which it is written that the appellant was advised to download his Facebook posts". The statement continues that "The materiality of such evidence

was not central to my preparation of the evidence presented in the bundles for the Tribunal given the subject matter of the appeal". That was why he had not sought to "trace" the evidence earlier. The witness statement continues that once it was realised that it would be important for the Tribunal to be fully aware that the appellant's evidence in his witness statement in relation to Facebook posts could be substantiated, he began to make enquiries of counsel involved at the hearing before the FtT and of the appellant himself. Counsel appearing before the FtT explained to him that he had not been given any Facebook material and could not remember whether the appellant himself had any with him on the day of the hearing. It appears then that there was some difficulty in counsel making contact with the appellant by phone.

12. An interpreter from a translation agency was contacted who thought, but could not remember clearly, that the Facebook posts had been translated. Counsel states that unfortunately those translations were not provided to him or to counsel at the hearing. That the translations had in fact been made was later confirmed with the translation agency. The statement continues that no-one from the agency could explain why the Facebook evidence and translations were not made available to the appellant or his then caseworker or counsel so that it could be served at his hearing. The translations were apparently made the day before the FtT hearing.

13. In opposing the application to admit the evidence Mr Metcalfe observed that the witness statement in support of the application does not say anything about the timeframe relative to when it was discovered that this material was potentially relevant. Further, it was apparent from the skeleton argument before the FtT and *AB and Others (internet activity – state of evidence)* Iran [2015] UKUT 257 that Facebook material was to be relied upon. Both the author of the witness statement and counsel appearing before the FtT would have been aware of the significance of that material. There was no explanation as to why the material was translated but not adduced in evidence before the FtT.

14. It was further submitted that it was not appropriate to allow that evidence to be admitted now, particularly in the context of the hearing being a country guidance case. There had been no notice of the application and no opportunity to consider the material in any detail. It was inappropriate and unfair for the material to be admitted now. In relation to the Facebook posts post-hearing, those, it was argued, were surely a matter for further submissions in due course.

15. Ms Naik submitted that it was clear from the appellant's witness statement that his case has always been that there were Facebook posts to be taken into account. The FtJ's decision accepted that there was such material at [16]-[17]. Furthermore, on behalf of the appellant no issue had been taken in relation to the late service of the respondent's skeleton argument or the agreed facts statement. The appellant's account that he had shared material on Facebook was accepted by the FtJ.

16. It was submitted that in deciding the appellant's appeal we would be assisted by the material sought to be adduced given that this was the first day of the hearing and there would be ample opportunity for questioning of experts on that material. It could not have been admitted before. That the material was not relied on at the

hearing before the FtT could not be explained any further. The appellant's internet activity is significant in terms of risk on return.

17. We decided to allow the new evidence to be admitted, having considered rule 15(2A) which provides as follows:

> "In an asylum case or an immigration case -
>
> (a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party –
>
> (i) indicating the nature of the evidence; and
>
> (ii) explaining why it was not submitted to the First-tier Tribunal; and
>
> (b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence."

18. We should say that the explanation provided as to why the evidence was not adduced before the FtT was rather weak. The assertion by the author of the witness statement in support of the application that the materiality of the evidence was not central to his preparation of the case is rather surprising given the nature of the evidence in the context of an asylum claim from an Iranian national. Nevertheless, the evidence is potentially of great significance and is a matter which we have balanced against the explanation for the evidence arising prior to the hearing before the FtT not having been adduced previously, and the post-FtT evidence not having been flagged up earlier. We have also considered the issue of "unreasonable delay". Further, we took the view that given the timetable for the hearing before us, there was sufficient time for the respondent to consider that material such as would allow for the matters to be canvassed in cross-examination of the expert witnesses and for submissions to be made on it.

EXISTING COUNTRY GUIDANCE AND RELATED CASES

19. As of 26 June 2018 there are 19 country guidance cases on Iran from the UT or its predecessor the Immigration and Asylum Tribunal. They date from 2002 to 2016, representing therefore, over a decade of judicial guidance on the assessment of protection claims from Iran. The range of issues covered is broad, dealing with, amongst other things, prison conditions, adultery, homosexuality, religion and ethnicity.

20. In the light of the above, we can say two things. First, the nature of the 'regime' in Iran, can, to some extent at least, be taken as read, in terms of its human rights record, subject to evidence about recent developments. Second, that we do not consider it necessary to refer to every one of those country guidance cases in dealing with the issues that arise in this appeal. We only need refer in this section, which encapsulates the most recent country guidance, to some of those cases which were

referred to by the parties as being of particular relevance, and which we too consider pertinent to the issues. For each of the cases we set out its guidance.

21. The decision in *AB and Others* is categorically not country guidance; it does not have that designation. However, it is a reported case in terms of the evidence that was before the Tribunal and both parties referred to it in that context. It is appropriate to include it in this section although noting that it is not country guidance.

22. The cases:

***SB (risk on return-illegal exit) Iran* CG [2009] UKAIT 00053**

(i) Events in Iran following the 12 June 2009 presidential elections have led to a government crackdown on persons seen to be opposed to the present government and the Iranian judiciary has become even less independent. Persons who are likely to be perceived by the authorities in Iran as being actively associated with protests against the June 12 election results may face a real risk of persecution or ill treatment, although much will depend on the particular circumstances.

(ii) Iranians facing enforced return do not in general face a real risk of persecution or ill-treatment. That remains the case even if they exited Iran illegally. Having exited Iran illegally is not a significant risk factor, although if it is the case that a person would face difficulties with the authorities for other reasons, such a history could be a factor adding to the level of difficulties he or she is likely to face.

(iii) Being a person who has left Iran when facing court proceedings (other than ordinary civil proceedings) is a risk factor, although much will depend on the particular facts relating to the nature of the offence(s) involved and other circumstances. The more the offences for which a person faces trial are likely to be viewed as political, the greater the level of risk likely to arise as a result. Given the emphasis placed both by the expert report from Dr Kakhki and the April 2009 Danish fact-finding report's sources on the degree of risk varying according to the nature of the court proceedings, being involved in ongoing court proceedings is not in itself something that will automatically result in ill-treatment; rather it is properly to be considered as a risk factor to be taken into account along with others.

(iv) Being a person involved in court proceedings in Iran who has engaged in conduct likely to be seen as insulting either to the judiciary or the justice system or the government or to Islam constitutes another risk factor indicating an increased level of risk of persecution or ill treatment on return.

(v) Being accused of anti-Islamic conduct likewise also constitutes a significant risk factor.

(vi) This case replaces *AD (Risk-Illegal Departure) Iran CG [2003] UKAIT 00107.*

***BA (Demonstrators in Britain – risk on return) Iran* CG [2011] UKUT 36 (IAC)**

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?*

***SA (Iranian Arabs-no general risk) Iran CG* [2011] UKUT 00041**

The Iranian state is suspicious of those Iranian citizens who are also Arabs and regards London as a centre of separatist activity. Being an Iranian Arab returned from the United Kingdom enhances other risk factors but an Iranian Arab does not risk persecution or other ill treatment solely by reason of ethnicity.

***SSH and HR (illegal exit: failed asylum seeker) Iran (CG)* [2016] UKUT 308 (IAC)**

(a) An Iranian male whom it is sought to return to Iran, who does not possess a passport, will be returnable on a laissez passer, which he can obtain from the Iranian Embassy on proof of identity and nationality.

(b) An Iranian male in respect of whom no adverse interest has previously been manifested by the Iranian State does not face a real risk of persecution/breach of his

Article 3 rights on return to Iran on account of having left Iran illegally and/or being a failed asylum seeker. No such risk exists at the time of questioning on return to Iran nor after the facts (i.e. of illegal exit and being a failed asylum seeker) have been established. In particular, there is not a real risk of prosecution leading to imprisonment.

***AB and Others (internet activity – state of evidence)* [2015] UKUT 257 (IAC)**

The material put before the tribunal did not disclose a sufficient evidential basis for giving country or other guidance upon what, reliably, can be expected in terms of the reception in Iran for those returning otherwise than with a "regular" passport in relation to whom interest may be excited from the authorities into internet activity as might be revealed by an examination of blogging activity or a Facebook account. However, this determination is reported so that the evidence considered by the Upper Tribunal is available in the public domain.

THE LEGAL FRAMEWORK-COUNTRY GUIDANCE STATUS

23. The Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal Practice Directions provide as follows in relation to country guidance decisions:

> "12. Starred and Country Guidance determinations
>
> …
>
> 12.2 A reported determination of the Tribunal, the AIT or IAT bearing the letters 'CG' shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later 'CG' determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:-
>
> (a) relates to the country guidance issue in question; and
>
> (b) depends upon the same or similar evidence.
>
> …
>
> 12.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law."

24. The UT Guidance Note 2011 No.2 on the reporting of UT decisions (as amended in July 2015) adds at [11] that:

> "If there is credible fresh evidence relevant to the issue that has not been considered in the Country Guidance case or, if a subsequent case includes further issues that have not been considered in the CG case, the judge will reach the appropriate conclusion on

the evidence, taking into account the conclusion in the CG case so far as it remains relevant."

25. On the question of country guidance, one finds the following in *CM (EM country guidance; disclosure) Zimbabwe* CG [2013] UKUT 59 (IAC) at [58]:

> "It is of importance to note that a Country Guidance case is only authoritative in so far as the evidence in any subsequent appeal is the same or similar. It is thus not a binding precedent that can only be varied by the Upper Tribunal or the higher courts. Where the evidence is materially different it is the duty of the judge of the First -tier Tribunal to evaluate it and reach his or her own conclusion, but in doing so he or she will start from the last extant Country Guidance case and see what if anything has changed."

COUNTRY BACKGROUND-HUMAN RIGHTS

General

26. We said at [20] above that the nature of the 'regime' in Iran to some extent can be taken as read in terms of its human rights record, subject to evidence about recent developments. The ground is well trodden in the country guidance cases, in their guidance and in the expert evidence put before them.

27. In addition, we need do no more than quote in a limited way from the following reports. First, the Report of the (UN) Special Rapporteur on the situation of human rights in the Islamic Republic of Iran to the Human Rights Council dated 17 March 2017 ("report of the UN Special Rapporteur") as follows:

> "3. …the Government has still not accepted the requests made since 2002 by the Special Rapporteurs on the independence of lawyers and judges; extrajudicial, summary or arbitrary executions; freedom of religion or belief; minority issues; and the promotion and protection of the right to freedom of opinion and expression; as well as the Working Groups on the issue of discrimination against women in law and in practice; Enforced or Involuntary Disappearances; and Arbitrary Detention.
>
> 4. The Special Rapporteur regrets that the information she received did not reveal any notable improvement in the situation of human rights in the country. The situation relating to independence of judges and lawyers, freedom of expression and use of arbitrary detention continues to be a matter of serious concern. She notes that some measures are under way, but their implementation and effectiveness is yet to be assessed.
>
> …
>
> 24. The Government did not [accept] any of the 20 recommendations regarding torture or other cruel, inhuman or degrading treatment or punishment made during the 2014 universal periodic review.
>
> …
>
> 26. Since her appointment, the Special Rapporteur has received numerous reports about the use of torture and other cruel, inhuman or degrading treatment or punishment. These include amputations, blinding and flogging as forms of punishment, physical and mental torture or ill-

treatment to coerce confessions (mostly during pretrial detention), prolonged periods of solitary confinement and denial of access to proper and necessary medical treatment for detainees."

28. Second, the Report of the Secretary-General to the UN on the Situation of human rights in the Islamic Republic of Iran, dated 31 October 2017 as follows:

> "5. Since the report of the Secretary-General to the thirty-fourth session of the Human Rights Council (A/HRC/34/40), [30 March 2017] the situation of human rights has been marked by a crackdown against human rights defenders, journalists and users of social media in the lead up to the presidential elections. The application of the death penalty, including for children in conflict with the law, has continued at a high rate. The United Nations human rights mechanisms have continued to receive numerous allegations of cases of torture, cruel, inhuman and degrading treatment, arbitrary detention and unfair trials. United Nations human rights mechanisms have also continued to receive information relating to persistent discrimination against women and the continued persecution of members of religious and ethnic minority groups. Limited progress has been observed during the reporting period in the implementation of the Citizen Rights Charter adopted in December 2016".

Kurds

29. Below we give a summary of some of the background material before us in relation to the human rights issues that arise in Iran for those of Kurdish ethnicity.

30. The report of the UN Special Rapporteur states the following:

> "79. Violations of the rights of ethnic minorities continue to be reported in the country. Almost one fifth of the executions carried out in Iran in 2016 concerned Kurdish prisoners. Among those executions, 21 were related to the crime of "*moharebeh*" (waging war against God and the State) and 1 to membership in a Kurdish political party. Kurdish political prisoners are said to represent almost half of the total number of political prisoners in the country.
>
> 80. The Special Rapporteur is seriously concerned about the alleged indiscriminate and blind use of lethal force towards Kurdish *kulbaran* (back carriers), which may be related to their ethnic affiliation. The *kulbaran* are Kurdish couriers who engage in smuggling commodities across the border. Due to the high rate of unemployment in Kurdistan provinces, this activity is generally the only way for them to provide for themselves and their family. In 2016, Iranian border security forces reportedly killed 51 *kulbaran* and injured 71 others, which is about twice as much as the previous year."

31. The Home Office Country Information and Guidance on Iran "Kurds and Kurdish political groups" version 2.0, July 2016 ("CIG") contains the following (with footnotes removed but which can be viewed in the original):

> 3.1.1 Kurds in Iran face discrimination which affects their access to basic services. However, in general, this level of discrimination will not reach the level of being persecutory.
>
> 3.1.2 Those involved in Kurdish political groups are however, at risk of arbitrary arrest, prolonged detention and physical abuse from the Iranian authorities.

Even those who express peaceful dissent or who speak out about Kurdish rights can be seen as a general threat and face a real risk of persecution.

3.1.3 Family members of persons associated with a Kurdish political group are also harassed and detained and may be subject to inhumane treatment.

3.1.4 Where a person can demonstrate to a reasonable degree of likelihood that they are known or likely to be made known to the Iranian authorities on the basis of their membership or perceived membership of a Kurdish political group they should be granted asylum.

3.1.5 Internal relocation to avoid persecution is unlikely to be an available option.

3.1.6 Where a claim falls to be refused, it is unlikely to be certifiable as 'clearly unfounded'.

…

4.1.1. The CIA world fact book estimates the population to be approximately 81,824,270. Iran is a multi-ethnic country. The largest ethnic community comprises Persians who constitute about 50-55% of the population. The rest of the population is combined of Kurds, Lurs, Azeris, Arabs, Armenians, and a host of other small ethnicities. Estimates vary as to their numbers, but at up to 8 million, Iran's Kurdish population is second in size only to the Kurds in Turkey and probably larger than the Iraqi and Syrian Kurdish populations combined.

…

5.2.3 The same source further noted that 'The activities that Kurds conduct that can be perceived as political activities include social welfare and solidarity activities.

5.2.4 The Danish Refugee Council and Danish Immigration service fact finding mission on Iranian Kurds and Conditions for Iranian Kurdish Parties in Iran and KRI, Activities in the Kurdish Area of Iran, Conditions in Border Area and Situation of Returnees from KRI to Iran 30 May to 9 June 2013, dated 30 September 2013 consulted a western diplomat and expert on Iran in Erbil who stated that; "being a Kurd in Iran does not necessarily mean getting into trouble with the authorities as has been the case in Syria. Troubles will start as soon as a person gets involved in political activities".

…

5.2.10 Asharq Al-Awsat reported in January 2016 that:

'Kurdish opposition sources in Iran have revealed yesterday that the executions carried out by the Iranian regime against the Kurds and other components are increasing annually, indicating that during the past nine months, according to the Iranian calendar, Iran executed more than 750 people, the majority of whom were Kurdish.'

5.2.11 In January 2016 Kurdistan Human Rights Network (KHRN) published a report on the violation of Kolber workers in Iran. The report stated that

'Kolber is a Kurdish name for workers and tradespersons, who for a small sum of money risk their lives to transport packs of various foreign items on their own back or on the back of horses to transfer them from and to Iranian border territories from border areas of neighbouring Kurdish regions in Iraq and Turkey.'

5.2.12 The report went on to state that:

'The Kolber workers mostly come from Kurdish border villages and towns, where they are usually left with no job other than Kolber work to make a small income to survive through the harsh reality of the deprived Kurdish border areas. However, the Iranian government describes them as "smugglers", while Iranian soldiers and border guards deliberately shoots to kill them across the border areas.'

5.2.13 Jane's 'Sentinel Security Assessment' noted that 'there is growing anger in Iran's Kurdish community over the number of Kurds executed in Iran amid allegations that torture is widespread.'

5.2.14 The US Congressional Research Service reported that:

'the Kurdish language is not banned, but schools do not teach it and Kurdish political organizations, activists, and media outlets are routinely scrutinized, harassed, and closed down for supporting greater Kurdish autonomy. Several Kurdish oppositionists have been executed since 2010.'

5.2.15 According to the 2015 US State Department Human Rights report for Iran:

'The estimated eight million ethnic Kurds in the country frequently campaigned for greater regional autonomy. The government continued to use security law, the media law, and other legislation to arrest and prosecute Kurds for exercising their rights to freedom of expression and association.

The government reportedly banned Kurdish-language newspapers, journals, and books and punished publishers, journalists, and writers for opposing and criticizing government policies. Authorities suppressed legitimate activities of Kurdish NGOs by denying them registration permits or bringing security charges against persons working with such organizations. The government did not allow Kurds to register most Kurdish names for their children in official registries. Authorities did not prohibit speaking the Kurdish language, but authorities prohibited most schools from teaching it.

32. At section 11 of the CIG entitled "Treatment of Kurdish political activists and family members" considerable detail is given. It is not necessary for us to quote the whole section; a selection suffices to reveal the import of this part of the CIG. Thus, there is the following:

11.1.1 The Danish Refugee Council and Danish Immigration Service's joint fact finding mission of September 2013 met with various sources who stated that:

"A Western diplomat and expert on Iran in Erbil explained that there is no tolerance on the Iranian regime's side for any kind of activities with connection to the Kurdish political parties and any affiliation with one of these parties would

be reason for arrest. The main reason for this is that these parties' ultimate goal, despite their non-violent opposition, is a change in the regime of Iran which is much worse than support for the Green Movement which aims for reforms within the existing system".

'…The Western diplomat and expert on Iran in Erbil informed the delegation that the execution rate is high among Kurds in Iran. A large part of these executions are based on accusation of drug smuggling. Sometimes political activists are executed under the pretext of being drug smugglers.

'…Mustafa Moloudi (KDP-Iran) explained that some of the (KDPI) party members who had been conducting secret activities in Iran were caught by the regime. While some of them were executed and some were freed after a period of detention, others were exchanged. However, those who were freed lost their public jobs, for instance if they were working as teacher, and they were not allowed to work anymore in the public sector'.

'…Regarding punishment for being a member of Komala, Ebrahim Alizadeh (Komala, SKHKI) told the delegation that if a Komala cell member is arrested by the Iranian regime, he will be tortured, imprisoned for life or even executed. As regards the consequences for the cell member's family, Alizadeh explained that his family members may be arrested, but they will be freed on bail after a while'.

'…According to Ziryan Roj Helaty (Tanupo Magazine), the Iranian regime is highly sensitive to the Kurdish population in Iran, and the regime always reacts disproportionately towards activities conducted by Kurds. As a result, if the Iranian regime for instance catches a sympathizer carrying out an activity against the government, the consequences for him and his family will be serious'.

'…Ziryan Roj Helaty also stated that anything related to KDPI, even talking about the Kurdish people and their rights could create a problem. Someone who talks directly about KDPI is, in the eyes of the regime, affiliated with KDPI, and a person speaking about Kurdish rights is seen as a general threat. … Kurdish patriotism that has spread throughout the Middle East in recent years, may also reach Iran, and this is exactly what the regime in Iran fears'. '…According to UNHCR in Erbil, persons with a high political profile as well as human rights activists are targeted. … Members of KDPI will get approximately two to ten years of prison if they are arrested by the Iranian authorities. Based on information from asylum seekers, KDPI members will be tortured during pre-trial detention in order to confess and disclose names of other KDPI members. The duration of the detention will typically be from one to six months depending on the level of the detainee's engagement. The sentence which is imprisonment will depend on the level of the engagement of the person and the evidence that are (sic) presented against him'.

11.1.4 The Austrian report [compiled] by the Federal Ministry of the Interior on Kurds: History –Religion – Language – Politics dated November 2015 noted that: 'The mere presumption of being a member of any of these parties can lead to long-term prison sentences. Many Kurds are among the victims of political persecution with frequent charges of terrorism – in particular the alleged support of PJAK – and often disproportionate degrees of punishment.'

11.1.5 On 10 November 2015, International campaign for human rights in Iran reported on a Sunni Kurd who was facing execution. The report noted that: Shahram Ahmadi has been sentenced to death in Iran due to his activism as a Sunni Muslim and a Kurd. Members of ethnic or religious minorities in Iran who engage in criticism of the government are singled out by authorities for particularly harsh treatment, and there is a well-documented history of the Judiciary disproportionately meting out capital punishment to minority activists. "Making speeches, distributing books and pamphlets, or opposing the government are not capital offenses. Unfortunately Judge Moghisseh said that Shahram's first two crimes are that he's a Sunni and a Kurd. Therefore he was presumed guilty from the start," a source told the International Campaign for Human Rights in Iran.

ASSESSMENT AND CONCLUSIONS-COUNTRY GUIDANCE

(i) *SSH and HR*; a starting point?

33. To reiterate, the guidance in *SSH and HR* is as follows:

> "*(a) An Iranian male whom it is sought to return to Iran, who does not possess a passport, will be returnable on a laissez passer, which he can obtain from the Iranian Embassy on proof of identity and nationality.*
>
> *(b) An Iranian male in respect of whom no adverse interest has previously been manifested by the Iranian State does not face a real risk of persecution/breach of his Article 3 rights on return to Iran on account of having left Iran illegally and/or being a failed asylum seeker. No such risk exists at the time of questioning on return to Iran nor after the facts (i.e. of illegal exit and being a failed asylum seeker) have been established. In particular, there is not a real risk of prosecution leading to imprisonment."*

34. Plainly then, the Tribunal in that case did not offer any country guidance on the issue of Kurdish returnees, as Judge Storey also said in his error of law decision in this appeal.

35. At [34] of *SSH and HR* it was stated that it was not suggested to the UT that an individual faces risk on return on the sole basis of being Kurdish.

36. However, in the same paragraph the UT went on to state as follows:

> "It was however agreed that being Kurdish was relevant to how a returnee would be treated by the authorities. For example, the Operational Guidance Note refers at 3.12.14 to the government disproportionally targeting minority groups, including Kurds, for arbitrary arrest, prolonged detention and physical abuse. No examples however have been provided of ill-treatment of returnees with no relevant adverse interest factors other than their Kurdish ethnicity, and we conclude that the evidence does not show risk of ill-treatment to such returnees, though we accept that it might be an exacerbating factor for a returnee otherwise of interest."

37. The respondent contends that *SSH and HR* should be the 'starting point' for consideration of the country guidance issue in this case. In written submissions reliance is placed on the whole of [34] and the following passage is emphasised:

> "Accordingly we conclude that it has not been shown that a person in the position of these appellants faces a real risk on return to Iran either on the basis of what would happen to them when questioned at the airport or subsequently if they were convicted of an offence of illegal exit."

38. It is also argued in the respondent's written submissions that in *SSH and HR* the UT made its decision "by reference to extensive oral and written evidence from Dr Mohammad Kakhki…" and that it considered specific evidence from him on the treatment of Kurds (at [45]-[47] of the summary of his evidence at Appendix 1).

39. The respondent's skeleton argument at [28] relies on what was said in *MY (Country Guidance cases, no fresh evidence)* Eritrea [2005] UKAIT 00158, namely that "In a case depending…on the same or similar evidence, a party will not be permitted to challenge the country guidance findings except by the production of new evidence. Attempts to contest the findings in a CG case without such fresh evidence are not permissible." However, apart from the fact that *SSH and HR* was not considering the same country guidance issue as arises in this case, the fact is that the appeal before us does not depend on the same or similar evidence.

40. Of course it is true that *some* evidence concerning the risk to those appellants as Kurdish returnees was considered but that evidence was nowhere near as extensive as the evidence before us and the UT did not purport to issue any guidance on the issue of Kurdish returnees.

41. We disagree with the proposition that *SSH and HR* should be the starting point for us in this appeal in the sense that we should somehow find that it is the foundation upon which our decision should be built. To do so would be to imply that that decision is authority on the issue of risk to Kurdish returnees as a distinct group, which it is not and does not purport to be.

(ii) The expert evidence-evaluation

42. We have no hesitation in accepting the expertise of both Anna Enayat and Professor Joffé whose knowledge and experience of Iran and the Middle East extends over many years, indeed decades. Their expertise has been recognised by courts and tribunals on numerous occasions.

43. To the extent that the respondent suggested that the weight to be attached to Professor Joffé's evidence was diminished by reason of judicial criticism from 2004 and earlier, we find no merit in that suggestion. The circumstances and context were then completely different, quite apart from the fact that that criticism is now of some vintage.

44. That is not to say that we consider ourselves bound to accept every aspect of the experts' evidence. Where we have not done so we explain why.

45. Ms Enayat's evidence is that the CIG, which in part we have quoted above, presents a "brief snapshot" of the situation in the Kurdish areas of Iran between 2012 and early 2016. Her view is that developments since then have seriously increased tensions in the predominantly Kurdish western provinces in a manner which will

mean that Kurds returned to Iran will now be subjected to heightened suspicion and scrutiny. Her oral and written evidence is that this is the result of the fighting in the Syrian war which had raised national consciousness amongst Kurds. Also relevant she said, was the resumption in 2016 of armed activities by Kurdish national parties who had repudiated violence and which were an offshoot of the PKK (Kurdistan Workers' Party), being the first major resurgence since the 1990's. In addition, Kurds in the abortive independence referendum in the KRI (Kurdistan Region of Iraq) mobilised the population in Kurdish cities of Iran. Lastly, the terrorist attack on the Iranian parliament in Tehran in July 2017 was relevant where the perpetrators were Islamist Kurds. The Iranian security services rounded up Kurds in the Kurdish areas. There was therefore heightened security activity.

46. Professor Joffé's evidence was to like effect. However, he also cited as significant the new Political Crimes Law ("PCL") of 2016. In his written answers to the respondent's written questions he refers to the PCL as having come into force in June 2016. Citing an Amnesty International ("AI") report dated 2016/2017 the PCL is described as a new law on Political Crimes which criminalised all expression deemed to be "against the management of the country and its political institutions and domestic and foreign policies" and made "with intent to reform the affairs of the country without intending to harm the basis of the establishment". A US State Department report on Iran of 2017 is also quoted.

47. Professor Joffé's evidence is that the burden is on the individual to show that they are innocent. He said that it was probably in terms of its implementation that the issue of the reverse burden of proof would be apparent. However, in our view there is force in the respondent's submission that there is no evidential foundation for Professor Joffé's view in terms of the reverse burden of proof. He was not able to give any examples of the PCL having been interpreted or implemented in that way and did not suggest that its terms, on their face, had that effect. Although he said that it had been commented upon by NGO's and by the US State Department especially, no such commentaries were identified. The article from Legal Agenda entitled "Is Iran's New Law on Political Crimes a Step Forward?" does not support Professor Joffé's evidence on the issue.

48. We accept that as an expert Professor Joffé is entitled to give an opinion on the effect of the PCL based on his knowledge and experience. However, we are not satisfied that his opinion in this respect carries much weight in circumstances where the basis for his opinion has not been demonstrated.

49. Having said that, we do not consider that the burden of proof question in relation to the PCL is of much significance at all in relation to the country guidance question in issue or in relation to this appellant's appeal in particular.

50. Of far greater importance is the consistent evidence of both experts, supported by sources and background evidence, in relation to the heightened tensions in Iran in security terms both generally and in relation to those of Kurdish ethnicity.

51. In *TK (Tamils – LP updated) Sri Lanka* CG [2009] UKAIT 00049 the Tribunal made a distinction between risk categories and risk factors. At [4] the distinction was explained thus:

> "In country guidance cases the Tribunal has a dual function. As in every case, it must decide the appeal before it, but it also seeks to identify relevant risks that arise in relation to classes or groups of persons. It does this in two main ways: (i) by identifying one or more "risk categories" (usually when the evidence is sufficiently clear-cut to justify a finding that the generality of persons in a particular category are at risk); (ii) by delineating "risk factors", i.e. factors of particular significance when assessing risk, a mode usually chosen when the evidence is less clear-cut."

52. At [122] of his report Professor Joffé states that:

> "…any Kurd returned to Iran must anticipate the serious risk of official discrimination or persecution simply on the grounds of his membership of an ethnic group, quite apart from any specific threats he or she might face for illegal exit from Iran or because there are specific charges outstanding against her or him."

And at [123]:

> "…it seems to me that a person fleeing persecution as a result of both his ethnicity and the attitude of the Iranian authorities towards failed asylum-seekers, as stated in *Kayhan* on February 17 and April 26, 2011, might legitimately anticipate a risk to himself which would allow him to apply for asylum on those grounds alone."

Lastly in this context at [124] Professor Joffé states that the extent of discrimination against Kurds shows that "such discrimination is so severe that it amounts to persecution"

53. In his oral evidence he maintained that there was a real risk of persecution for an individual simply on the basis of their being Kurdish, stating that that was his inference from the evidence that he had seen.

54. Professor Joffé then, asserts that Kurdish ethnicity alone would amount to a risk category (as the term is used in *TK*).

55. However, that is not in fact the appellant's case as advanced on his behalf. At [3] of the appellant's skeleton argument it states that "it is not being suggested in the instant case that Kurdish ethnicity constitutes a risk category *per se*". There the appellant's case is that for Iranian Kurds ethnicity is a risk factor which creates a risk of persecution when combined with other factors. The position on behalf of the appellant as expressed in closing written and oral submissions was to the same effect. Thus in the appellant's written submissions at [14] it states that "[c]ontrary to the implication of the Respondent's written submissions…it is not the appellant's case that any failed Kurdish asylum seeker faces a real risk of persecution simply by virtue of being Kurdish".

56. Ms Enayat's evidence was not to the effect that Kurdish ethnicity alone creates a risk of persecution or that all failed asylum seekers of Kurdish ethnicity were at such risk. In oral evidence she said that she was not arguing that a Kurd, who was not

perceived in some way to be politically active, would be arrested. She pointed out that she had repeatedly said in her report that targeting was not purely on the basis of Kurdish ethnicity.

57. In her report, in answer to the question of whether the Iranian government imputes an anti-government political view to a person on account of their Kurdish ethnicity alone she said that "The answer is, quite evidently, no". However, she goes on to state that it is important to be wary of the sometimes repeated opinion that Kurds are at risk only if they engage in political activity. She then states that the COI [CIG] does not fall into that error in that it refers to a range of activists or perceived activists, including cultural activists, those who express peaceful dissent or so much as speak about Kurdish rights, could be at risk. Thus, she agrees with para 2.3.4 that:

> "If the Iranian regime catches a *perceived* sympathizer carrying out an activity *perceived* to be against the government, the consequences for him and his family can be result (sic) in arbitrary arrest, detention and possible ill-treatment."

58. The emphasis on *perceived* is that of Ms Enayat and she explains why, stating that most country information on Kurds indicates that they are at particular risk of imputed political opinion if for some reason they come to the attention of the authorities.

59. The appellant's skeleton argument states at [99] that Professor Joffé accepts that Kurdish ethnicity does not create a risk of persecution *per* se. However, we do not think that that accurately captures his view in the light of what he says at [124] of his report which we refer to above, and in the light of his oral evidence to which we have also referred.

60. If Professor Joffé does take that view, we are not satisfied that the evidence supports a contention that Kurdish ethnicity alone creates a risk of persecution or Article 3 ill-treatment on return. That is not a view supported by the background evidence, it is inconsistent with Ms Enayat's evidence and indeed we are not asked on behalf of the appellant so to conclude.

61. We note Professor Joffé's evidence in his report at [113] that he is substantially in agreement with the conclusions in *SSH and HR* "if it were not for two further considerations". He wonders whether the Tribunal in that case overlooked two general aspects of the "current situation" in Iran: the worsening security situation in parts of the country occupied predominantly by one of the many ethnic or religious minorities and the increased domestic tensions. He states that in his view the Tribunal "has under-estimated the potential difficulties connected with the acquisition of laissez-passer documentation."

62. His report then expands on those issues, concluding that there is intensified repression of Kurds and that if a Kurdish returnee has given rise to suspicions of anti-regime behaviour, either abroad or in Iran before they left, "his prospects of avoiding persecution upon return will have been significantly diminished". He goes on to state that he does not feel that the decision in *SSH and HR* has paid sufficient attention to those considerations which would now be intensified by Iranian Kurdish

reaction to the independence referendum in Iraqi Kurdistan. He also suggests that those considerations have been neglected in the latest edition of the COI [CIG].

63. Those views led to Professor Joffé's conclusions which we have set out at our [52]-[54] above and which we have rejected.

64. However, we have returned to Professor Joffé's evidence on this in order to explain why, in so far as Professor Joffé suggests it, we reject the contention that *SSH and HR* is wrong in terms of its country guidance. In the first place, we do not consider that Professor Joffé's reasons provide a sufficient basis for us to reconsider the guidance in *SSH and HR*. Secondly, that is not a position argued for on behalf of the appellant and was not the basis upon which the appeal before us was presented by either party.

65. Thus, in the appellant's written submissions at [8] it states that the appellant does not seek to disturb the country guidance findings in *SSH and HR* and at [11] that it is the country guidance case for assessing asylum claims that rely upon the unparticularised fact of having claimed asylum abroad. In addition, we have already referred to the appellant's suggestion that *SSH and HR* is the starting point for the assessment of the appellant's claim, a suggestion which we have rejected for the reasons given. Lastly, at [12] of the written submissions it is expressly stated that the appellant is not seeking to go behind the country guidance in *SSH and HR*.

66. We are firm in concluding that the country guidance given in *SSH and HR* remains valid.

(iii) Returns

67. As regards returnees and what, if anything, can be deduced from the numbers of those returned, on behalf of the appellant it is observed in the skeleton argument that the figures for returns clearly show that some failed asylum seekers from Iran do go back. It is nevertheless said that the figures are unrevealing although certain trends can be observed it is suggested. The figures for returns referred to come from tables rt_01 and rt_05 at https://www.gov.uk/government/publications/immigration-statistics-july-to-september-2017. The tables on the UK government website require the application of the filters in order to obtain the figures for Iran. We think that there are minor errors in the table in the appellant's skeleton argument as compared to the government tables, namely for asylum claims from Iran in 2013 (2,410 not 2,417); 2016 (4,184 not 4,192) and total claims in 2016 (30,747 and not 30,603), although these are simple mistakes and not significant.

68. On behalf of the appellant it is said that from 2006 to 2014 the UK government's figures reveal that claims for asylum in the UK by Iranian nationals ran at an annual average of 2,234, ranging from 1,834 to 2,659. It is said that since then there had been "a dramatic increase" in claims, from 3,242 claims in 2015 to 4,192 in 2016 (the correct figure is 4,184 we think).

69. However, we do not accept the implied suggestion that what is described as a dramatic increase in the number of claims from Iran equates, necessarily, to evidence that there are more individuals from Iran in need of international protection. There is

no necessary correlation between the two. An increase in claims could be due to various factors, and without any speculation one could suggest, for example, that economic circumstances in Iran may be relevant, or a change in destination of choice, say from some other European country, or unknown factors in terms of the actions of people smugglers. In addition, what we say below about the lack of information about the particulars of those returned to Iran could be said to apply with equal force in terms of the basis upon which the claims for international protection were made by the 'increased number' of claimants. In other words, in the context of country guidance in relation to those of Kurdish ethnicity from Iran, the fact that it is not known how many of those applying for asylum were Kurdish means that little, if anything, of relevance can be deduced from the numbers in that context.

70. What can be seen is that 2016 saw the highest number of asylum claims from Iran since 2001 which appears from the government tables to be the date from when figures appear by country of origin. However, it is also the case that there has been a certain ebb and flow in the number of claims from Iran. Thus, purely by way of examples, in 2014 there were 2,000 Iranian claims but in 2006 there were 2,376. In 2010 there were 1,866 but in 2008 there were 2,270.

71. The appellant relies on the rate of *voluntary* returns of failed asylum seekers to Iran. It is pointed out that the government's figures reveal that there has been a further sharp reduction since 2011 (from an already relatively low rate). It is suggested that "when considered on *Sivakumaran* and *Karanakaran* principles" the disproportionately high reluctance of Iran's nationals to return after failing their asylum claims is a significant part of the factual matrix.

72. However, we do not consider that we are assisted much, if at all, by the evidence as to the numbers or proportion of voluntary returns to Iran. On behalf of the appellant the implication is, presumably, that a low and decreasing rate of voluntary returns is an indication of risk, or if not risk, then at least a subjective fear of return.

73. However, as in the case of the numbers of claims for asylum, we do not consider that the raw data on voluntary returns has much evidential value in terms of the issues to be decided in this appeal, either generally in terms of country guidance or specifically in relation to this appellant. Whilst we bear in mind the standard of proof in protection claims, one would need at least some information about the motivations of those not willing to return voluntarily before reaching any evidential conclusions. Motivations other than risk or fear could be, for example, economic considerations. In this respect we note that the Country Policy and Information note for Iran, version 4.0 dated December 2017 ("CPIN") states at para 10.1.1 that:

> "Iran faces a difficult economic situation, due to a combination of past economic mismanagement and international sanctions. The economy has been hit in recent years by high inflation, the high cost of Government subsidies, significant currency depreciation and an increase in the cost of food and imported goods."

74. In relation to employment, para 10.2.1 states that officially unemployment stands at 10% although it is considerably higher in reality, with some estimates putting unemployment at 20% with informal estimates at 40%. It goes on to state that

substantial unemployment exists, with young people and women particularly badly hit. At 10.2.2 one finds that:

> "The unemployment rate returned to a three-year high of 12.7 percent (or 3.3 million unemployed) in the second quarter of 2016 despite the high growth rate in this period".

75. Other employment and economic difficulties are referred to in the report. We do not say that there are not some positive employment and economic factors and plainly an assessment of the economic and employment opportunities in Iran is beyond our scope. The point we wish to illustrate with, admittedly, a necessarily selective reference to that aspect of the background material, is that it *may* be that economic factors have a part to play in relation to any relative lack of voluntary returns.

76. A related issue and a source of dispute between the parties concerns the disclosure request made on behalf of the appellant in November 2017. The request relates to details of Iranian asylum claimants and returnees, in particular whether the claimants were of Kurdish ethnicity. The respondent's response dated 17 January 2018, to summarise, refers to the government website and tables to which we have referred above but in terms of the number of Iranian nationals of Kurdish ethnicity claiming or granted asylum each year up to 2017 the respondent said that that information is not held in a manner that can be extracted by means other than a manual review of all the cases. It is pointed out that for 2016 alone that would require a manual review of over 4,000 asylum applications. A similar response is given in relation to enforced involuntary returns and what documents they were returned on.

77. The appellant, if not complains, then at least comments that the respondent "chooses" (skeleton argument [54]) not to record information about ethnicity of returnees in an easily accessible way and thus declines to disclose it. Any notion that the respondent has somehow contrived to conceal relevant information about the fate of failed asylum seekers of Kurdish ethnicity is rejected by the respondent; the information simply cannot be obtained save at disproportionate cost the respondent says.

78. We do not interpret the appellant's case as suggesting any attempt to conceal information on the part of the respondent, only the contention that the information as to ethnicity of those from Iran making asylum claims (and no doubt returnees) ought to be information provided by the respondent. We do not consider that this is a matter upon which we should make comment in terms of what information is collected by the respondent in relation to asylum claimants and returnees, or in what form. Suffice to say that there is nothing to indicate any bad faith on the part of the respondent in this respect and the respondent has explained the reasons for not providing it.

79. What it does mean however, is simply that little, if anything, of evidential value can be deduced from the information as to numbers of asylum claimants from Iran or returnees. The evidence of claims and returns before us is, we conclude, merely part of the background to the appeal and we find that it does not assist us in our

assessment of the issues because we simply do not know enough about the details of those individuals.

(iv) Conclusions

80. Although there was some evidence before us in relation to the potential risk to family members who themselves are at risk or who for some reason have come to the adverse attention of the authorities in Iran, that was not the focus of the arguments advanced by the parties and was not addressed in detail in the expert evidence. We do not therefore give guidance on this issue but simply note the background evidence, for example in the CIG at sections 3 and 11, which in part we have quoted above, as well as the expert evidence.

81. On behalf of the appellant it is suggested (as set out in written submissions) that guidance be given to the effect that a risk of persecution arises where an individual is involved in the making, re-posting or otherwise publicising critical, insulting satirical etc comments about Islam, Islamic religious figures, the Qur'an, Iran's policies or regime members, online on social media networks whether in Iran or abroad.

82. However, we consider that such proposed guidance is way outside the scope of the case before us and in any event is far too widely drawn. Although there was evidence before us regarding the potential risk for those whose internet activity/social media use may attract the adverse attention of the authorities, that was not a matter which the parties or experts engaged with in relation to the giving of country guidance in terms, for example, of the ability of the Iranian state to monitor such activity. Indeed, in oral evidence Ms Enayat said that she had not been asked to deal with the question of social media in her instructions (although she had given evidence on the issue in *AB and Others*). We also take the view that such a consideration is likely to require some technical evidence and such was not before us. Social media use is however, relevant to this particular appellant's appeal and we consider it in that context.

83. Similarly, quite apart from being outside the country guidance issue that we are concerned with, we do not consider that the evidence before us was such that we are able to offer guidance in relation to persons who have evidenced support for a Sunni Salafi group or ideology.

84. It was also suggested on behalf of the appellant that a circumstance that will create a reasonable risk of persecution for Iranians of Kurdish ethnicity includes "[p]revious residence in the Kurdish regions of Iraq". This is on the basis that although Iran is a major trading partner with the KRI and has cooperated with it in the fight against ISIS, the KRI contains a significant population of Kurdish refugees from Iran and the Kurdish partisan groups all keep bases and training camps there. Thus, it is suggested that any Iranian Kurd who has resided in the KRI and comes to the attention of the Iranian authorities is reasonably likely to face questioning in detention.

85. In his written submissions Mr Metcalfe accepted the evidence of Ms Enayat in terms of the appellant being likely to face additional questioning by reason of having lived

in the KRI for so many years, although it was nevertheless argued that she did not say that he would therefore face a real risk of ill-treatment or persecution as a result. Ms Enayat said that the authorities are interested in the backgrounds of Iranians who had resided for a long time in Iraq and they would want to know where and what he was doing in Iraq and there would be an investigation. Professor Joffé gave similar evidence. He said that if the appellant said that he came from Iraq, the first thing is that it would mean that he had left Iran illegally. The second question would be as to why he went to Iraq. It would be pre-supposed that he would be connected with the opposition movements which are all centred in Iraq.

86. We consider that the expert evidence on this discrete issue, seen in the context of the background evidence overall, is a sufficient basis from which to conclude that 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.

87. Above we have referred to *SSH and HR*. Ultimately, neither party contended that that decision should no longer be followed in terms of the country guidance for which it was reported. We have given our reasons for not accepting Professor Joffé's evidence in so far as he suggested that *SSH and HR* should no longer be followed. It remains valid country guidance.

88. It is common ground that Kurds in Iran face discrimination. However, the evidence does not support a contention that that discrimination is at such a level as to amount to persecution.

89. On behalf of the respondent objection was taken to some of the evidence of Professor Joffé and Ms Enayat as to the individual examples of human rights abuses against Kurds (and non-Kurds) on the basis that they either pre-dated *SSH and* HR or were in fact considered in that case. However, the respondent's position is inconsistent, on the one hand decrying a lack of recent examples of individual cases of mistreatment of Kurds yet also stating in submissions that it was accepted that conditions have deteriorated.

90. It is common ground that Kurds involved in Kurdish political groups are at risk of arrest, prolonged detention and physical abuse by the Iranian authorities. Kurds expressing peaceful dissent or who speak out about Kurdish rights also face a real risk of persecution.

91. Those activities that can be perceived to be political 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. The threshold for consideration by the Iranian authorities of activities being political is a low one.

92. What emerges from the background and expert evidence is an extreme sensitivity on the part of the Iranian state to activities that are, or are perceived to be, anti-regime. Ms Enayat's evidence was that even being in possession of a Kurdish flag or a leaflet would put someone in trouble with the authorities. Although there was criticism of her evidence on behalf of the respondent in that respect (a single leaflet), her evidence chimes with what appears at para 11.1.2 of the CIG (on Kurds and Kurdish political groups) in the quotation from a Landinfo report of February 2013:

> "The Landinfo report further noted that; 'if an individual were caught with a leaflet, he would most likely be arrested and tortured as well as forced to confess to being a member of whatever group could have been behind such a publication. He or she would go through a five minute trial and the outcome such a trial could vary from many years imprisonment to a mild sentence. It is impossible to say'."

93. This example of low level activity having the potential to create a risk of ill-treatment is nothing new therefore. It can hardly be said that the human rights situation in Iran in general has improved in recent years and, as we have seen, recent events have created an environment of greater suspicion of Kurds and Kurdish activities. In addition, the example of the mere carrying of a leaflet or Kurdish flag is entirely consistent with the background material put before us, for example "Even those who express peaceful dissent or who speak out about Kurdish rights", "there is no tolerance on the Iranian regime's side for any kind of activities with connection to the Kurdish political parties and any affiliation with one of these parties would be reason for arrest".

94. The evidence before us makes it clear that 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 and are reasonably likely to be subjected to heightened scrutiny. We accept what Ms Enayat says at [53] of her report, namely that "it is quite evident that the increased militancy of the Kurdish parties coupled with the IS attack of July 2017 will mean greatly enhanced suspicions of any Kurdish returnees". Professor Joffé's evidence was to like effect

95. The evidence also indicates that 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' we mean that the threshold for suspicion is low and the reaction of the authorities is reasonably likely to be extreme.

96. It is true, as argued by the respondent, that there is a lack of evidence of problems from the authorities faced by Kurdish returnees, but that must be seen in the context of the relatively low numbers of those returning. In addition, as already explored, nothing is known to us about the ethnicity of those returned, or indeed of the nature of any asylum claim made.

97. What is not disputed is that a returnee without a passport is likely to be questioned on return. Such is the expert evidence before us and such is recognised in current country guidance, for example, *SSH and HR*. It is not within the scope of this decision to revisit existing country guidance in terms of the procedures for obtaining a laissez-

passer or in relation to questioning on return, notwithstanding that both parties, to a greater or lesser extent, sought to explore those issues.

COUNTRY GUIDANCE

98. Drawing on all the expert and background evidence, and taking into account the submissions of the parties, we come to the following conclusions:

(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.

THIS APPELLANT-ASSESSMENT AND CONCLUSIONS

99. In applying the above guidance and existing country guidance to the facts of this appellant's appeal, we remind ourselves of the statement of agreed facts which we have set out in full at [4]. Judge Storey referred to the FtJ having found that the core of the appellant's account was credible. We think however, that we ought to make further reference to the specific credibility findings made by the FtJ.

100. At [13] the FtJ found that the appellant had at all times been consistent in his account. In that same paragraph he considered the respondent's challenges to the appellant's account of his parents' support for the Peshmerga. In that context the FtJ said the following:

> "The Respondent accepted his claim to be of Iranian nationality but felt that there were challenges to credibility because of his lack of knowledge of his parents' activities. It was felt that it was not credible, for instance, that the Appellant had not known about his parents' support for peshmergas prior to his return to Iran in 2015. It was not thought that it was credible that the Appellant's uncle would not know of their actions. It is unclear to me how the Respondent reached those conclusions when the uncle was not available to clarify what he did or did not know and the Appellant was only six years of age when he was moved from Iran into Iraq. It is difficult to see why the Appellant and his uncle should have looked for opportunities to discuss his parents' activities in detail. The Appellant did say in his asylum interview that his parents had provided support for peshmergas in matters such as food (asylum interview record question 39)."

101. At [14], in relation to the disappearance of the appellant's parents the FtJ said this:

> "The Appellant in his testimony accepted that he did not know what had happened to his parents, simply that they had been taken away and he had not heard of them since. Again, as he was only six years of age, his level of personal knowledge and understanding will be extremely limited."

102. To complete the picture, at [15] the FtJ said that he did not accept the appellant's evidence "about the reasons why his parents disappeared" because he had no personal knowledge of the details and the information given by his uncle was very vague. At [17] he found that the evidence did not show any real likelihood that the

appellant would be regarded as a person of adverse interest "because of his parents' activities now more than 23 years ago".

103. It is at least implicit from the FtJ's decision that he found that the appellant's parents had been politically active in terms of providing support for Kurdish political groups referred to as "pro-Kurdish separatist groups" in the statement of agreed facts.

104. Finally, it is important to note that the FtJ said at [17] that he accepted the appellant's evidence "that he has never had any involvement in political activities even though he is, broadly, a supporter of Kurdish rights".

105. In the light of the FtJ's acceptance of the appellant's account of his parents having been involved in providing support for pro-Kurdish groups, even if limited to providing support for the Peshmerga in terms of food, we consider that the disagreement between the parties in relation to how it came to be that the appellant's family home was destroyed/burnt down in 1994 to be a rather sterile debate. The respondent suggests that this may have been the work of a Kurdish group but Ms Enayat emphatically rejected that suggestion. Put simply, she said that such activity was redolent of the methods of the Iranian security forces at that time and not of Kurdish groups.

106. It is a preserved finding that the appellant's parents did disappear, i.e. were "taken away" in 1994. It is also a finding that they provided support for pro-Kurdish groups. In relation to Ms Enayat's evidence as to the destruction of the family home, we consider that it does not 'close the gap', as it were, in terms of the evidence that was before the FtJ in relation to why the house was destroyed or why his parents disappeared. If the only two possibilities for the cause of the destruction of the appellant's home were actions by the Iranian security forces or a Kurdish group we would choose the former. But that is not a sufficient basis from which to conclude that it was the result of activity by Iranian security forces. Likewise, we do not consider that there is a sufficient evidential basis from which to conclude that Iranian security forces caused his parents to 'disappear'.

107. In the context of the findings that are preserved and in the light of what we say below about the other aspects of the appellant's claim, we do not consider that the evidential gap in those respects is significant to our determination of his appeal.

108. We next consider the appellant's social media profile. There is additional evidence before us in that respect that was not before the FtJ. We permitted further evidence on that issue to be adduced (see [9]-[17] above).

109. We repeat what we said at [9] above. The copy documents are contained in a bundle of 59 pages. They are posts under the appellant's name and are accompanied by translations of posts between 24 December 2016 and 16 January 2017. The date range for the posts is 24 December 2016 to 16 January 2017 (pre-FtT hearing) and 23 February 2017 to 23 October 2017 (post-FtT hearing), the latter not being accompanied by translations.

110. We have not been provided with an agreed summary of the content of the Facebook posts but there are translations of a portion of them. For reasons which will become

apparent, not every post needs a translation. We refer to only a sample of the translations.

111. In general, as revealed in the posts that have been translated, they express support for the Kurdish political cause and express opposition to the Iranian regime. They consist of shared posts from individuals and from, for example, the Democratic Party of Iranian Kurdistan (PDKI) Scotland and one from Denmark (but the latter was not able to be translated).

112. The following is a sample of the posts (in the order in which they appear in the bundle):

- A shared post of a video, dated 16 January 2017, says "If you consider yourself a Kurd please shared it (sic) to be watched by as many people as possible". What is on the video is not stated.

- A shared "Democratic Rebels' video dated 16 January 2017 says "The Peshmerga of Kurdistan Democratic Party destroyed the Iranian forces ambush in Sardasht".

- A shared post, dated 15 January 2017, from the PDKI (Scotland), with a photograph, refers to the 71st anniversary of the establishment of "Kurdistan Republic of Mahabad" going on to refer to the Republic of Kurdistan as the first Kurdish national state.

- A shared post, dated 11 January 2017 refers to the burial ceremony of "the martyrs of the Kurdistan Freedom Party (PAK)".

- A shared PDKI (Scotland) post, dated 10 January 2017 refers to the death of Ali Akbar Rafsanjani [former President of Iran] and includes the words "The father of terrorists has died" with his photograph and a cross through it.

- Another shared post from the PDKI (Scotland), dated 4 January 2017 says "The Iranian regime of execution is the biggest terrorists in the world".

- A similar shared post, dated 4 January 2017 says "Happy Kurdistan Flag Day and Peshmerga's Day".

- A shared post from an individual dated 27 December 2016 has, amongst others, the words "Down with the Islamic Republic of Iran" and "We must struggle to end the oppression" accompanied by a photograph of Ayatollah Khomeini with superimposed images of men hung by the neck on ropes.

- A photograph in a shared post, dated 8 January 2017, depicts Ayatollah Khomeini on all fours being kicked from behind by a woman.

- A photograph in a shared post dated February 2017 (and 1 March 2017) depicts Ayatollah Khomeini with an altered facial impression. The photograph is not clear enough in the photocopy to be more specific. In the same shared post Ayatollah Khomeini has a toilet pan superimposed over his body.

- A photograph in a (possibly original) post, with no discernible date, superimposes Ayatollah Khomeini's face over the body of a dog on a lead.

- A photograph in a (possibly original) post, dated June 2017 shows Ayatollah Khomeini's face with male genitalia superimposed over his nose.

113. Mr Metcalfe submitted that there is insufficient evidence that the Iranian authorities would necessarily be aware of that material and that the evidence did not establish that the Iranian authorities routinely inspect the internet profiles of failed asylum seekers.

114. However, we noted at [97] above that it is not disputed that a returnee without a passport is likely to be questioned on return, confirmed in the expert evidence before us and recognised in existing current country guidance, for example, *SSH and HR*. Ms Enayat's evidence was that it is part of the routine process to look at an internet profile, Facebook and emails of a returnee. A person would be asked whether they had a Facebook page and that would be checked. When the person returns they will be asked to log onto their Facebook and email accounts. That is also the effect of her evidence given in *AB and Others* which was accepted by the Tribunal in that case (see [457]).

115. Mr Metcalfe accepted that the material posted by the appellant on Facebook, if it became known to the authorities, would expose him to prosecution with a risk of imprisonment and that this would result in a real risk of ill-treatment. It was also accepted that the appellant's Facebook page is currently visible to the public at large.

116. We are satisfied that the content of the appellant's Facebook page would become known to the authorities on return as part of the process of investigation of his background. That is the effect of the expert and background evidence before us. It is then, no step at all to the conclusion that this would involve a real risk of persecution and Article 3 ill-treatment in his case, by reason of detention and ill-treatment and likely prosecution. His Facebook posts would reveal not only his support for Kurdish rights but also his having insulted the Iranian regime and leading figures in it. This is reasonably likely to be regarded not only as having 'crossed the line' in terms of political views or activity, but also in terms of religious dissent.

117. There are in fact a cluster of factors that would lead to significant adverse reaction to this appellant by the Iranian authorities, quite apart from the Facebook material which would be sufficient on its own. That material in its political content of support for Kurdish rights would dovetail in the minds of those questioning the appellant with what he is reasonably likely to reveal under questioning about his parents' support for Kurdish groups, albeit many years ago and his own broad support for Kurdish rights. Likewise the fact of the appellant having lived in the KRI for many years.

118. In terms of what the appellant would be expected to reveal under questioning, Mr Metcalfe relied on an unreported decision of the UT in *Secretary of State for the Home Department v MH* (PA/02219/2017), 7 December 2017, where at [41] it was said that what an individual would say, if questioned, "is a factual finding which must be

made on the basis of all the evidence". That decision is relied on in support of the proposition that there was no evidence from this appellant to show that he would disclose his political opinions and the FtT did not find a risk in that respect.

119. Ms Naik raised a number of objections to this aspect of the respondent's case as can be seen from our summary of the parties' submissions. It is sufficient for us to state that we do not consider that the respondent is entitled to rely on that unreported decision in circumstances where the Senior President's Practice Directions at paragraph 11 in relation to the citation of unreported decisions has not been complied with. For our purposes the decision in *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38 requires no clarification.

120. In any event, the resolution of this appellant's appeal does not depend on what he would say if asked about his political opinions when questioned, given what would in any event be discovered. If we had to answer the question as to what he would say, we would simply conclude that, following *RT (Zimbabwe)* the appellant could not be expected to lie about his political belief of support for Kurdish rights, about which he is reasonably likely to be directly questioned given his particular circumstances.

121. In the light of our assessment of what is reasonably likely to befall the appellant when questioned on return, we are satisfied that he has established to the required lower standard that he has a well-founded fear of persecution for a Convention reason, namely his actual and imputed political opinion. Thus we allow his appeal on asylum grounds and under Article 3 of the ECHR.

Decision

122. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision having been set aside, we re-make the decision by allowing the appeal on asylum and human rights grounds with reference to Article 3 of the ECHR.

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

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

Upper Tribunal Judge Kopieczek

ANNEX A

ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/14213/2016**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 11 May 2017

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR H B
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Spurling, Counsel, instructed by Barnes Harrild & Dyer Solicitors
For the Respondent: Mr N Bramble, Home Office Presenting Officer

ERROR OF LAW DECISION AND DIRECTIONS

1. The appellant is a national of Iran. On 1 February 2017 First-tier Tribunal Judge (FtTJ) Nicholls dismissed his appeal. The judge did so despite finding that the

appellant had given at core credible account of his experiences in Iran (and Iraq). At paragraph 17 the judge stated:

> "17. Although I accept the Appellant's evidence of the course of his claim, I find that that evidence does not show any real likelihood that this Appellant would be regarded as a person of adverse interest either because of his parents' activities now more than 23 years ago or because of any of the Appellant's own actions more recently. I accept his evidence that he has never had any involvement in political activities even though he is, broadly, a supporter of Kurdish rights. I find that if he is returned to Iran the Appellant would simply be identified as a person who left the country illegally and, probably, was a failed asylum seeker. The key question in this appeal is whether those two factors by themselves are sufficient to demonstrate a well-founded fear of persecution."

2. The judge then addressed the appellant's attempt to rely on two expert reports from Professor Joffé:

> "18. The Appellant has submitted the two expert reports from Professor Joffé, in the second of which the professor takes issue with the conclusions of the Upper Tribunal in SSH and HR, arguing that they reached the wrong conclusion about the risks faced by failed asylum seekers, particularly those of Kurdish ethnicity. In his skeleton argument and closing submissions counsel for the Appellant argued that the two conclusions reached in SSH and HR did not go so far as to assess the position of Kurdish failed asylum seekers and that it was open to me to reach conclusions on the basis of the evidence without needing to find grounds to reject the conclusions in the country guidance case. I do not accept that submission."

3. The judge went on to find that the two appellants considered in **SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC)** were in the same position as the appellant and observed that at paragraph 34 of **SSH** the UT had concluded that "the evidence does not show risk of ill-treatment to such returnees, though we accept it might be an exacerbating factor for a returnee otherwise of interest". At paragraphs 20 and 21 the judge concluded:

> "20. I have carefully read both of Professor Joffé's reports and I note his disagreements both with the conclusions reached by the Upper Tribunal and his evidence that the position of Kurds in Iran has deteriorated since the evidence in that decision was heard. However, I am required to follow country guidance cases unless there is clear evidence that the conclusions are out of date. Many of the factors mentioned by Professor Joffé are discussed in SSH and HR, such as the procedures for obtaining a laisser-passer and the views of a retired Iranian judge. I am not satisfied, therefore, that there is sufficient new evidence which was not considered by the Upper Tribunal which requires me to depart from the country guidance case.

21. I find that this Appellant has shown that he is of Kurdish ethnicity, that he illegally exited Iran and that he would return as a failed asylum seeker. I find that he falls squarely within the facts of those considered in SSH and HR and that he has not shown that there are any extra or additional risk factors which would identify him as a person of adverse interest to the Iranian authorities. I find that the Appellant has not established a well-founded fear of persecution and has not shown an entitlement to protection in the UK."

4. The appellant's principal grounds of appeal as amplified by Mr Spurling before me were that the judge failed to provide any satisfactory reasons why he found at paragraph 20 that there was insufficient new evidence that was not considered in **SSH**. The grounds highlighted that Professor Joffé's reports concluded that "being both a Kurd and a failed asylum seeker does imply significant risk of persecution" and that the Tribunal in **SSH** had not dealt properly with the difficulties facing persons leaving Iran illegally of obtaining a laissez-passer document.

5. I am grateful to both representatives for their helpful submissions.

6. I am persuaded that the FtTJ materially erred in law. It is clear from the judge's reasoning that he considered that the appellant could not succeed because the issue of whether he was at risk (because of his Kurdish ethnicity combined with his being someone who left illegally and would be perceived as a failed asylum seeker) had been ruled on by the UT in the country guidance case of **SSH**. However, whilst it is true that the UT in **SSH** did reach conclusions on the issue of Kurdish ethnicity as a risk factor, that issue was not one of the identified country guidance issues in the case and as such fell outside the scope of Practice Direction 12.2. It cannot be excluded that had the judge correctly directed himself regarding the scope of the country guidance in **SSH** he would have come to a different conclusion.

7. By the same token, the judge cannot be criticised for relying on the findings reached by the UT in **SSH** on the laissez-passer issue because that was an issue specifically identified by the UT in that case as a country guidance issue: see paragraph 33(a).

8. For the above reasons I conclude that the FtTJ materially erred in law and his decision is set aside.

9. I discussed with the parties how they thought I should dispose of the appeal on the hypothesis that I did set aside the decision of the FtT. I also raised with them the matter of whether the case was potentially suitable for listing together with other cases in the context of a new country guidance on Iran. Mr Spurling said that the appellant was publicly funded and confirmed immediately after the hearing that the appellant and his instructing solicitors would have no objection to the appellant's case being joined with other cases being case managed for a new country guidance hearing. Mr Bramble said it was a matter for the UT but if I decided to set aside the decision of the FtTJ the appellant's case might be a suitable one to be added to the country guidance proceedings.

10. I have concluded that I am not in a position to re-make the decision in this case as it requires a further hearing. Both parties have indicated that they consider that the FtTJ's primary finding of fact about the appellant's adverse experience should be preserved. I concur. The case is one that can best be dealt with by being retained in the UT.

11. Bearing in mind the above, the appellant's case will be set down for a further hearing. Whether or not it will be joined with other cases being case managed for a new country guidance case will be a matter for the Upper Tribunal to decide. If it does so decide, it would be with a view to the issue of Kurdish ethnicity as a risk factor being identified as one of the specific country guidance issues. If the parties receive listing of the appeal without any reference to country guidance they can assume the matter of it being added to country guidance was considered but rejected by the Upper Tribunal.

12. For the above reasons:

    The FtTJ materially erred in law and his decision is set aside.

    The case is to be listed for a further hearing in the Upper Tribunal.

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

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

Signed Date: 26 May 2017

Dr H H Storey
udge of the Upper Tribunal

ANNEX B

EXPERT (ORAL) EVIDENCE

Anna Enayat

1. In examination-in-chief Ms Enayat said that the fact that the appellant comes from Betoosh on the Iran/Iraq border is not something in particular that adds to the issue of risk, either in terms of it being a route used by the Kurdish Democratic Party of Iran ("KDPI") or in terms of the fact that the appellant comes from that area. The issues are the same for all Kurds from western provinces.

2. As she said in her report, the Western provinces are the epicentre of Kurdish political activity and Kurds residing there face far greater risks of running foul of the security apparatus than Kurds elsewhere. There are more situations in which Kurds would have imputed to them a belief that they were doing something wrong, but going about their day-to-day business there would not be such greater risks. Particular situations of heightened scrutiny for Kurds would be if they were to go and live in Iraq or pass through the airport having failed in an asylum claim or being on the streets when demonstrations were going on.

3. They could come to the attention of the authorities for a non-political reason such as being involved in various charitable activities. The risk is then that they might be perceived as being anti-government. This is because the government has always sought to eliminate any organised activity. This was less so in 2000 but increased between 2005 and 2006. It was particularly in Kurdish areas where there was a widespread suppression of NGO's, for example environmentalists. Kurds would be at greater risk in this respect. Typically they would be arrested for national security crimes. It is clear that the government thinks that any civic organisation is a cover for political activity. It is the organised nature of it, rather than the activity itself.

4. That started to emerge in relation to non-political organisations in about 2007 or 2008. That was the build up to the start of the presidency of President Ahmadinejad. Those who were not Kurdish were also at risk but the risk was much more evident in Kurdish areas and became noticeable in 2007-2008. There are less instances now because people do not make NGO's anymore. There are now very few NGO's in Kurdish areas, but also overall. From 2006 to 2008 and to now, it has made it virtually impossible to register an NGO. Persecution in relation to NGO's was intense in Kurdish areas but also happened elsewhere. She referred to examples given in her response to written questions.

5. As to whether the situation is now more sensitive now than in 2016, she said that a series of events had affected the whole political context in terms of Iran

and Kurdistan. First, there was the fighting in the Syrian war which has raised national consciousness amongst Kurds. Second, there was the resumption in 2016 of armed activities by Kurdish national parties who had repudiated violence and which were an offshoot of the PKK; the first major resurgence since the 1990's. Third, Kurds in the abortive independence referendum in the KRI mobilised the population in Kurdish cities of Iran. Fourth, was the terrorist attack on the Iranian parliament in Tehran in July 2017 where the perpetrators were Islamist Kurds. The Iranian security services rounded up Kurds in the Kurdish areas. There was therefore heightened security activity. They were worried about terrorist attacks.

6. In relation to someone who confines their activity to the internet or leafleting who could be described as a low level activist, that would lead to arrest if it took place on Iranian territory. If a Kurd was returning from abroad it would lead to increased vigilance.

7. In relation to the appellant, in terms of sharing anti-regime posts and making fun of senior government or religious figures, if the appellant was caught and identified he would be punished by being put in prison. Before that he would probably be tortured in pre-trial detention. Procedures used to identify persons in those circumstances who would be returning as a refugee, would involve interrogation and background checks. Secondary checks would be as described in her report. That would be pretty much routine if a person went back on a temporary document or was deported. There would be questioning at the airport by security officials.

8. If the person was identified as being of interest in relation to email or internet activity, it is very likely that the person would be prosecuted as opposed to just being detained and ill-treated. The state has an interest in making examples of such people. She referred to the examples in her report (appendix IV). The formal accusation would usually be insulting Islam, or the supreme leader, or spreading lies and propaganda against the system.

9. As to the suggestion made by the respondent that it would be different if a person was found to be posting in an opportunistic manner or in fun, or to bolster an asylum claim, Ms Enayat said that the reaction of the authorities can be seen in particular cases, for example one 'SB' sometime in 2011-2012 who had a joke website or Facebook page. The punishment was something like 15 or 16 years' imprisonment. He was beaten in custody. She does not have the information with her because she had not been prepared for questions on that issue.

10. Even in relation to someone who could be said to have made up stories to make their asylum case better, the point is that the authorities would regard it as besmirching their name and accusing them of human rights violations. If someone were to say that they had pretended to convert but had not really, that would be okay. If it was a genuine conversion they would probably pressure

you to recant. But if one was making up a political statement it is not so easy to say that that was all 'rubbish'. When pressed on the matter Ms Enayat responded to state that she felt she was being asked questions that she could not answer.

11. As to whether the fact that a person was Kurdish would add to the seriousness of their situation, she said that one does not necessarily have to be Kurdish to be punished for anti-government jokes. The more important point about Kurdish refugees is the likely greater degree of scrutiny. She said that she was not saying that in the vast majority of cases there would be a risk in applying for asylum but a person would be questioned about it. One would have to sign a piece of paper saying that they regretted their claim. If one were to have something like the Facebook page as in this case, that would be very likely to come to light at the airport. It is part of the routine process to look at an internet profile, Facebook and emails. A person would be asked whether they had a Facebook page and they would check. The checks at the airport apply to everybody.

12. As to whether there would be a greater risk for Kurds, she did not think that spot checks for Kurds occurred but if a person was going back and had applied for asylum in the West, they would be checked. If there was proper documentation they would not do so although she did not know. Her understanding was that everybody returned on a temporary document would be questioned. It would be routine for an internet profile to be examined.

13. In relation to Kurds, the security people would go on to ask which Kurdish groups or organisations the person was involved in. It would be followed through much more.

14. Unless they said something against the state which was identifiable, there would be no other problems. If a person had made an asylum claim but had no internet profile although had said something against the state, if there was no other reason (of interest), the security forces would not bother them, just because they had made an asylum claim. However with Kurds, they always do have something else to bother about because they want to find out if they have organisational connections. From what she understands, they monitor Kurdish returnees. They would say "off you go" and then call them back, although she does not know exactly. She does know that they have a monitoring system.

15. As to whether there was a risk of ill-treatment in that process, she said that there was always a risk of ill-treatment for that category but she could not predict it or put numbers on it. As to whether in the current context, post 2016, it was reasonably likely that there would be ill-treatment in those circumstances, she said that the risks were increased. Any case of pre-trial detention involves a risk of being beaten up or psychologically tortured. Individual cases are very difficult to predict. It was impossible to say that there would not be a risk.

16. A Kurdish returnee who had made an asylum claim but who had no internet activity who is monitored, would not be at risk. The initial interview is where there would be the risk if the interview goes on and they go "beyond the office" as it were, into detention. If a person is recalled, there would not be a risk unless the detention becomes lengthy. She could not say that there was a risk because there is not enough information about returnees. She does not know whether there would be a risk in the context of people recalled for questioning.

17. Questioning would not always take place at the airport. She has only anecdotal evidence in relation to the questioning. A security person would ask where they were going to be. The person they recall is then summonsed. She knows of at least two cases where the people have been beaten up but she does not know what documentation the returnees had. The only inference that she draws is that there are no patterns. The questioning at the airport can be for hours or days. She referred to her report and the response to questions.

18. As to what she refers to at [34] of her report in terms of "securitization" of Kurdish provinces by the Iranian government since the mid 2000's, more and more troops have been garrisoned in Kurdish areas over the last decade. The procedure at the airport is in the hands of the intelligence side of the state. The head of the judiciary is chosen by the Supreme Leader and the Minister of Justice is an administrative post. The Revolutionary Courts are under the head of the judiciary which then goes back to the supreme leader who has a state within a state, as it were.

19. Referred to the Facebook posts in this appeal, Ms Enayat said that if the material was accessed by the security forces on return it would be explosive. She said she did not know whether there were any circumstances in which that material would not cause a risk to the appellant. The material would put him at risk of a very sound beating and they would definitely take him into court, followed by prosecution and imprisonment. She did not think it would make any difference if a person had been found to be not credible in his asylum claim or said that the material had been put there simply to make up a claim. Ms Enayat referred to an example in her report (page 73) in relation to a German-Iranian arrested in 2011 when visiting her family in Iran and imprisoned for Facebook posts, having been charged with anti-government propaganda and insulting the Supreme Leader, and released in 2015 (after being given a three year sentence). She said that she had other examples but had not previously been asked about it.

20. In cross-examination she said that she does not claim to be an expert in relation to Kurds or the Kurdish situation in particular. When she was in Iran she did visit the Kurdish areas. She had not been to the particular region relevant to the appellant's case. She does not speak Sorani.

21. Referred to her report at [4], she said that there were lots of sources for what she says about punitive measures taken against the Kurdish community in the

1990's (in terms of the demolition of houses or whole villages). She referred to footnotes on page 5 of her report as to the source of her information in that respect. She could not think of other reasons for the appellant's family house being burnt down. The Revolutionary Guard would do such a thing but Kurdish groups were not in the conflict at that point and she is not aware of Kurdish groups being responsible for the demolition of houses. She said that when she had been asked to respond to written questions she revisited the material in relation to the appellant's area. There was now evidence (referred to in her answers) that in 1984 when the Revolutionary Guard attended the area, Betoosh (the appellant's area) was the HQ of the KDPI.

22. In relation to Dr Jalaeipour's article (about Kurdish forces in the area) referred to at page 4 of her report, he used to be a member of the Revolutionary Guard and a leading political scientist in Iran. She had given more detail at page 3 of her response to questions. As to whether the article was reliable in terms of the methods of the Revolutionary Guard, she said that it was not about the Revolutionary Guard but about partisans. The article that she had quoted about the Revolutionary Guard operation in the Sardasht area in 1984 explicitly describes going into Betoosh and neighbouring villages and clearing them out.

23. It was true that one does not know the reason for the appellant's parents' house being burnt down but we know what is a reasonable likelihood. She could not think of any other reason as to why the house was burnt down and his parents taken away. It could not be retaliation by other Kurdish groups because there were none there at the time. As to whether the appellant's parents might have been punished for refusing to help a Kurdish group, she said that she had never heard that Kurdish groups terrorised villagers. They need to keep good relations with the villagers. She could not answer in terms of whether the Revolutionary Guard had another reason for doing such a thing.

24. In relation to the "careful scrutiny" of the local population of the Kurdish borderland provinces by the government that she had referred to in her report at [16] and [17], that was to watch to make sure there were no signs of political activity and to identify threats.

25. She presumes that it would be right that that would not work if the state could not distinguish between genuine and non-genuine threats. Asked about whether that was something that was relevant to a person's return to Iran, she said that they would not know the background of a person and there was a huge amount of corruption. She gave an example of the activities of a particular unit of the Revolutionary Guard which had been murdering young Kurdish men and dressing them up as Peshmerga to collect the bounty. She gave a further example of three American hikers being arrested by the same unit. The purpose of the security operation may be to identify genuine threats but what was the purpose in arresting three American hikers? It was a scandal in Iran for the Kurdish people in the area because their children were disappearing.

26. In relation to [18] of her report, the case of DH (granted asylum in Finland in 2011, returned on a visit to Iran in 2017 and arrested and died) was not a situation where she was saying that he came to the attention of the authorities purely because of his Kurdish ethnicity. What she was saying was that they could get arrested anywhere.

27. As to what she says in her report about NGOs ([19]), she could not say categorically that there were no NGOs operating. She did not say that she disagreed with paragraphs 2.3.2 and 2.3.3 of the COI [CIG] report for Iran (version 2.0 July 2016) but only expands on it. In relation to the example of SG (who died in custody) who had previously been in prison for five years and released after the authorities realised the error, and whether that showed that the authorities were concerned to distinguish between those who were a genuine threat and those who were not, she said that sometimes one gets an honourable and principled individual.

28. She said that she was not arguing that a Kurd, who was not perceived in some way to be politically active, would be arrested. She could not say anything further about the word "perceived" used at [21] of her report in relation to those Kurds perceived to have been in contact with Kurdish parties being at risk of arrest and harsh treatment, because she does not know enough about the various cases.

29. The example at [22] of her report is of a low level activist Ebrahim Lotfollahi ("EL") (said to have been in possession of Kurdish leaflets) but an extreme example of ill-treatment (detained and then said by the authorities to have committed suicide while in prison, with an autopsy denied and his grave covered over with concrete). PJAK (Party of Free Life for Kurdistan) is an armed group but she was separating that from (mere) possession of a leaflet (about the PJAK). EL only had one leaflet, which is what every source that she had read says and every source that she had read said that he was not an activist. Possession of leaflets is regarded as a crime. She accepted that there was no translation of the article which referred to this example. At around the same time a 19 year old smuggler of alcohol was beaten to death in jail in Kurdistan

30. As to whether her report was unclear in terms of that individual not distributing or having had in his possession a number of leaflets, she said that there was very little more that she could say. In answer to further questions in relation to other examples, she said that she had never argued that someone who was not involved in political activity would be persecuted. The difference between them seemed to be in terms of what was regarded as political activity.

31. In answer to our questions, she said that those perceived to be political activists were at risk and even someone in possession of a leaflet would be at risk.

32. As to the examples she gives at [23] of her report, those were examples of political activists. She had repeatedly said in her report that targeting was not purely on the basis of Kurdish ethnicity. The risk involves people identified as being in possession of dissenting attitudes. That is how low the threshold goes. She agreed that if a person was Kurdish and politically active the situation would be worse for them than someone who is non-Kurdish and politically active. That was what the evidence indicated. The treatment is harsher. She added that even possession of a Kurdish flag would put such person in trouble with the authorities.

33. In relation to the Danish Fact-Finding Mission of 2009 at page 11 and the reference to people affiliated with a person who has some "controversy" with the authorities being on a 'list' of those affiliated, a person related to another person who is on such a 'list' can become susceptible to harassment and interrogation.

34. In relation to the appellant's maternal uncle who remained in Iran, if the appellant's parents were people of interest at the time his uncle probably was also on a list and was probably harassed. That was probably why the appellant was sent away. It may be that the uncle stayed in order to protect the property. Given that one was now talking about the 1990s, she does not know if the situation was the same at the time. Today the uncle might be on a list. He would not be at risk unless something happened to bring him into contact with the authorities. According to the appellant's account, his uncle is not politically active and so he would not be at risk. His uncle is super cautious. The significance of being on a list, according to the Kurdish Human Rights Project, is that the list is used to intimidate people.

35. The authorities would more be vigilant of the background of a refugee. She was not able to judge how likely it would be that someone who is not politically active would be questioned under duress, as she is not present at the interrogations. As she said in her report, one does not know how many Kurds have gone back because the figures are very, very sparse. Therefore, she does not know how many have been subject to enhanced questioning. However, she does know the way that things work. Iran is a security state and the position in the predominantly Kurdish provinces of the west is strategically important for the state. The situation has seriously deteriorated in the last few years. There is constant surveillance of the population. They would be careful about people coming back. Again, in answer to our questions she said that there are checks done at the embassy in the UK and the embassy would report back.

36. She agreed that the state would be concerned with identifying genuine threats, but she did not know how much investigation that would take. Also, that does not mean to say that if a person is not active it would only take five minutes for that to be understood.

37. She did not agree that it was generally highly unusual for a Kurd to join IS. There had been quite a lot who had joined. There is a Salafist Islamist movement in the KRI and Iran. It was true however, that there was very strong hostility between Kurdish groups and IS. The Iranian government was not surprised that there were Kurdish people involved (in the attack on parliament) but surprised that they managed to get through. It was the population itself that was surprised that Kurds were involved. In many ways the authorities turned a blind eye to Kurdish involvement with IS as it undermined the separatist parties. There is a larger movement of Salafist Islamists which thrives in the border areas and which is a fund of personnel and recruitment. Ansar al-Islam is the most important part of the Salafist Movement.

38. As to whether there would be questioning at Tehran Airport of a returned Kurdish asylum seeker as to involvement with IS in the context of the security forces not expecting large numbers of Kurdish asylum seekers to be members of IS, she said that she could not answer that question and put herself in the mind of the security forces.

39. In relation to emergency travel documents ("ETD's") (issued abroad), a person always used to be asked background questions but that does not mean that they would not also be asked at Tehran Airport. However, she does not know of the set up now. Applications for ETD's are filtered through security. Information is passed to the authorities in Tehran even if a person is not questioned by intelligence or security officers. If the system is the same now as in 2009 we know that anybody with an ETD is scrutinised.

40. She agreed that she had not been asked to deal with the question of social media in her instructions. However, she did provide a report in *AB and Others* and gave evidence. There is also quite a good COI (Country of Origin Information) report on that issue and she thinks there are more recent Canadian reports but she does not have the references.

41. She does not know about what questioning there would be about social media at the embassy when someone is trying to obtain a laissez-passer, but they would be questioned in Iran. She does not know whether Facebook or Twitter would be checked in a person's presence at the embassy. There would be a check of a person's internet profile and a name would be run through Google. In relation to the appellant's name, it is true that some names are similar but she questioned whether there would be 10 HB's returning at the same time. Iran has a huge Basiji cyber army and various units for surveillance of cyber space. Those people are trawling the net all the time. For them there is no boundary in terms of someone inside or outside Iran. As to whether the security agencies have to be quite selective otherwise there would be too much information (to check), she said that it would be possible to do such searches if they had the technology. She understands that Iran does have the technology to download millions and millions of kilobytes of information and they have a huge number of people to do that.

42. She said that the surveillance is done from Iran on the web. She was asked about surveillance of people, for example in the UK using Facebook and Twitter and to what extent the intelligence services would be interested in say, people cutting and pasting or clicking on 'likes'. She said that that had all been gone through in *AB and Others*. What is more certain is that when the person returns they will be asked to log onto their Facebook and email accounts and that those things will "out".

43. Referring to appendix IV of her report, she said that it appeared that people whose Facebook pages were used against them after their return had actually deleted those pages they said. In relation to someone going to the embassy, an application would not be accepted unless it was voluntary and it was unlikely then that someone would go to the embassy voluntarily so the question was hypothetical. Even if a person said that what they had written was all 'rubbish', the person will have already committed the crime. Whether it was possible for a person to go to the embassy as a failed asylum seeker and say that they had clicked on things that they should not have, she said that that was highly unlikely.

44. Referred to her report at [57], as to the possibility that a person might be asked in an application for an ETD about their social media use, anything is possible and she did not know what a person was going to be asked apart from their immigration and migration history. She knew of people who had had to get an ETD because they had lost their passport. As to whether it was unlikely that a failed asylum seeker would seek an ETD from the embassy, she said that anything is possible but she did not know if that would happen at the embassy. She knows that people have been penalised for possessing very little material or even after having said that such material was not their own.

45. She said that she had read *SSH and HR.* Those people did obtain an ETD and returned. In answer to the suggestion that she was reluctant to address the possibility that when a failed asylum seeker admits to being such, they would be asked questions about social media, that is because she does not know. There is no requirement to be a good person to get an ETD. The authorities are interested in that information. We know about people asked about their internet profile at the airport or, as in relation to the people mentioned at appendix IV, who were convicted.

46. As to whether one would not hear about someone who was not put in detention who admitted what they had said and done on social media, she said that she could not dream about a scenario like that. If Dr Kakhki had said that they were, then they were.

47. Referred to her report at page 26 in relation to undocumented refugees, she said she could not put a percentage on the number who had no birth certificate but according to government figures it did happen.

48. As to what she said at [63]-[64] of her report about obtaining a replacement birth certificate outside Iran, one would have to find two Iranian nationals in this country. One has to distinguish the situation where a person's birth is not registered so the national register only has information about the parents. The point about asking people to bring witnesses or documents with photographs is that they have to be able to say that the person is in fact the person they claim to be. If they do not have photo ID there is no procedure from abroad. The matter is referred to the police in Iran to resolve. So the police in Sardasht or somewhere would ask who you can get to verify your identity. Presumably they have a procedure. That is in the hands of the police to decide. But the person must be present.

49. With reference to [65] of her report and whether she was saying that the appellant's uncle could not under any circumstances obtain a copy of his birth certificate, she said that he could not obtain a replacement copy and send it to him. The appellant must apply at the Consulate here with his witnesses.

50. Ms Enayat was asked whether security officers are capable of distinguishing between expedient reasons for expressing dissenting views in a claim and genuine ones. She agreed that that could be done if the person tells them that. However, the default position of the Iranian security forces is that they are all liars. What is important to them is that the person has been saying nasty things about the Iranian State. Referring to what she had said in her report about Article 500 (of the Islamic Penal Code), she said that if the regime wanted to prosecute an asylum seeker for an act of asylum itself they have got many means of being able to do so. They want to pick out people whose conduct they do not like. However, one also needed to go back to the fact that there were few returns and most people would not want to go back voluntarily. The purpose is to pick out people with dissenting views. She agreed that they would ask about the contents of an asylum claim. A person has to apply for a special type of passport. They write down the content of the asylum claim and the person signs to say that they regret the claim. It is recorded in the passport in a passport number code.

51. It was put to Ms Enayat that if the focus was on people politically active, the authorities would be less concerned with people who 'liked' offensive images on Facebook. She disagreed, saying that it was not likely that they would forgive the type of images (on the appellant's Facebook) that she had seen. If an official had seen those things the person would be likely to be beaten and taken to Evin Prison for questioning. As to whether there would be a greater risk of ill-treatment if the person was politically active, she said that they would not know and they would have to find out.

52. In relation to [71] of her report (interviews of returnees to see if they have been politically active), she said that she had some additional examples of information on that issue beyond 2001-2012, in her answers to written questions, and two others. Some of the material was considered in *SSH and HR*

but fewer than she had collected. She is looking at the matter in the wider context.

53. As to [80] (questioning at the airport and detention), she agreed that those matters were considered previously by the Tribunal but she needed to refer to it because of her instructions from the solicitors. She did not accept was that there was no evidence that interviews do not take place.

54. In relation to [82] the International Organisation for Migration ("IOM") explicitly states that it is not concerned with monitoring. She was not clear what happened after 2010 in terms of the administration of voluntary returns on behalf of the Secretary of State. She did not think it worthwhile to make enquiries of the IOM itself. That is a small point and was only concerned with voluntary returns.

55. In terms of background checks ([85]-[87] of her report), they would occur in relation to people with temporary documents voluntarily returning or people who are forcibly returned whatever the documentation. Not all returning asylum seekers are on temporary documents. For example, if a passport had expired or there was an illegal exit without a passport, the Rules state that the person can only have an ETD. That is the way the system works.

56. As to whether she is categoric that there would be social media checks on return, she said that she could not be categoric about anything but it was a reasonable likelihood. She thinks it unlikely that the type of social media use like that of this appellant would be ignored.

57. As to the possibility that no 'hits' would be registered because of a transliteration issue, she said that it would be likely that they would try others because of the differences in transliteration. She does not know how long they would spend on investigating different transliterations, spellings or variations of spellings.

58. She reiterated that her report had said that the majority of returnees were not at risk. The majority of those returning voluntarily would not be at risk. It was then suggested to her that people who go back voluntarily may include those who claimed ideological or political dissent. She said that the security forces might or might not accept what a person said and the enquiry would then go on to the next stage. She could not give an average as to how long the questioning would take. The sources show that it can take some time. In relation to a voluntary returnee, she is confident that it would not take more than a few hours.

59. As to whether the appellant would be viewed as a person who had exited Iran illegally, because he had left Iraq and returned to Iran before coming to the UK, the authorities would say that he had to prove that he was an Iranian citizen. The fact of the matter is that any return of the appellant is hypothetical because of documentation.

60. Ms Enayat referred to a quoted remark from the Norwegian immigration authority which said that there were always documentation problems from Kurds from the camps in Iraq. The appellant's position would be no different. Kurds in the camps from Iraq do not have a birth certificate so it is very difficult to document them from afar.

61. As to why the appellant would be regarded as from Iraq and not from Iran, she said that the authorities are interested in the backgrounds of Iranians who had resided for a long time in Iraq. To the proposition that it was not likely that he would be punished for exiting Iran illegally, she said that he might if they brought a political case against him because of the material on the internet and he would be fined for illegal exit. However, he left in about 1994 so she is not saying that he would be punished for illegal exit. He would first have to face a court on the issue of illegal exit. He would be viewed as someone brought up in Iraq. They would want to know where and what he was doing in Iraq and there would be an investigation. There is a system of vetting and monitoring those from Iraq.

62. She agreed that it would not be difficult to establish that he was not 'on their radar' in Iraq but he would have to go through the process (of investigation). He would have to convince them. What he said would be cross-referenced with information the Iranian authorities have and that would take time. They would detain him until they established the truth.

63. Apart from the social media issue, there was his parentage. He would not be punished for the fact of his house being burnt down and if the social media profile was not known she is not saying that he would be beaten up and so forth, but the questioning would be lengthy.

64. In order to be documented the issue of his parents would have to come out. Maybe the witnesses would be reluctant to say that they know him. As to whether the risk of ill-treatment would be increased because his parents disappeared in 1996, she said that she thought he would be exposed to more prolonged questioning.

65. In relation to his account of his fear of being exposed to the Iranian authorities because of selling the land to fund his travel, she said that he would have had to have sold the land by traditional methods as he is not documented. The sale would have to be written down and his fingerprint would need to be accepted by the parties.

66. When she refers to "internet activism" in her report, as was established in *AB and Others* that would be regarded as the equivalent of NGO activity. In relation to an asylum seeker in the UK who had, for example , 'liked' a page involving Greenpeace, she did not think that the authorities would mind about that. As to whether therefore, not all internet activism would necessarily be of interest, she said that if a person was in Iran now and had that website they

would be in trouble if they 'liked' a page which was linked to some Iranian environmental organisation. The Iranian authorities would not distinguish between a 'like' and a re-posting of material, or the originating material. If one posted that sort of material one would be caught and put in prison. She referred to an example in her report of a person who had only written two lines without any other political activity. Obviously they would be interested in the organisers. She gave another example from 2008-2009 of a group in a chat room discussing religion. The originator got well over 10 years in prison and a woman who made a couple of remarks got three or four years.

67. Questioned again about the appellant's Facebook posts she said that she was absolutely certain that in relation to that material he would be persecuted, and that had nothing to do with Article 500. There are many cases where there is persecution for this type of material. In the past several years travellers are asked to login to their Facebook or email accounts, although not everyone. Everyone who had something like that would be prosecuted. In Iran people are very, very careful about having such material. Article 500 can cover almost anything.

68. In re-examination, when asked about what would happen if the appellant repeated the content of his asylum claim in terms of his house being burnt by the state when he was a child because of his parents' association with separatist groups, he might be given a slap round the ears for that. They would not like it but they would not put him in prison because of it unless he repeated it publicly. They may harass him in Sardasht or wherever he goes afterwards. If he articulated support for Kurdish rights in interview then he would be in trouble.

69. In cases where a person is an activist, such as by attending Kurdish meetings abroad, that would be culpable. Their threshold for activism is very different from ours. Political activism and someone insulting the state through Facebook are not mutually exclusive. Sometimes they overlap and sometimes they do not. She would agree with what was said at [65] of *BA* ("While it may well be that an appellant's participation in demonstrations is opportunistic, the evidence suggests that this is not likely to be a major influence on the perception of the regime"), if one substituted opportunistic demonstrations for opportunistic internet activity. With reference to her report at [83] and the 2005 material set out there in relation to the duration of returnee interviews, she has no reason to believe that the situation had improved such that the pattern of behaviour would be different now.

70. She would agree that if there are relatively few returnees, especially forced returnees, the more scrutiny there would be. She often ponders that the refusal to issue documentation is on the basis that they do not want to deal with that population of people.

71. Illegal exit, and residence in Iraq, are two discrete potential risk factors but they are potentially cumulative.

Professor Emile Joffé

72. In examination-in-chief Professor Joffé explained his familiarity with the issue of Kurds in Iran and Iraq, as well as with the facts of the appellant's case.

73. He was asked what factor Kurdish ethnicity would play in relation to someone with no political profile of any kind. He said that until fairly recently Kurdish ethnicity was not a very significant point but Kurds are treated very differently. Since 2016 the situation has been very different. There has been a consistent pattern of attacks between Iran and the PJAK. That and the attack on the shrine of Khomenei has worsened the situation of the Kurds. The people involved were Kurds and many others from Kurdistan assisted providing backup. There had been a truce in place for around 21 years.

74. The significance of the June 2017 incidents in Tehran (the attack on the Parliament and the shrine complex) is in terms of the personnel involved. There were four Kurds in the team and investigations showed that it involved a network of Jihadi extremists. Previously attacks would have been based on nationalist sentiments but those were now a religiously based ideology. That had not before been shown in relation to Kurds.

75. Another change is the new Political Crimes Law ("PCL") of 2016. Combined with Article 500, people who had claimed asylum would also by implication be criticising the regime. Given the worsening situation for Kurds, a Kurd would attract greater attention than might previously have been the case. There has been a hardening of attitudes and this also might be due to increased tension since 2009. Article 500 and the PCL mean that it is for the person to demonstrate their innocence. As to examples of the law being used against people, he said that he did not think that there are any reports yet as the Iranian judicial system is very opaque but it has been commented on, for example by NGOs elsewhere. He imagines that a large part of the purpose is to deter people from making political statements abroad. If a person left illegally they would be questioned on return.

76. The regime does not tolerate criticism, especially abroad. It is not a question of whether a person is a threat to state security. It is what you have said which will determine whether you would be questioned or persecuted. This answer was given in relation to an example suggested in terms of a person whose asylum claim was rejected because their activity was at too low a level but the claim or account was nevertheless accepted. As to what added significance there may be, if any, of a person being Kurdish, he said that that would increase suspicion generally in relation to those that had applied for asylum. Given the incidents he had referred to and the referendum in Kurdistan, more time would be spent in investigating that person who would be felt to be more of a threat to security than someone in another group.

77. In relation to the new PCL, the burden is on the individual to show that they are innocent. That is said in the commentaries on it by the US State Department especially. He agreed that that was probably in terms of its implementation. He is not certain how a person would be able to demonstrate their innocence. He thought that this law is more severe than Article 500. He is not aware of any government explanation of what the PCL intended to achieve.

78. Kurdistan had been a constant problem for Iran, both before and after the revolution. The 200,000 troops garrisoned there is significant in terms of Kurdistan having one tenth of the population of Iran. He also thinks that the Baluchis and Ahwazi Arabs in the south are also at increased risk.

79. As per his report, he agreed that a laissez-passer is only issued to those who agree to return, at least so far as the UK is concerned. Other countries claim not to be able to return people on a laissez-passer so the situation is not clear.

80. As to whether persons returning to Iran voluntarily presumably have no subjective fear, he said that it may be that they have a fear but it is not so great as to prevent them from returning.

81. In relation to the appellant's Facebook posts, the likely reaction of the authorities he thinks would be pretty bad. They would take quite an exception to quite a few of the images. He considered that there would be a very difficult period of questioning and a lengthy prison sentence. The questioning would be both physically and verbally difficult. He could not imagine a scenario when that would simply be waived through.

82. Absent a voluntary admission, as to the likelihood of the process of return revealing that material, he said that the Iranian authorities monitored the internet, especially Facebook. At least one of the images has got his name on it. As to whether he was suggesting that every returnee is monitored, he said that that was speculation and he just did not know. However, they have a considerable capacity for monitoring the internet. He has dealt with several cases where this has been claimed. He did not think it would make any difference if the appellant admitted that he did not believe in what was in the Facebook post or if it was opportunistic.

83. If the appellant said that he came from Iraq, the first thing is that it would mean that he had left Iran illegally. The second question would be as to why he went to Iraq. It would be pre-supposed that he would be connected with the opposition movements which are all centred in Iraq.

84. In cross-examination he agreed that his last visit to Iran was in 1999. He had not visited the Kurdish regions of Iran but had been to Iraq for two weeks in March 2011. He had not been to the Kurdish regions in Syria, Turkey or Azerbaijan. He does not speak Kurdish Sorani or Persian. He agreed that he was reliant on the English language translations of the reports to which he had referred.

85. The rural administration in Iran is deficient in terms of access to birth certificates and land sales. Land sales are a matter of private agreement and people would not think of the need to register the sale. So it is perfectly possible that a private transaction could have occurred (in terms of the sale of the appellant's land). As to whether it was still important to verify that a person has the title to sell, it really does not work like that. People in the village know who owns what. A notary would have been involved. That does not mean that a person would need identity documents because if people agreed that he owned the land it could be sold.

86. As to whether it would be somewhat unusual to someone who had not been in Iran since the age of six to say that they owned land, he said that normally people are well aware of who owns the land even if people have been away for a long time. People in that circumstance do not require a lengthy process. However, he does not know enough about the process of his sale, which could have been through his uncle.

87. The appellant could be liable for exiting Iran illegally both in relation to 1996 and 2015. In relation to a six-year-old, he does not know the age of criminal responsibility but generally the age would be quite low. He does not think the decision would be made on that basis but on the basis of the family decision. People are held collectively responsible for the activities of their relatives. The point is not whether he would be liable as a matter of law.

88. In answer to our questions, he said that he really does not know whether the appellant would be prosecuted for illegal exit as a six-year-old but there would be an investigation. He was unable to speculate.

89. In further cross-examination he said he was quite sure that it would be the case that the authorities would be more concerned with the exiting in 2015 as an adult.

90. In relation to the decision in *SSH and HR* on illegal exit and there being very little risk, he agreed generally with the Tribunal's conclusions were it not for two additional factors; firstly, the attacks in Tehran given that Kurds were strongly implicated, and secondly the general deterioration in relations in the Middle East generally. He did not agree that but for those two factors the appellant would not be at risk. The question is of the penalty. He certainly would be questioned about illegal exit, but the situation has now changed in the respects to which he had referred. In his report he was commenting on the situation of return now. At the time when he wrote his report he did not think that the Tribunal was right in what it said. There is an increased likelihood of prosecution. All he can say is that the situation for Kurds has probably degenerated significantly. He has not reviewed the information to see if the same applies to everybody.

91. As to [12] of his report, and what he said about dozens of Kurds being arrested without warrants for real or perceived links with Kurdish political movements, he said that the security forces considered that they were linked to the KDPI (Kurdish Democratic Party of Iran). They believe that they do have evidence to support that view. He was referring to a statement by Amnesty International. He is not in a position to explain why the Iranian authorities act as they do. He is aware of particular cases where links are perceived, for example there has been quite a lot of reporting of people acting as smugglers across the border being accused of links when they do not have any. He could not comment on whether or not that was just an excuse (by the security forces).

92. In terms of people who are merely related (to others of interest), there tends to be a collective view of liability and responsibility. He does not have evidence or examples of such cases in the materials before the Tribunal. People do claim to have been arrested for that reason. He is referring to blood relationships.

93. In relation to a child whose parents disappeared more than 20 years ago, it is quite possible that a child would be regarded as equally dangerous as the parents. It might be assumed that he would be hostile towards them for that reason alone. The crucial thing is the male line.

94. As to there being no report of any incident having occurred in relation to the appellant's uncle for a period of 20 years, he said that he could not make any assumptions on the basis that he has no evidence.

95. He does not know that it is the case that mainstream Kurdish society and IS are extremely hostile towards each other. He agreed that the Iranian authorities now have a reasonably clear idea of the nature and extent of IS involvement but they are also concerned about all the groups. He is not in a position to say that it is an incredibly small minority, but it is a minority of support for IS (in the Western provinces). He is not able to comment on what the "common appreciation" is in relation to western provinces' support. He is not aware of any sample of views of the academic community on the issue. As to whether there is a belief that there is great support for IS in the western provinces, there is not great support but there is support which is founded on a religious view. One cannot be precise about these things.

96. Asked whether all Kurds in Iran are Sunni, he said they are not but the majority are. He was unable to give details as to the exact percentage and refused to speculate on whether it could be, for example, at least 50%.

97. He believes that people of Kurdish extraction would face a greater degree of scrutiny on return than others and than would have been the case before. Asked about other minority groups, he said each of the minority groups have specific difficulties with the regime. In relation to smugglers, it is not simply that there is increased scrutiny of them because they are smuggling but because of the political implications. There is considerable traffic across the border on a

daily basis. It is true that the authorities are probably concerned about smuggling *per se*. However, so far as politics is concerned, it would probably be assumed that they would be involved in that as well.

98. A person in the appellant's situation who is facing return would be subject to certain formal questions at the embassy but that would not be an interrogation. He referred to [128] of his report in terms of what would be required by the embassy in London. The authorities in Tehran would authorise the issuing of a travel document. This was all in the context of questions asked about whether there would be any security screening for a person who may be a potential threat.

99. Asked whether he was saying that failed Kurdish asylum seekers would have political motives attributed to them, he said they would not but they would be suspected. He referred to a footnote at page 27 of his report being the source for information in relation to the arrest in 2011 of a Kurd who was returned to Iran from Norway. He was not suggesting that that incident happened because the person was simply of Kurdish ethnicity.

100. Professor Joffé was asked about the proposition at [105] of his report that the Iranian authorities assume that all asylum seekers who are returned have engaged in anti-regime activities whilst abroad, especially in spreading false information about the Islamic Republic. In response to the suggestion that he had made an impermissible leap from one Kurdish refugee being returned in 2011 to the general statement that anyone as a failed asylum seeker would be assumed to having engaged in sur place activities, he said that the two statements were quite distinct. He would have to investigate to answer as to whether there is other material to justify his conclusion in this respect.

101. In relation to the article by the former judge in the newspaper Kayhan (described in his report as a newspaper controlled by the Supreme Leader's office), it is a reasonable inference from this article that the official view is that there is increased scrutiny of asylum seekers.

102. In relation to [107] in terms of failed asylum seekers facing an enhanced threat of being considered to have defamed the Islamic Republic whilst abroad, and whether he was aware that there were any specific instances where this had applied, he said that it was a reasonable inference from the evidence on the question of the reverse burden of proof previously referred to. Professor Joffé maintained that it would be for the individual to demonstrate that they had not been involved in anti-regime activities whilst abroad. Pressed on evidence to support that contention, he said that an Amnesty International report referred to the article from Kayhan and repeated that the article was written by a former judge.

103. Militant Sunnis or Kurds are not necessarily co-extensive although most militant networks identified are within Kurdistan.

104. If a Kurdish returnee had applied for asylum he would be suspected of impugning the reputation of the state by demonstrating or taking part in sur place activities. Being a failed asylum seeker would be enough, given the attitude he had referred to and what was said in the article in Kayhan. As to whether his report between [114]-[120] did not go so far as to suggest that there was a real risk of persecution simply by being Kurdish, he said he disagreed and his understanding was that it does. That was his inference from the evidence that he had seen. In answer to the suggestion that all the material he relied on was considered by the Tribunal in *SSH and HR* and material since 2016 did not support the contention that there was a real risk of persecution for Kurdish returnees simply on the basis of their ethnicity, he said that he disagreed.

105. In relation to the PCL, and whether there was evidence that people had been prosecuted under it, he said that apparently there had been a large number of people who had been prosecuted. As to whether that related to failed asylum seekers who had been returned, he said that the activities of the courts are not necessarily made public. He could not say if those people were prosecuted or not. He did not think that it was at all possible that none of them were returned asylum seekers.

106. As to [130(v)] of his report in terms of the lack of reporting of problems faced by failed Kurdish asylum seekers, he accepted that Kurdish organisations would be keen to publicise mistreatment of failed asylum seekers. He also agreed that if a person had family in Iran word would leak out to Kurdish groups of a person's non-arrival. He said that he was sure that NGOs would publicise such matters.

107. In relation to surveillance by Iranian Intelligence Services, that had come up in the materials he had analysed. He said that it seems to take place outside Iran but he had not worked on that matter specifically and does not claim to be an expert on it. The Iranian Intelligence Services do however monitor the internet and it is quite likely that they would be aware of material on social media. They are especially pre-occupied by Facebook. He then said that they might be aware of it when they sign off on a travel document.

108. If this appellant's Facebook material was disclosed, the authorities would take it very badly because it was insulting individual senior people in the regime. It was not a question of whether it was a serious political activity but simply of the action of having done it. He would be punished for that far more than if he represented a significant risk to the state.

109. In relation to the authorities' understanding of a difference between 'liking' something on Facebook or being an active organiser, Professor Joffé said that the activities are of rather a different kind. Activists outside the country reflect on the country's reputation. Both are however treated seriously. The Iranian government would argue that the sort of activity shown on Facebook damages

the reputation of the country and therefore is a security threat. If the appellant only 'shared' the material, he thought that that was more than 'liking' the material.

110. If re-posting material, the authorities would draw a distinction. Evidence of posting material is evidence of dissatisfaction with the state which would attract punishment. As to whether account would be taken of the fact that a person's claim was rejected, he said he was absolutely certain that they would take no account of the context.

111. As to whether the authorities' assessing a security threat are rational and would take into account opportunistic reasons for (social media material), he said that it was not that they were irrational but they do try to identify potential threats. It is the anticipation of the potential threat which would lead to that person's condemnation.

112. In re-examination he said that in relation to a distinction between a person who insults the state or is politically active against the state, it would depend on what article of the Penal Code the person had offended against. To suggest that they would be somehow indulgent just because the activity was part of an asylum claim is not something that they would engage with.

113. In relation to the Kayhan article, the significance of the fact that it is a newspaper controlled by the Supreme Leader's office is that it reflects the official view of the material published. He does not know for how long the author of the report, the retired judge, had been retired for.

114. Regarding a claim which was based on sexuality or adultery, the extent to which this would be seen as a statement against the state would depend on the degree to which the authorities were aware of the basis of the claim. Any asylum claim is seen as a threat to the state. A person would be tried under whatever Penal Code article applied. A sexual claim would offend the Penal Code.

115. In terms of the broader geo-political context and how individual security officers at the airport would behave, he could only surmise that everyone in Iran is aware of the geo-political situation in terms of the way they see the outside world. They operate in an environment where this is a concern. He does not know whether particular instructions go to security officers but many people would be prejudiced by the environment within which they operate. People in Iran certainly know about the wider world.

116. Asked whether, given the wide discrimination against Kurds, the appellant as a failed Kurdish asylum seeker and in the context of the events of 2016, as well as issues in relation to IS and the KDPI, would make the interrogation of the appellant much more acute and demanding, he said that there would be more willingness to impute activities by him as a threat to the state.

117. He said he agreed with [65] of *BA* completely ("While it may well be that an appellant's participation in demonstrations is opportunistic, the evidence suggests that this is not likely to be a major influence on the perception of the regime"). The only change is to have intensified the situation in that the authorities are now even more concerned about dissent since the demonstrations of last December which were countrywide, unlike those of 2009.

ANNEX C

SUBMISSIONS

Respondents oral submissions

1. Mr Metcalfe relied on his written submissions and referred to aspects of the written submissions provided on behalf of the appellant. It was noted that the appellant did not seek to disturb the findings in *SSH and HR*, and what is said in the appellant's submissions at [12] in terms of the significance of *SSH and HR*.

2. Mr Metcalfe accepted on behalf of the respondent that there was a distinction between failed asylum seekers' opportunistic claims, for example in terms of religious beliefs or sexual orientation, and those that are political claims in terms of Kurdish political support. However, it was submitted that that distinction does not show that Kurds are more at risk than non-Kurds who make opportunistic political claims for asylum.

3. In terms of the criticism in the appellant's written submissions of what was said at [13] of *SSH and HR* (degree of reality on the part of the Iranian authorities in relation to false claims for economic betterment), the Tribunal in *SSH and HR* was plainly aware of what was said in *BA* on the same issue but the point was more general. It was not limited to taking part in *sur place* activities but was a more general assessment of opportunistic claims. The appellant seeks in this respect to expand what was said at [65] of *BA* to the effect that that was the attitude of the regime to <u>all</u> political claims, which is not what was said in *BA*.

4. It was agreed on behalf of the respondent that the Tribunal should not guess as to the attitude of the Iranian authorities. *SSH and HR* did not find that failed asylum seekers were at risk generally. As can be seen from [2] and [3] of *SSH and HR*, both appellants there claimed that they would be at risk of persecution on account of support for Kurdish groups but they were not believed. It was submitted that [28]–[29] indicate that it was not speculation on the part of the Tribunal in *SSH and HR* where they stated that one can expect a degree of reality on the part of the Iranian authorities in relation to those who made asylum claims in the interests of advancing their economic circumstances.

5. It was submitted that the same applied in relation to this appellant's case. One would have expected to see evidence of Kurdish refugees having been singled out on return. The Iranian authorities would be concerned with those who are a threat and less concerned with others who were simply failed asylum seekers. The appellant does not advance direct evidence in relation to the treatment of failed asylum seekers and the Secretary of State does not have such evidence either.

6. In relation to the evidence relied on on behalf of the appellant at para 23.1 of the written submissions, the majority of that evidence is pre-2016. That is important because the appellant's case is that there has been a deterioration in conditions.

However, there is no criticism on behalf of the appellant of *SSH and HR* and so there is a mismatch between this, pre-2016 material, and the present situation.

7. The appellant's written submissions at [23.2] make it clear that Ms Enayat accepts the respondent's guidance (on returns). Political activities in Iran may be differently perceived from those in the UK. The respondent's guidance accepts that political activity or activity perceived as such would create a risk.

8. In relation to the submissions on behalf of the appellant in relation to Professor Joffé, the respondent accepted that the Tribunal is entitled to consider evidence given in a previous country guidance case but the Tribunal is bound by previous country guidance. It should be very slow to depart from an assessment of evidence given in previous country guidance. Much of the material relied on in the case of this appellant was previously considered in *SSH and HR* or was not material that was relied on. It was decided at [34] of *SSH and HR* that there would be no risk to a returnee on the sole basis of being Kurdish. Neither of the experts in this appeal disputed the findings in *SSH*.

9. It was accepted on behalf of the respondent that conditions have deteriorated. However, it is less than two years since *SSH and HR* was promulgated. In relation to what is said at [35] of the appellant's written submissions in terms of the respondent not having identified even one Kurdish person who had been returned to Iran in recent years, let alone one of Kurdish ethnicity who had made an asylum claim in the UK, that was an inversion of the rules of proof. However, it is not suggested that there is a burden of proof on one party or another in a country guidance appeal. In terms of [39] – [45] of the appellant's written submissions, the background material referred to is highly generic and sheds very little light on the country guidance issue to be determined.

10. In terms of [46] onwards of the appellant's submissions, the expert evidence before us was not to the effect that there was widespread support for IS amongst Kurds. Although [49] of the submissions refers to the dramatic increase in the rate of Iranian asylum claims in the UK, one does not know if any of those were Kurds. It is likely that some were but one could not make any deductions from the rise in such applications. Furthermore, although it is suggested at [50] of the appellant's written submissions that the authorities are much more likely to impute dissident views to Iranians of Kurdish ethnicity and the circumstances which give rise to a real risk of persecution are much wider for them than for non-Kurdish citizens, no examples have been given and both witnesses were pressed on that issue. The example given of EL, who had a leaflet or leaflets in his possession, was a very poor example to support the assertions of risk.

11. It was accepted on behalf of the respondent that Kurds are more likely to be punished more harshly but the experts were not able to give examples of the persecution of Kurds as failed asylum seekers.

12. In terms of the issue of a person being tainted by association, both experts were questioned about that. Professor Joffé suggested that the appellant would be prosecuted in relation to events that occurred when he was a six year old. It was submitted, however, that that was not credible. No other cases have been referred to of circumstances in which a person left Iran as a child.

13. What is suggested about the PCL effectively reversing the burden of proof is "a lost cause".

14. The suggestions as to proposed country guidance in the appellant's submissions were criticised in various respects by Mr Metcalfe including in terms of those suggestions going wider than the country guidance issue. It was however, accepted that the proposition that making, re-posting or otherwise publicising critical, insulting, satirical or otherwise adverse comments about Islam, the regime and so forth, could create a risk if the authorities know about it. It was also accepted that there was a risk of imprisonment or being held in detention for questioning or investigation or pending trial would be at risk of treatment contrary to Article 3. It was agreed that this was uncontroversial.

15. In summary, it was submitted on behalf of the respondent that there was nothing to add in addition to the country guidance in *SSH and HR* of 2016. None of the evidence indicates that the current country guidance should be altered.

Appellant's oral submissions

16. Ms Naik pointed out that *SSH and HR* was only heard over one day. It consists of 34 paragraphs and two appendices. That part of the decision relating to Kurds is extremely brief and was not a country guidance issue. To identify risks, the Tribunal needs to be alive to the context in the treatment of Kurds now in Iran.

17. It was accepted that there may need to be "inferential conclusions" based on the expert evidence. In *SSH and HR* there was one expert, Dr Kakhki. It is not suggested on behalf of the appellant that Professor Joffé or Ms Enayat disagree with his evidence although they elucidate matters.

18. The respondent agrees that those suspected of being or who are politically active are at risk. The question is what is in the minds of the Iranian border guards. It is not just an issue of the 'pinch-point' or the point of return. We were invited to give the fullest guidance possible in relation to political activity in terms of what is or what is perceived to be political activity and why being a Kurd is an additional risk factor.

19. *AB and Others* is not country guidance but is a reported decision and has a headnote. That evidence and its conclusions do need to be examined. *SSH and HR* did not really consider that decision, although it was referred to to some degree. It was submitted that *SSH and HR* is not the start and end point for this Tribunal's consideration of country guidance.

20. In terms of [30] of *SSH and HR*, it was accepted that the Iranian authorities may well be able to make a distinction between opportunistic claims and others, but that does not mean that they will (in fact) make such a distinction. It was suggested that the Tribunal in *SSH and HR* went slightly wrong at [30] in that context.

21. Absent this appellant's internet activity, his claim is based on pro-Kurdish views, his parents and the area in which he lived. The question is how he would be treated by the Iranian State.

22. In terms of the respondent's written submissions at [1f] in terms of the appellant's particular case, the question is, is there a risk that the authorities would be aware of any support by the appellant's parents for Kurdish groups.

23. It was submitted that following *AB and Others* the appellant would be asked for his passwords, and some of his posts are publicly available. His Kurdish ethnicity makes questioning of him more likely and there is an issue in terms of the level of severity of any ill-treatment.

24. Since 2016 there are new circumstances to take into account as set out in the written submissions. The respondent accepted in submissions that the Iranian authorities are not wholly unconcerned with refugees whose claims have failed. The process of return would establish the facts. One needed to consider how a person would be perceived.

25. There was no evidence from the respondent in relation to the details of returns and the respondent is the only source from which that information could be provided. The respondent had chosen not to provide the information. Although in *SSH and HR* there was evidence from Mr Griffiths (the Assistant Director of Immigration Enforcement) dated February 2016 in relation to the numbers of failed asylum seekers who had been returned to Iran, that evidence pre-dated the change in circumstances in Iran. The nature of the State of Iran is a necessary backdrop to assessment of risk. The evidence indicates how repressive the regime has become, and reference was made to the written submissions in terms of the evolution of the regime's attitude.

26. In the accepted context of discrimination against Kurds, the question is really how that would impact on the behaviour of (say) border guards. It was, however, accepted that evidence was not given about Salafists, although that was part of the context.

Respondent's written submissions

27. The starting point for the treatment of failed asylum seekers to Iran remains the decision in *SSH and HR*.

28. The majority of the material relied on by Ms Enayat and Professor Joffé was considered in *SSH and HR*. Although they refer to some evidence post-dating that decision, none of them address directly the country guidance point in issue in this

appeal. Ms Enayat did not disagree with paras 2.3.2 and 2.3.3 of the CIG of 2016 on Kurds and Kurdish groups, namely that the evidence does not disclose that there is a risk to Kurdish returnees on the grounds of ethnicity alone unless the person is otherwise of interest to the authorities.

29. Professor Joffé was not able to provide any evidential basis for his contention that the PCL imposed on the accused person the burden of proving innocence of a political crime.

30. The Iranian authorities are capable of distinguishing between Kurds who genuinely engaged in political activity and those who merely claimed to be engaged in such activity to bolster an asylum claim.

31. The First-tier Tribunal ("FtT") did not accept the appellant's account that his parents' disappearance in 1996 was due to their support for Kurdish groups and nor was there evidence before the FtT to show that he was politically active. There was no evidence to show that the authorities in Iran would impute political views to the appellant or treat him as in need of investigation. He left Iran when he was 6 years old and he had not been politically active in the KRI.

32. However, it was accepted that if the Iranian authorities became aware of it, the appellant would be liable to criminal prosecution but there was no reliable evidence to show that the Iranian authorities would "necessarily" be aware of his social media use or that he would disclose his support for Kurdish rights if questioned.

33. In *SSH and HR* the Tribunal heard expert evidence from Dr Kakhki. The evidence before the Tribunal addressed the issue of illegal exit and failed asylum seekers but also considered specific evidence on the treatment of Kurds. Although the respondent accepted the conclusion of Upper Tribunal Judge Storey in the error of law decision in this appellant's case that Kurdish ethnicity was not one of the issues identified for country guidance in *SSH and HR*, it was wrong for the appellant to mischaracterise *SSH and HR* as not addressing the risk to Kurds on account of their ethnicity. The findings in that decision remain the starting point for the guidance in the present appeal.

34. In relation to Ms Enayat's evidence, the respondent did not dispute that a Kurd who is politically active is likely to be more harshly treated than a non-Kurdish Iranian who is politically active, but that does not show an increased risk to Kurdish returnees simply by virtue of the fact that they are Kurdish.

35. Although she gave evidence of the worsening political situation since 2016 and that as a result of these tensions Kurds returning from abroad were likely to be the subject of "heightened scrutiny", she agreed that there was a lack of evidence to show that failed Kurdish asylum seekers had in fact been subject to enhanced scrutiny on that basis. She was similarly unable to state the likelihood of a Kurdish returnee being the subject of secondary checks. She stopped short of saying that heightened scrutiny of Kurds would, in and of itself, give rise to a real risk of ill-treatment or persecution. Likewise in terms of the mere fact of being a returning Kurdish failed asylum seeker.

36. As with Ms Enayat, the evidence relied on by Professor Joffé in relation to the risk to Kurdish failed asylum seekers mostly dates from before 2016 (and *SSH and HR*). Much of his evidence was concerned with "broader geopolitical shifts" in the middle east since 2016 but there were numerous deficiencies when it came to demonstrating how such shifts affected the treatment of failed asylum seekers. Professor Joffé's knowledge of the region was accepted but his evidence in relation to the PCL (and the suggested reverse burden of proof) was indicative of a general want of accuracy on his part and a tendency to overstate his testimony, often in sweeping terms. His evidence had been criticised in *AB (Algeria, scope of remittals) Algeria* [2004] UKIAT 00323.

37. The evidence of Professor Joffé in relation to the risks faced by failed Kurdish asylum seekers post 2016 should be accorded relatively little weight.

38. The evidence fails to show that Kurdish ethnicity, even when combined with other factors, such as illegal exit and/or claiming asylum abroad, would give rise to a real risk of persecution or ill-treatment. None of the post-2016 evidence is enough to displace the findings of *SSH and SR*. On the appellant's case ('very little else in addition to Kurdish ethnicity is required') any Kurdish failed asylum seeker (other than one who claimed asylum on grounds of religious belief or sexuality) would face a real risk since it is almost always` the case that their asylum claim involved some form of opposition to the Iranian government or support for Kurdish rights.

39. The authorities in Iran are capable of distinguishing between returnees who are politically active and those who claim to be so for purely opportunistic purposes. Ms Enayat accepted that the purpose of questioning of returnees was to identify those who posed a real threat to security. The evidence to date remains broadly consistent with the country guidance in *SSH and SR* and that in the CIG, version 2 of 2016.

40. As to the appellant's appeal, the FtT did not accept the appellant's claim as to the reasons for his parents' disappearance or the burning down of their house (namely support for Kurdish groups). The reason for the burning down of the house remains unknown, the third hand account of the appellant's uncle being some 20 years after the fact. The article by Hamidreza Jalaeipour relied on by Ms Enayat does not support her suggestion that these events happened because the village was used as a supply route for Kurdish groups and thus attracted reprisals by the Revolutionary Guard. That article describes a different tactic used, namely the shelling of villages from a distance. In any event, the burning down of houses is a tactic used by many groups in the region.

41. At best, the destruction of his parents' house and their disappearance might prompt some additional questioning by the Iranian authorities. The fact that the appellant's uncle remained in the same village as his parents without apparent difficulty for more than two decades shows that it is unlikely that the Iranian authorities would have any continuing interest in the appellant for those reasons.

42. Ms Enayat said "possibly not" in answer to the question of whether the authorities would seek to prosecute the appellant for having left Iran when he was 6 years old. The evidence of Professor Joffé on this point was not credible. In addition, in *SSH and HR* concluded that prosecution for illegal exit was not generally experienced by returnees and when it is, the likely sentence is a fine.

43. The evidence of Ms Enayat is accepted in terms of the appellant being likely to face additional questioning by reason of having lived in the KRI for so many years. However, she did not say that he would therefore face a real risk of ill-treatment or persecution as a result.

44. It is accepted that the material posted by the appellant on Facebook, if it became known to the authorities, would expose him to prosecution with a risk of imprisonment and that this would result in a real risk of ill-treatment. It is also accepted that the appellant's Facebook page is currently visible to the public at large. However, there is insufficient evidence that the Iranian authorities would necessarily be aware of that material. There is also insufficient evidence to show that the Iranian authorities routinely inspect the internet profiles of failed asylum seekers.

45. As to the appellant's claim that he would be obliged to reveal his support for Kurdish rights under questioning, either at the consulate and/or at the airport on return, the question of what an individual would actually say if questioned is a factual finding which must be made upon the basis of all the evidence (*Secretary of State for the Home Department v MH* (PA/02219/2017), 7 December 2017). There was no evidence from the appellant to show that he would disclose his political opinions in such circumstances and the FtT did not find a risk in that respect.

Appellant's written submissions

46. The appellant's Kurdish ethnicity is a risk factor rather than a risk category. The act of return crystallises that risk factor into a real risk of persecution when it is reasonably likely that the circumstances of return will lead the authorities to investigate the returnee. That is likely to occur when the returnee has no passport, left Iran illegally and/or claimed asylum abroad wherein he has criticised the state. Kurdish ethnicity in those circumstances would increase the likelihood that the regime will suspect the returnee of having claimed asylum on grounds which challenge the authority of the state. Similarly, Kurdish ethnicity increases the likelihood that the regime will respond to any perception of political opposition with persecutory action.

47. The appellant does not seek to disturb the country guidance of *SSH and HR*. As per the appellant's skeleton argument, in his error of law decision Judge Storey found that Kurdish ethnicity was not one of the issues identified for country guidance in that case and thus fell outside the Practice Direction at para 12.2. Although the Tribunal in *SSH and HR* did address the issue of Kurdish ethnicity it did so briefly and did not issue country guidance on the point.

48. The FtT made credibility findings that were largely in the appellant's favour but erred when it went on to dismiss the appeal because it mistakenly treated *SSH and HR* as binding country guidance on the issue of risk on return for Kurds. The credibility findings were preserved.

49. *SSH and HR* "sets out the starting position" for assessment of whether the appellant would be at risk if all that were known about him was that he had left Iran unlawfully and claimed asylum in the UK. According to the country guidance in *SSH and HR* the answer would be 'no'. However, that is not the end of the matter because it does not address the substance of the appellant's claim.

50. It is not the appellant's case that any Kurdish failed asylum seeker would be at risk simply by virtue of being Kurdish. There is no basis for the respondent's suggestion that the Iranian authorities are capable of distinguishing Kurds genuinely engaged in political activity and those doing so to bolster an asylum claim. The point in any event is not whether they are *capable* of making such a distinction but whether they do. Both experts agreed with what was said in *BA* at [65] about opportunistic involvement in demonstrations not being likely to be a major influence on the perception of the regime and that expressing dissent itself will be sufficient to result in a person having a significant political profile in the eyes of the regime.

51. In so far as *SSH and HR* came to a different view in relation to the issue of motivation at [30], that view is *obiter* in relation to the country guidance issues in the case and wrongly departs from previous country guidance (*BA).*

52. Reference is made in the written submissions to evidence said to indicate the "extreme sensitivity" of the Iranian authorities to even slight indications of dissent, whether at home or abroad. The oral evidence of the experts is also relied on in this context, with various examples cited.

53. It is acknowledged that several of the examples given by the experts in this case of those persecuted on return were considered in *SSH and HR* (albeit in the context of what that case was considering).

54. As regards the figures for numbers of returnees to Iran, whether those disclosed in *SSH and HR* or those in the public domain provided by the respondent in this case in respect to the disclosure request, they say nothing about the content of claims for asylum that were made. The figures do not reveal how many of the returnees were Kurdish, or if they were, whether the elements of the claim contained anything such as a challenge to the authority of the state. Thus, the respondent's complaint as to a lack of evidence relating to the treatment of Kurdish returnees (and in relation to failed asylum seekers generally) misses the point.

55. Firstly, very few of those who fled Iran seeking asylum return voluntarily or by compulsion even when their claims are rejected. Secondly, the respondent's evidence is insufficiently particularised to disclose anything of relevance to the asserted risk. The respondent's apparent reluctance to enforce returns to Iran and Iran's policy of

refusing to issue laissez-passers to undocumented Iranian nationals, effectively operate to prevent the return of the vast majority of failed asylum seekers.

56. The nature of the Iranian state, the activities of its security forces and its human rights abuses are described with reference to country guidance cases, the expert evidence and background materials.

57. The expert evidence in relation to the impact of recent events on the assessment of risk is summarised. In addition, the statistics on asylum applications show a dramatic increase in the rate of asylum claims in the UK which has roughly doubled over the period when the main Kurdish partisan groups resumed fighting, from 2014 when there were 2,000 claims to 2016 when there were 4,192. At the very least this must ring alarm bells.

58. As regards Professor Joffé's evidence in relation to the PCL, as an acknowledged expert on Iran he is entitled to draw inferences from what he has read. He explained that from memory he thought he had read a commentary to the effect that the PCL effectively reversed the burden of proof for those accused of political crimes.

59. As to the respondent's reference to cases in which Professor Joffé's evidence had been subject to criticism, in the last 12 years his evidence has been considered in at least 17 cases reported in the Court of Appeal, SIAC and the UT, four in the UT being country guidance cases, with no judicial criticism of his expertise or objectivity. In this case his evidence was highly consistent with that of Ms Enayat and was not contradicted by any "body of evidence".

60. In terms of this appellant's appeal, in her written and oral evidence Ms Enayat said that the appellant's account was consistent with conditions in the appellant's home area in 1994.

61. It is accepted that the evidence does not provide a reasonable basis for concluding that there is a reasonable likelihood that the Iranian authorities are already aware of the appellant's *sur place* activities on Facebook. However, there are substantial grounds to believe that they would become aware of those activities during the process of return, either at the Iranian consulate during the redocumentation process or (more likely) when questioned at the airport on return. Support for this was to be found in what was said in *SSH and HR* at [11] and in *AB and Others* in terms of what was said about the 'pinch point'.

62. Both experts gave unequivocal evidence that the appellant's Facebook content would put him at risk of persecution if discovered by the Iranian authorities. The respondent accepts that were it known then the appellant would be at risk but questions whether he would in fact disclose the content. However, that question is answered by the preserved finding of the FtT that he is a genuine believer in Kurdish rights, and by settled authority to the effect that his claim must be assessed on the basis that he will, if asked, tell the truth.

63. In so far as the respondent relies on the unreported decision *Secretary of State for the Home Department v MH*, in the first place the Practice Direction on citation of unreported decisions has not been complied with. Secondly, the *ratio* of the decision does not support the contention relied on in terms of what an individual would actually say when questioned and thirdly the respondent's position is contrary to the decision of the Supreme Court in *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38. Fourthly, the situation in *MH* was different in that the appellant in that case made an opportunistic attempt to bolster an ill-founded claim and was not a genuine Christian convert. In this appeal, the appellant have been found to be a genuine supporter of Kurdish rights.

64. Both experts agreed that the appellant's long stay in Iraq would be problematic for him on return, aspects of their evidence being referred to.

65. On the country guidance issue, Kurdish ethnicity meets the conditions for being identified as a risk factor in the sense explained in *TK (Tamils – LP updated) Sri Lanka* CG [2009] UKAIT 00049.

66. The appellant's written submissions make suggestions as to the guidance to be given.

ANNEX D

INDEX OF COUNTRY MATERIALS

Date	Document	Source
January 2018	The Legal Agenda, Is Iran's New Law on Political Crimes a Step Forward?	http://legal-agenda.com/en/article.php?id=4160 (accessed on 22.02.18)
December 2017	UK Home Office, Country Policy and Information Note, Iran: Background information, including actors of protection and internal relocation (Version 4.0)	https://www.justice.gov/file/1039541/download
November 2017	Unrepresented Nations & Peoples Organization (UNPO), Iranian Kurdistan	https://unpo.org/members/7882?id=7882
October 2017	Office of the High Commissioner for Human Rights (OHCHR) (United Nations), Report of the Secretary-General: Situation of human rights in the Islamic Republic of Iran (A/72/562)	https://www.ohchr.org/Documents/Countries/IR/ReportSG2017.pdf
March 2017	Office of the High Commissioner for Human Rights (OHCHR) (United Nations) Human Rights Council, Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran (A/HRC/34/65)	https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session34/_layouts/15/WopiFrame.aspx?sourcedoc=/EN/HRBodies/HRC/RegularSessions/Session34/Documents/A_HRC_34_65_AEV.docx&action=default&DefaultItemOpen=1
July 2016	UK Home Office, Country Information and Guidance, Iran: Kurds and Kurdish political groups (Version 2.0)	https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/565829/CIG-Iran-Kurds-and-Kurdish-political-groups-v2-July-2016.pdf
October 2012	UK Home Office, Operational Guidance Note: Iran	https://www.refworld.org/publisher,UKHO,,IRN,508fd7112,0.html
March 2011	UK Home Office, Operational Guidance Note: Iran	https://www.refworld.org/publisher,UKHO,,IRN,4d7f54a42,0.html
October 2010	UK Home Office, Operational Guidance	https://www.refworld.or

	Note: Iran	g/publisher,UKHO,,IRN,4cc176c72,0.html
January 2009	UK Home Office, Operational Guidance Note: Iran	https://www.refworld.org/publisher,UKHO,,IRN,4cc176c72,0.html
February 2007	UK Home Office, Operational Guidance Note: Iran	https://www.refworld.org/publisher,UKHO,,IRN,46028cfc2,0.html
1997	Iranian Refugees at Risk, Iranian Refugees' Alliance Quarterly Newsletter	http://www.irainc.org/nletter/su97fa97/su97fa97.html