Neutral Citation Number: [2024] EWCA Civ 1482

Case No: CA-2024-000028

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Upper Tribunal
HHJ KEBEDE
UI-2022-006225

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 December 2024

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE LEWIS
and
LORD JUSTICE JEREMY BAKER

- -

Between:

S	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Ms Gita Patel and **Mr Jonathan Greer** (instructed by **Greater Manchester Immigration Aid Unit**) for the **Appellant**
Mr William Hansen (instructed by **the Government Legal Department**) for the **Respondent**

Hearing date: 27 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 6 December by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Jeremy Baker:

1. This is an appeal against the dismissal by the Upper Tribunal of the appellant's appeal against the decision of the First-tier Tribunal to dismiss the appellant's appeal against the respondent's refusal to grant asylum.

Appellant's case

2. The appellant's case throughout the proceedings has been that he is an Iranian citizen of Kurdish ethnicity born on 1 August 1994, and now aged 30.

3. Whilst working as a shepherd in Iran, the appellant befriended two Kolbars who were members of the Kurdistan Free Life Party, ("PJAK"). About two months later, one of them gave the appellant a letter and asked him to place it in his barn from where it would be collected by a third-party. However, the Kolbar who gave him the letter was discovered and the appellant's mother phoned the appellant to warn him not to return home, as someone had been arrested and his home had been raided.

4. Later that day, the appellant was taken out of Iran and travelled via Iraq to Italy. He then travelled across Europe and entered the UK by lorry on 13 March 2020 when he claimed asylum.

5. Once in the UK the appellant was politically active in that he attended a demonstration outside the Iranian Embassy and posted on social media.

Respondent's decision to refuse asylum

6. On 10 March 2022, the appellant attended a substantive asylum interview with the respondent who refused his claim for asylum on 25 March 2022.

7. In the written reasons for refusal, it was noted that the appellant's political activities were limited to his attendance at a demonstration outside the Iranian Embassy on one occasion, as depicted in an image which he submitted which showed him standing alone at a significant distance away from the Embassy behind a hedge. Moreover, his Facebook account, which had been set up by a third-party on an unknown date, had ceased about 2 months or so prior to the interview, due to his phone being deactivated by his service operator. The appellant provided three images from the Facebook account, comprising a profile picture, a cover photo and a post by a third party. It was not clear as to whether the Facebook account was a public one and the appellant stated that he did not intend to create another one.

Appeal to the First-tier Tribunal

8. The appellant appealed against the decision under section 82(1) of the Nationality, Immigration and Asylum Act 2002, ("2002 Act") and the appeal was heard and dismissed by the First-tier Tribunal, Tribunal Judge Dilks, in a decision promulgated on 21 October 2022, on asylum, humanitarian protection and human rights grounds.

9. In the course of her judgment, the judge reminded herself of the guidance in *HB (Kurds) Iran CG* [2018] UKUT 430 (IAC) ("*HB*") that the Iranian authorities are suspicious of Kurdish political activity and that Kurds involved in even "*low-level*" political activity, if discovered, are at real risk of persecution or Article 3 ill-treatment. However, the judge considered that the appellant's account as to what had taken place in Iran was internally inconsistent, vague and lacking in detail such that she did not accept that the appellant was a supporter of PJAK or subject to adverse attention from the Iranian authorities for PJAK activities in Iran.

10. In that regard, the judge considered that the appellant had not provided a satisfactory explanation as to why, inter alia, he had trusted the two Kolbars who may have been working for the Iranian authorities, or why they may have trusted the appellant. Nor why the Kolbar had asked the appellant to place the letter in his barn, or how the third-party would know from where to collect it.

11. The judge went on to consider the risk to the appellant on his return to Iran. She reminded herself of the further guidance in *HB,* that those of Kurdish ethnicity are regarded with greater suspicion by the Iranian authorities, and are likely to be subjected to heightened scrutiny on return to Iran. Moreover, that although 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 in itself create a risk of Article 3 ill-treatment, being Kurdish is a risk factor, which when combined with other risk factors, such as involvement in low-level political activity, if discovered, involves the risk of persecution or Article 3 ill-treatment. Moreover, that the Iranian authorities demonstrate a "*hair-trigger*" approach to those suspected of or perceived to be involved in Kurdish political activity or support for Kurdish rights, such that the threshold is low and the reaction by the authorities is likely to be extreme.

12. The judge noted that prior to the respondent's refusal letter, the appellant had only attended one demonstration outside the Iranian Embassy on 13 July 2021, but since then had attended another five demonstrations on 22 March 2022, 5 April 2022, 17 April 2022, 25 May 2022 and 10 August 2022. It was noted that the appellant had provided further images from some of these demonstrations, in which the appellant was

holding various anti-Iranian regime posters and flags, which the judge accepted as evidence that the appellant had attended four or five demonstrations outside the Iranian Embassy.

13. The judge noted that the appellant's previous Facebook account had been in the name of DSS, and that the appellant stated that he was unable to access this account, since his phone had been deactivated by his service provider. However, he had since then set up a new Facebook account in the name of DS, from which about a hundred posts had been provided some of which included images of the appellant with the PJAK flag and included the words, "*No to the Islamic Republic of Iran*," which the judge accepted were of a political nature and anti-regime.

14. The judge reminded herself that in *BA (Demonstrators in Britain – risk on return) Iran CG* [2011] UKAT 36 (IAC) ("*BA*") it was pointed out that when considering the risk on return to Iran it is the authorities' perception of the individual's political activities which is important, such that the appellant's motivation for taking part in demonstrations and posting on social media is irrelevant. In these circumstances the judge found that, if discovered, the appellant faces a real risk of persecution or Article 3 ill-treatment in Iran due to his political activities in the UK.

15. However, the judge noted that it was not being suggested that any of the demonstrations had attracted media attention in the UK or Iran. Moreover, she considered the appellant to be an infrequent demonstrator who played no particular role in the demonstrations, such that he was just a face in the crowd. The judge found it was not reasonably likely that the appellant was a demonstrator who the Iranian authorities would wish to identify, such that she did not find that it was reasonably likely that the appellant's attendance at demonstrations had already come to the attention of the Iranian authorities.

16. In relation to the appellant's social media posts, the judge reminded herself of the guidance in *XX (PJAK – sur place activities – Facebook) Iran CG* [2022] UKUT 00023 (IAC) ("*XX*") that there was no evidence to show that the Iranian authorities monitor Facebook accounts on a large scale, and that more focused searches will be confined to individuals of significant adverse interest. In this regard, whether an individual's Facebook account will be targeted, before it is deleted, will depend on the individual's existing profile, and whether they fit into a "*social graph*."

17. The judge, having already found that the appellant had not come to the adverse attention of the Iranian authorities for PJAK activities in Iran, and that his attendance at demonstrations would not have brought him to the attention of the Iranian authorities,

went on to consider whether the appellant's social media posts in the UK would have brought him to their attention.

18. The judge determined that it was not reasonably likely that the appellant's use of social media had already become the focus of targeted surveillance by the Iranian authorities, and that the material on the Facebook accounts would not already be known to the Iranian authorities. In this regard, the judge noted that the appellant had not been photographed with anyone of any prominence within the PJAK. Neither the old nor current account was in the appellant's name, and there was no satisfactory explanation as to why a number of the "*likes*" originated from the appellant. Moreover, there had not only been a lack of full disclosure in electronic format of the Facebook accounts, but there was no reason why the appellant could not have produced such evidence.

19. The judge accepted that as the appellant had left Iran illegally, he would have to obtain an emergency travel document in order to return to Iran, and that his application for such a document would be the first of the potential "*pinch-points*," as referred to in *XX*, when the Iranian authorities are likely to carry out basic searches, including open internet searches relating to the appellant. The judge reminded herself that in *XX*, it was said that provided an individual's Facebook account had not already been the subject of specific monitoring prior to its closure, the timely closure of an account is likely to neutralize the consequential risk of having had an account which was critical of the regime.

20. In this regard, the judge found that the appellant's political activities in the UK were opportunistic and not genuine, such that the appellant would be likely to close his Facebook accounts prior to applying for an emergency travel document. In respect of his first account, the judge found, at [74], that, "*I do not accept the reasons the appellant says he is unable to access his previous Facebook account and I find that with assistance he would be able to close his Facebook accounts*".

21. The judge accepted that the second "*pinch-point*" would be upon the appellant's return to Iran, and that he would be questioned upon arrival as a failed asylum seeker, *PS (Christianity – risk) Iran CG* [2020] UKUT 46 (IAC) ("*PS*") and that such an individual may have to reveal their online accounts, *AB and Others (internet activity – state of evidence) Iran* [2015] UKUT 0257 (IAC) ("*AB*").

22. The judge reminded herself of further guidance from *XX*, that,

> *"In deciding the issue of risk on return involving a Facebook account, a decision maker may legitimately consider whether a*

> *person will close a Facebook account and not volunteer the fact of a previously closed Facebook account, prior to application for an ETD."*

23. The judge stated that having rejected the genuineness of the appellant's political beliefs, he fell outside the scope of *HJ (Iran) v SSHD* [2011] AC 596 ("*HJ*") and that it was reasonably likely that the appellant would not volunteer information regarding any of his political activities in the UK or his reason for claiming asylum. Therefore, his political activities in the UK would not come to the attention of the Iranian authorities on his return to Iran, and he would not be at risk of persecution or Article 3 ill-treatment.

Application for permission to appeal to the Upper Tribunal

24. The appellant sought permission to appeal the decision of the First-tier Tribunal upon multiple grounds concerning various of the finding made by the judge, most of which were considered to be of no arguable merit by the Upper Tribunal on the basis that,

> *"The decision includes clear and cogent reasons as to why the Appellant had not established that he had any involvement in PJAK or politics prior to leaving Iran and why he would not, even taking into account his sur place activities, likely to have already come to the attention of the Iranian authorities. There is no arguable failure to apply the country guidance or consider any material matters in reaching those conclusions which were open to the Tribunal on the evidence before it."*

25. However, permission was granted by the Upper Tribunal on renewal, following refusal by the First-tier Tribunal, on the following basis,

> *"The only part of the grounds which have some arguable merit (just) are as to the Judge's assessment of whether the Appellant would be identified as of interest to the authorities and whether he would disclose or would have to disclose any of his sur place activities (demonstrations and Facebook posts) given he is likely to be interviewed on return; in accordance with the various country guidance. I do not however limit the grant of permission to this ground, but the Appellant should be aware that I find no arguable merit on the remaining points for the reasons set out above."*

Upper Tribunal 1st decision

26. The appeal came before the Upper Tribunal on 20 July 2023 when, following the respondent's concession concerning the two grounds which the Single Judge had identified as having some arguable merit, the Upper Tribunal, in a decision promulgated on 13 September 2023, set aside the decision of the First-tier Tribunal on that limited basis, and ordered that, whilst the majority of the findings made by the First-tier judge were preserved, it was appropriate for the remaining issue of risk on return to be decided in the Upper Tribunal. The single judge stated that,

> *"….*
>
> *12. There is no error in the judge's detailed and careful findings as to the lack of credibility of the appellant's pre-flight claim or the conclusion that his limited sur place activities were not reasonably likely to have come to the attention of the Iranian authorities. Grounds three, four and five amount to little more than disagreement with the conclusions of the judge and as such they identify no error of law.*
>
> *….*
>
> *17. The respondent, neither in the Rule 24 response nor in submissions, refers to any passage of the decision where the judge grappled with the existence of any risk to the appellant based solely on what he could reasonably be expected to say to the Iranian authorities regarding the basis of his asylum claim or the extent of his political activities when questioned, particularly on arrival in Iran. This amounts to a material error given the importance of the pinch-point issue, as highlighted in PS. Given this error, the overall conclusion of the judge as to the risk to the appellant on return to Iran and the decision dismissing the appeal are set aside. The remaining findings are preserved.*
>
> *….."*

Upper Tribunal's 2nd decision

27. The re-making of the decision in the appellant's appeal came before the Upper Tribunal, Judge Kebede, on 26 October 2023, and in a decision promulgated on 8 November 2023 the appeal was dismissed.

28. At the hearing, the appellant had provided a further witness statement dated 13 October 2023, which attested to his attendance at demonstrations outside the Iranian Embassy on four further occasions, namely 22 November 2022, 2 January 2023, 11 June 2023 and 5 August 2023. It was stated that whilst attending these demonstrations he had been vocal and visible wearing a hi-vis jacket and was therefore not just a face in the crowd. The appellant provided images in support of these assertions, and further Facebook posts in which he had shared his support for PJAK. It was asserted that he was unable to delete his previous Facebook account as he had lost his old mobile phone and therefore he would be at risk from the Iranian authorities on his return to Iran.

29. In the course of her judgment Judge Kebede noted that,

> *"15. In her decision, Upper Tribunal Judge Kamara found no error of law in Judge Dilks' findings as to the lack of credibility of the appellant's pre-flight claim or the conclusion that his limited sur place activities were not reasonably likely to have come to the attention of the Iranian authorities. She found that Judge Dilks had provided sound reasons for treating the evidence relating to the appellant's claimed Facebook posts with circumspection. It was also the finding of Judge Dilks, as preserved by Upper Tribunal Judge Kamara, that the appellant's sur place activities were not a reflection of any genuine political belief, but were opportunistic and were undertaken in order to provide a basis for demonstrating a risk on return to Iran."*

30. Judge Kebede referred to *XX*, and considered that in contrast to the activities which had taken place in that case, the additional evidence provided by the appellant did not take his case any further.

31. In relation to the appellant's attendance at demonstrations, she stated that,

> *"17. In this appellant's case, whilst photographed wearing hi-vis jacket and holding posters, the appellant is pictured with his back to the Iranian Embassy, at a distance from the Embassy and apart from the crowds at the demonstrations. Contrary to the*

> *appellant's evidence in his statement there is nothing in the photographs to suggest that he was an active participant or that he was an interested and identifiable protestor, or that he was anything other than a face in the crowd. Rather the photographs suggest that he simply posed for a few photographs for the purposes of his asylum claim, standing apart from the main demonstration. As Mr Bates submitted, there is no supporting evidence such as video footage to show that the appellant was an active and vocal participant, and that his involvement was anything other than posing for a few photographs. Neither is there any evidence to support his claim to have played a role of guiding the protestors or to have invited others at his college to attend the demonstrations, as stated in his statement. There is nothing to suggest that he would have been observed by the Iranian authorities or that he would come to their attention in any way."*

32. In relation to the appellant's use of social media, Judge Kebede stated that,

> *"18. The same can be said of the appellant's Facebook postings which, as Judge Dilks found, were not accompanied by full disclosure in electronic format and, as Mr Bates submitted, did not include any meta-data showing that his account had not been edited, as the guidance in the headnote to XX refers at [7] and [8]. As Mr Bates submitted, that in itself diminished the weight to be given to the posts as evidence of the appellant's perceived political stance. Further, as Judge Dilks found, and as Mr Bates submitted with reference to [100] of XX, there is no reason why the appellant could not close his Facebook account and not volunteer the fact of a previously closed Facebook account, prior to the application for an ETD, given that the postings were not a reflection of any genuinely held political beliefs. Unlike the situation in XX, where the deletion of XX's Facebook material and closure of his account before he applied for an ETD would serve no purpose since his profile was such that there was a real risk that he had already been targeted before the ETD pinch-point, there is no basis in this appellant's case for concluding that he is already known to the Iranian authorities or has been targeted for surveillance. He has no 'social graph' as in XX which would have led to attention being drawn to him and which could have made him the subject of targeted social media surveillance. Contrary to Ms Patel's submission, therefore there would be no interest 'flagged up' in relation to the appellant at the first pinch point at the ETD application stage since any internet or other searches against his name would not produce any information adverse to the Iranian regime."*

33. In relation to the issue as to what would be reasonably likely to occur at the second pinch-point on the appellant's arrival in Iran as a failed asylum seeker who had left Iran illegally, Judge Kebede reminded herself of *BA, PS, HB,* and *SSH and HR (illegal exit: failed asylum seeker) Iran CG* [2016] UKUT 00308 (IAC) ("*SSH*") and noted that it was accepted on behalf of the appellant that those factors without more would not put the appellant at risk and that it was only if the authorities suspected the appellant's involvement in political activity or support for Kurdish rights, that he would be at risk. In these circumstances the judge considered that the determinative question would be what the appellant would or could reasonably be expected to say when questioned by the Iranian authorities.

34. In relation to that question Judge Kebede stated that,

> *"21. Ms Patel submits that the appellant cannot be expected to lie about his activities in the UK and the basis of his asylum claim and that his disclosure of his Facebook postings and attendance at demonstrations would be sufficient to put him at risk irrespective of the fact that they may have been opportunistic. However, as Mr Bates submitted, not only would the Iranian authorities have no prior knowledge of the appellant's attendance at demonstrations or his Facebook activities and would not find any presence on social media since the appellant would have deleted his account, but that, as established in XX, the appellant would not be required to volunteer information about his activities which were not an expression of any genuinely held beliefs and which had been contrived solely to enhance a false claim for asylum and to deceive the UK authorities. That was precisely the point made by the Upper Tribunal in XX at [100] where it was said that 'Decision makers are allowed to consider first what a person will do to mitigate a risk of persecution, and second, the reason for their actions if the person will refrain from engaging in a particular activity, that may nullify their claim that they would be at risk, unless the reason for their restraint is suppression of a characteristic that they have a right not to be required to suppress, because if the suppression was at the instance of another it might amount to persecution.'*
>
> *22. As Mr Bates submitted, the appellant's true account was that he had been photographed at the back of a demonstration pretending to be an attendee but that that did not reflect any genuine beliefs, and that he had created a Facebook account and*

posting to deceive the UK authorities. There was no reason why he should volunteer that information and the withholding of such information would not impact upon any fundamental rights protected by the Refugee Convention. There is accordingly nothing in the guidance in SSH to support Ms Patel's submission that there would be a second stage of questioning which would involve detention and a risk of Article 3 ill-treatment. As was found in that case at [23], 'a person with no history other than that of being a failed asylum seeker who had exited illegally and who could be expected to tell the truth when questioned would not face a real risk of ill-treatment during the period of questioning at the airport.' Likewise, there is nothing in the guidance in HB, BA or PS to support Ms Patel's submission in that regard.

23. Accordingly, there being no reason for the Iranian authorities to have any suspicion of the appellant on the basis of any actual or perceived activities in the UK, and there being no reason for him to be detained and transferred for further questioning, the appellant has simply failed to demonstrate any basis for being at risk on return to Iran. There is no reason to believe that he would wish to engage in any anti-regime activities in Iran, having never previously held any genuine political beliefs and having never previously been genuinely or knowingly involved or perceived to be involved, in anti-regime activities. The appellant's removal to Iran would not, therefore, give rise to any real risk of persecution and he has failed to make out any grounds of claim on asylum, humanitarian protection or human rights grounds."

Grounds of appeal

35. The appellant's grounds of appeal against the 2nd decision of the Upper Tribunal are twofold:

i. Firstly, that the judge erred in law by failing to consider material matters as per the Iranian country guidance cases of *BA*, *HB* and *XX*, including the increased likelihood of the appellant's attendance at demonstrations being brought to the attention of the authorities due to the increased number of demonstrations which he attended, the extent to which the appellant had drawn attention to himself at those demonstrations, expert evidence in *HB* to the effect that the closure of a Facebook account does not diminish the risk on return to Iran, the evidence in *XX* that limited caches of Facebook data may remain on internet search engines after the closure of a Facebook account and that images on other individuals' accounts can still

exist, and the increased risk which may arise at the first pinch point, if a Facebook account has not been closed prior to an application being made for an emergency travel document.

ii. Secondly, that the judge failed to apply the facts as found in the appellant's case to the country guidance cases of *PS*, *BA*, *HB* and *SSH*, in that she failed to consider that the appellant was Kurdish and therefore at heightened risk of suspicion on return to Iran, that the appellant had left Iran illegally and would therefore be questioned on return at the airport, that the appellant had attended 4 or 5 anti-regime demonstrations outside the Iranian Embassy and the fact that the appellant had made anti-regime Facebook posts whilst in the UK.

36. The respondent resists the appeal and submits that the appellant's grounds are no more than a disagreement by him with the findings and conclusions which Judge Kebede was entitled to reach on the evidence and in accordance with the relevant authorities which she properly applied.

Discussion

37. When considering the merits of these grounds, it is important to bear in mind the context in which Judge Kebede was required to undertake the re-making of the decision as to whether the appellant would be subject to persecution or Article 3 ill-treatment due to him being identified as being of interest to the authorities on his return to Iran and whether, when interviewed, he would disclose or have to disclose any of his activities in the UK or his reasons for claiming asylum. The context being the remaining findings by Judge Dilks upon which permission to appeal had not been granted and were therefore retained.

38. The findings which were retained included the lack of credibility of the appellant's account of events leading up to his leaving Iran, his lack of any involvement in PJAK or politics up till then, his activities in the UK being opportunistic and lacking in genuine belief, and which would not have come to the attention of the Iranian authorities prior to the appellant's return to Iran.

39. It is of course correct that following the hearing before the First-tier Tribunal, the appellant had chosen to undertake further activities in the UK, which were set out in his more recent witness statement dated 13 October 2023, and which Judge Kebede was obliged to take into account when considering the appeal. Moreover, when it came to her assessment of the impact of those activities upon the determinations which were required to be re-made, it was necessary for the judge to follow those aspects of the country guidance which were relevant to that assessment.

40. In this regard, the appellant seeks to rely upon a passage in *BA*, at [65], to the effect that there is evidence that the Iranian authorities attempt to identify those participating in demonstrations outside the Embassy in London by filming them, such that it is argued that the mere presence of the appellant at these demonstrations would be sufficient to trigger his identification on his return to Iran. However, this is to take this aspect of the judgment out of context from the remainder of the Upper Tribunal's judgment, and in particular, at [66], that,

> *"66. As regards identification of risk back in Iran, it would appear that the ability of the Iranian regime to identify all returnees who have attended demonstrations, particularly given the number of those who do, on return, remains limited by the lack of facial recognition technology and the haphazard nature of the checks at the airport. The expert frankly admitted that it was extremely difficult to estimate the risk to identified participants in protests against the Iranian government. Mr Basharat Ali's careful submission was not that all of those returning, or returned from the United Kingdom, would be subject to mistreatment. We conclude therefore that for the infrequent demonstrator who plays no particular role in demonstrations and whose participation is not highlighted in the media there is not a real risk of identification and therefore not a real risk of ill-treatment, on return."*

and, at [67], that,

> *".....we have seen no evidence to lead to the conclusion that merely having exited Iran illegally an appellant might be subjected to persecution…"*

41. Furthermore, although *XX* is a relevant country guidance case in which the Upper Tribunal found that an individual's deliberately contrived activities at demonstrations was "*just*" sufficient to establish a risk that he had been subject to surveillance by the authorities, this was a fact-specific judgment in that case, and our task in the present appeal is to determine whether Judge Kebede appropriately assessed the risk emanating from the particular activities caried out by the appellant in the UK.

42. *XX* also dealt authoritatively with the potential relevance of the use of social media. It was apparent from the expert evidence in that case, at [31] – [36], that the deletion of a Facebook account was achievable, and that the effect of this was set out at [126], namely that,

> *"126. The timely closure of an account neutralises the risk consequential on having had a 'critical' Facebook account, provided that someone's Facebook account was not specifically monitored prior to closure."*

43. In that regard, it is apparent from [84] of the judgment, that the existence of what was termed "*residual data*" following the closure of a Facebook account is time limited, hence the guidance referred to at [126] to the effect that provided the account is closed in sufficient time prior to any checks being carried out, the data will cease to be accessible.

44. Moreover, the Upper Tribunal in *XX*, proceeded to provide guidance on social media more generally, at [127] – [129], as follows:

> *"…..*
>
> *127. Social media evidence is often limited to production of printed photographs, without full disclosure in electronic format. Production of a small part of a Facebook or social media account, for example, photocopied photographs, may be of very limited evidential value in a protection claim, when such a wealth of wider information, including a person's location of access to Facebook and full timeline of social media activities, readily available on the 'Download Your Information' function of Facebook in a matter of moments, has not been disclosed.*
>
> *128. It is easy for an apparent printout or electronic excerpt of an internet page to be manipulated by changing the page source data. For the same reason, where a decision maker does not have access to an actual account, purported printouts from such an account may also have very limited evidential value.*
>
> *129. In deciding the issue of risk on return involving a Facebook account, a decision maker may legitimately consider whether a person will close a Facebook account and not volunteer the fact of a previously closed Facebook account, prior to application for an ETD: HJ (Iran) v SSHD [2011] AC 596. Decision makers are allowed to consider first, what a person will do to mitigate a risk of persecution, and second, the reason for their actions. It is difficult to see circumstances in which the deletion of a Facebook account could equate to persecution, as there is no fundamental right protected by the Refugee Convention to have access to a particular social media platform, as opposed to the right to political neutrality. Whether such an inquiry is too speculative needs to be considered on a case-by-case basis.*

…..”

45. In the present appeal, it is apparent from the judgment, at [17], that Judge Kebede not only took into account the appellant’s attendance at further demonstrations, but carried out a careful analysis of the supporting evidence as to the activities carried out by the appellant at those demonstrations.

46. Undoubtedly, it was necessary for the judge to have regard to the whole history of the appellant’s attendance outside the Embassy since his arrival in the UK, and to consider its significance in relation to the risk to the appellant, in accordance with the relevant country guidance in the cases to which both she and we have referred.

47. Likewise in relation to the evidence concerning the appellant’s use of social media, it was necessary for the judge to take into account the whole history of his usage of social media since his arrival in the UK, and to consider its significance in relation to the risk to the appellant in accordance with the relevant country guidance.

48. It is apparent that this is the approach which the judge took, not only in relation to the appellant’s attendance at demonstrations outside the Iranian Embassy at [17], but also in relation to his use of social media. The judge’s analysis of the latter evidence being set out at [18] of the judgment which, taken together with the evidence concerning the appellant’s attendance at demonstrations, entitled her to find that the appellant’s activities whilst in the UK would not have come to the attention of the authorities, such that he would not have been identified as of interest to the Iranian authorities prior to his arrival in Iran.

49. As the judge found, the appellant had been photographed at a distance away from both the Embassy and the crowds demonstrating outside the Embassy. Moreover, he did not appear to be playing any particular role, and the images appeared to have been taken purely for the purposes of advancing his claim for asylum, rather than evidencing any genuine participation in the events. Likewise in relation to the evidence concerning his use of Facebook, these comprised photocopied extracts, rather than full disclosure in electronic format. Moreover, reflecting the findings of Judge Dilks, there was no reason why the appellant could not close his Facebook accounts prior to the first pinch-point, when he applied for his emergency travel document, nor why he should disclose the existence of them, which would not have previously been known to the authorities, as like his attendance at demonstrations, their apparent contents did not reflect any genuinely held belief by the appellant. Although the judge did not say so in terms, it inevitably follows that the same would apply to the appellant’s attendance at demonstrations since his arrival in the UK.

50. In my judgment all of these findings were ones which were properly open to the judge on the evidence and were determined in accordance with the relevant country guidance cases, and accordingly the first ground of appeal fails.

51. Turning to the second ground, it was in the context of these findings that the judge went on to consider the matters which it had been held that the First-tier Tribunal had failed to analyse properly, and which Judge Kebede was required to determine, namely the existence of any risk to the appellant based on what the appellant could reasonably be expected to say to the authorities on his return to Iran.

52. In doing so, it was necessary for the judge to take into account the relevant country guidance, and in particular that set out in *HB* at [98] namely,

> *".....*
>
> *(4) ...the mere fact of being a returnee of Kurdish ethnicity with or without a valid passport, and even if combined with illegal exit, doe 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 Kurdish ethnicity is a factor of particular significance when assessing risk. Those 'other factors' will include the matters identified in paragraphs (6)-(9) below.*
>
> *.....*
>
> *(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 long 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.*
>
> *…."*

53. The judge set out her findings in relation to this issue between [21] – [23] of the judgment, and as I have already observed she was doing so in the context not only of the retained findings of fact by Judge Dilks but also her own as to the lack of prior knowledge by the authorities of the appellant's activities whilst in the UK. In these circumstances, she was entitled to approach the issue on the basis that although being an individual of Kurdish ethnicity was a factor of particular significance when assessing the appellant's risk, the fact that he had exited Iran illegally and did not have a valid passport did not of itself create a risk of persecution or Article 3 ill-treatment.

54. Regardless of this, it is apparent that the judge accepted that as the appellant was of Kurdish ethnicity, he would be likely to be questioned on entry into Iran; hence the question which she posed, namely what the appellant would or could reasonably be expected to say when questioned by the Iranian authorities. In my judgment, bearing in mind the retained finding that the appellant's activities whilst in the UK were opportunistic and not genuine, the judge was entitled to find that the appellant would not be required to volunteer information about those activities. Furthermore, that as the appellant had no involvement in PJAK or politics before he left Iran, there would be no other reason for the Iranian authorities to have any suspicion about the appellant, such that on his return to Iran, there would be no risk to the appellant either of persecution or Article 3 ill-treatment either by reason of second-stage questioning or otherwise.

55. In the course of oral submissions, Ms Patel on behalf of the appellant brought to our attention *RT (Zimbabwe) v SSHD* [2012] 1AC 152, ("*RT*") and submitted that it was necessary for Judge Kebede to have considered the type of issues which Lord Dyson mentioned at [57] before being properly able to reach a view as to the risk to the appellant on his return to Iran, including what the appellant might be asked by the authorities on his return and how well he would be able to lie to them. However, as was pointed out in *XX* at [98], the issues which the Supreme Court were considering in *RT*, arose in a very different context, namely the return of a non-political Zimbabwean to an area in which it was likely that he would have to provide a convincingly false account of his allegiance to the ruling party when stopped and questioned by ill-disciplined militia at roadblocks.

56. In contrast, as was pointed out in *XX* at [99] the Iranian authorities do not persecute individuals because of their political neutrality. Moreover, in the present case, and in the light of both the retained findings and those made by Judge Kebede as to the unlikelihood of the appellant having already come to the attention of the authorities and his lack of genuine political belief in the PJAK, the appellant was not in a position where he would have to prove his political loyalty, rather it would be one in which, as Judge Kebede found, the appellant would not be required to volunteer information about his activities in the UK.

Conclusion

57. In my judgment as these finding were ones which the judge was entitled to find on the basis of the evidence before her, and were reached in accordance with the relevant country guidance, the second ground of appeal fails and accordingly I would dismiss the appeal.

Lord Justice Lewis

58. I agree.

Lord Justice Moylan

59. I also agree.