Neutral Citation Number: [2024] EWCA Civ 149

Case No: CA-2023-001065

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER
UT JUDGE KEBEDE
UI-2021-001596

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 February 2024

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE SINGH
and
LADY JUSTICE ELISABETH LAING

- -

Between:

FA (IRAN)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Gita Patel and Craig Holmes (instructed by **Broudie Jackson Canter Solicitors**) for the **Appellant**
Matthew Wyard (instructed by **the Treasury Solicitor)** for the **Respondent**

Hearing date: 1 February 2024

- -

Approved Judgment

This judgment was handed down remotely at 2pm on 22 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lady Justice Elisabeth Laing:

Introduction

1. The Appellant appeals on a point of law from a determination of the Upper Tribunal (Immigration and Asylum Chamber) ('the UT'). The UT dismissed the Appellant's appeal from the First-tier Tribunal (Immigration and Asylum Chamber) ('the F-tT'), holding that the F-tT had not erred in law. When she gave permission to appeal in this case, the view of Andrews LJ was that, '[o]n the face of it' the UT's determination was 'unimpeachable'. She explained why. She had been 'narrowly persuaded' to give permission because the case raised 'an interesting and important question about how the UT is to deal with a country guidance case which is published between the F-tT decision and the hearing of the appeal'. It would be 'helpful', she said, if this court were to say whether or not the UT was entitled to take that country guidance case into account when deciding whether or not the F-tT had erred in law in its determination.

2. In this judgment I will refer to that country guidance case either as 'the later country guidance case', or by an abbreviation of its name, *XX (PJAK – sur place activities – Facebook) Iran* [2022] UKUT 23, that is, '*XX*'. I will refer to the determination of the F-tT as 'determination 1' and to the determination of the UT as 'determination 2'.

3. In the event, this court does not now need to decide that issue of law. Before the hearing, this court drew counsel's attention to a recent authority which, by reference to earlier decisions of this court (of which the Secretary of State was aware because they were in the bundle of authorities for this appeal), clearly decided that issue. The Secretary of State, belatedly recognising that, then accepted that the UT had erred in law in taking into account the later country guidance case, *XX*, in its decision that the F-tT had not erred in law. On that concession, the Appellant then withdrew one of his grounds of appeal.

4. As a result, the only issue for our decision was whether the UT's accepted error of law was material to the outcome of the appeal to the UT. There was some debate at the start of the hearing about what that issue involved. The upshot (which coincides with my own view) is that the UT's agreed error of law is only an immaterial error of law if, albeit for reasons which the UT did not itself fully explain, determination 1 was not, itself, wrong in law. If, however, determination 1 was wrong in law, the UT's agreed error of law was material, because it led the UT to dismiss an appeal which it should have allowed. The issue whether the F-tT's determination was wrong in law thus became the focus of the parties' oral submissions, and is the focus of this judgment.

5. On this appeal, the Appellant was represented by Ms Patel and Mr Holmes. Mr Wyard represented the Secretary of State. I thank them all for their written and oral submissions.

6. For the reasons given in this judgment, I have decided that the UT's agreed error of law was material. Determination 1 was wrong in law for the reasons I give in paragraphs 66-73, below. Instead of dismissing the Appellant's appeal, the UT should have allowed it. I consider the potential consequences of that conclusion in paragraphs 74-78, below.

The facts

7. I have taken the facts from determination 1. There are many spelling mistakes and other errors of expression in determination 1. In some cases, it is difficult to understand what determination 1 means. Rather than distracting the reader by drawing attention to these errors in my quotations from determination 1, I will correct them, if I am reasonably confident that I know what the F-tT meant to convey.

8. The Secretary of State accepted that the Appellant is a 'Kurdish National of Iran' (paragraph 4). He claimed to have left Iran illegally on foot, and to have got married en route to the United Kingdom. He entered the United Kingdom on 4 December 2019 and claimed asylum. The Secretary of State rejected his claims for asylum and for humanitarian protection.

9. In paragraphs 10-19 and 23-39, below, I summarise the F-tT's findings of fact based on the evidence which it heard, and on its consideration of the extant country guidance cases.

Determination 1

10. In paragraphs 3-30 the F-tT summarised the reasons which the Secretary of State had given for her decision dated 17 November 2020 ('the decision'). It is not necessary for me to describe more than a few of the matters to which the F-tT referred. The Appellant had admitted in his asylum interview that he was a supporter of the Kurdish Democratic Party of Iran ('the KDPI') and not a member. The Secretary of State considered it strange that the Appellant had not been introduced to the KDPI until he was 29. The Secretary of State also considered that the answers to questions 117 and 122 in the Appellant's asylum interview were inconsistent. His account about whether his friend B had been involved in the third of the three political activities on which he relied was also inconsistent. His claim that his friend S had given his name to the authorities when he was being tortured was 'speculative', as was his answer to question 176. The Secretary of State considered that there was no evidence that the Appellant's posts on Facebook had been seen by the authorities. The Secretary of State did not accept his account of leaving Iran illegally as he had given 'little detail' about it.

11. The Secretary of State had referred to two country guidance cases: *SSH and HR (Illegal Exit) Iran* CG [2016] UKUT 308 ('*SSH and HR*') and to *HB (Kurds) Iran* CG [2018] UKUT 430 ('*HB*'), and to the CPIN dated February 2019 about illegal exit. The Secretary of State's conclusion was that the mere fact of being a Kurdish returnee without a valid passport who had left Iran illegally did not create a relevant risk. The Secretary of State also concluded that as the Appellant's claim to be a supporter of the KDPI had been rejected and because he had not spent time in the Kurdish area of Iraq, and he was not of adverse interest for his political opinion, he had no relevant criminal or political profile.

12. The Secretary of State had taken into account *BA (Demonstrators in Britain: Risk on Return) Iran* CG [2011] UKUT 136 ('*BA*') when considering the Appellant's sur place activities. The F-tT said, summarising the decision, 'The Respondents noted that he had attended as a Kurdish supporter in the UK at an event or indeed events but had not indicated that this was to go against the Iran regime and had not produced documentary evidence of him attending the event and stated that his political posts in Facebook could

easily be removed'. I also note that paragraph 67 of the decision explains that, on the Appellant's account, the event in question was 'to support the anniversary of the Kurdish republic'. I also note that in paragraphs 52 and 53 of the decision, the Secretary of State's assessment of the screenshots of Facebook posts on which the Appellant relied was that those posts were not in the Appellant's real name and that none showed him in a photograph, so that there was nothing to tie them to him. In effect, they were self-serving and could be deleted. The Secretary of State's conclusion was that the authorities would not be interested in the Appellant.

13. In paragraphs 31-47, the F-tT summarised the evidence. The Appellant's evidence was that he did not know where he was born. He had been found and handed in to a Mosque. His mother told him that he had been 10-20 days old when he was given to her, and that he did not have any siblings. He did not go to an official school, but was educated at the Mosque for three years. He understood that he had been eight to ten years old when his father died. He had known B as a friend or neighbour since childhood. He did not know how long B had been involved with the KDPI. He told the Appellant about his KDPI activities just before they started them in 2019. His father had been a supporter of the KDPI and for the freedom of Kurdish people in Iran. He believed that his father was a martyr.

14. He did not have any contacts in the KDPI even though his mother had told him that his father had been a martyr. It was difficult to join the KDPI because of spies who might inform on him. B had then contacted him and he had started to help him in the first month of 1398 (in the Iranian calendar). He worked for B three times in the first six months of that year. B lived in his village. He saw him often, but not every day. 'He had only been aware of B's activities when he began to participate'. The Appellant had been a farmer since his childhood.

15. He wanted to deliver leaflets as revenge for the killing of his father, and to make people aware of the brutality of the Iranian regime towards the Kurdish people. He accepted that he was not good at reading and that he did not know all the details of the text of the leaflets. It was to do with life in Kurdistan, the life of Dr Khasim and with the view that the group would be successful in the end. He was worried about what would happen if he were caught, but he knew that the KDPI was for the Kurdish people.

16. His first activity was to take a package for B to a shop in Sardasht. The second was sticking leaflets to walls in Sardasht. B gave him a lift to Sardasht with his friends R and S, who lived in a nearby village and whom he had known since childhood. S was a very close friend. From this second activity he knew that S was involved with the KDPI. B dropped him off for the third activity, which was to 'monitor and watch…effectively as a guard'. He had seen the Etellat arrest S. R had run away.

17. He believed that the Etellat must have known that he had been there because S must have told them when he was questioned. His uncle had told him that the Etellat had later raided his house. He had said in his screening interview that it had been his mother who had told him this. He had said that because his mother had told his cousin, who had told his uncle, and his uncle had told him. He had been told at the screening interview to give short answers. After the third incident, he ran away. He did not go home and left Iran within three days. An agent or smuggler had helped him. His uncle arranged for his travel 'via the smugglers'. He had spoken to his mother on the

telephone just after he arrived in the United Kingdom. He did not ask whether anyone was looking for him. He just wanted to know that she was well. His journey took about two months. He did not know what countries he had been in, apart from Turkey. He had met his wife at his smuggler's home. He did not know where that was. They decided to get married after ten days. The agent spoke to an Imam on the telephone and the Imam married them over the telephone. They had lived together in the United Kingdom.

18. While in the United Kingdom they had been to a demonstration together and one other meeting in London. The demonstration was in front of the Iranian Embassy, 'saying things against the regime and showing photographs of the President of Iran' (paragraph 44). He had been using Facebook since 2020 'to show that he was against the regime'. In Iran he was known by [name 1] but he had changed his name on Facebook to his surname, that is, his family name [name 2]. That was after the Secretary of State had refused his asylum claim (paragraph 45).

19. His wife is literate. She supports him with his posts on Facebook, although she does not speak English. Most of the posts are in Kurdish Sorani. He also has a friend who helps him with English. 'He said people in Iran have Facebook and social media but he himself had only used it after coming to the United Kingdom'. He had only ever rung his mother once because he was worried about her and the family in Iran. He felt that phones were checked by the regime.

20. The Appellant was represented by Ms Mason, and the Secretary of State by Ms Day. The F-tT summarised their submissions in paragraphs 48-68. It is not necessary for me to summarise them at any length, but there are two relevant points.

21. First, Ms Day submitted that after the decision, the Appellant had changed the name on his Facebook account, 'put a photograph on' and posted 12 photographs in the current year (paragraph 53).

22. Second, Ms Mason submitted that 'there was a real risk on return following his sur place activities on Facebook' (paragraph 66). Her submission was that while she accepted that he did not have 'a sufficient profile at the moment to have brought him to the attention of the authorities…the pinch point is on the return to Iran and the expert states that on return there would be risk and they would ask him about his social media because he is Kurdish and they would then require his passport and they would then find out the details of his postings. This would be when he arrives in Iran and he would be at risk of his position being disclosed by the Iranians [sic] approach at the airport' (paragraph 67). 'Kurds are not well treated and it would be found out that he opposed the Iranian regime…' (paragraph 68).

23. In paragraph 69, the F-tT directed itself correctly about the burden and standard of proof.

24. The F-tT's findings are in paragraphs 70-98. In paragraph 71, the F-tT described its surprise that the Appellant had rung his mother once. If he was really concerned, he would not have rung her at all, and if he was not concerned, he would have rung her more. His evidence about who told him about the raid on his house was 'confused and contradictory'. That was 'a significant factor' against him. The F-tT rejected the explanation that the interpreter had told him to keep his answers short (paragraph 71).

25. After the refusal of his claim, 'for whatever reason' the Appellant had changed the name on his Facebook account. 'This appears to be a desperate attempt to try to ensure that he altered his claim of coming to the attention of the Iranian authorities in respect of what happens if he is returned to Iran. I can see no other reason for this'. If he could change his name once, he could do it again. It showed 'as far as I am concerned, yet further indication of there being a lack of real support for the KDPI. Yes I appreciate he has attended an event and one demonstration but his agent' (I think the F-tT meant 'his representative') was 'candid enough to accept that he has not come to the attention of the authorities because of that' (paragraph 73).

26. The Appellant had not explained why he had waited about 29 years before speaking to his neighbour and friend about the KDPI. His explanation that his mother had encouraged him because his father had been 'a martyr simply did not ring true'. The F-tT considered that it was 'a fabrication'. The Appellant had also said that it was only after watching a television channel in his twenties and seeing information about the KDPI that he became interested in them: 'which again appears incredible' (paragraph 74).

27. It was 'no great surprise' that, in his asylum interview, the Appellant was aware of figures from the KDPI as this information is generally available. The F-tT noted the CPIN (paragraph 75).

28. The F-tT found the Appellant 'difficult to accept with regard to credibility', even against the lower standard. The F-tT agreed that he had given 'little detail' about his journey to the United Kingdom. The F-tT considered the Appellant's 'speculation as to how it was claimed that his name had been given out was indeed speculative'. The F-tT referred to other 'letter' [sic – possibly 'lesser'?] inconsistencies in paragraph 77. Those included how he knew what was written on the leaflets. The F-tT was not convinced by the 'overly deliberate' way in which the Appellant had given evidence. It was 'generally lacking in detail one would have expected'. His lack of interest in the KDPI given that his father had been killed 'seemed ungenuine and did not assist his credibility'. The F-tT did not accept that the Appellant could have been B's neighbour for so long without knowing about his activities and without asking about the KDPI, given 'the killing of his father which he now cites as a major reason for his involvement'. The F-tT also mentioned inconsistencies to which the Secretary of State had referred in the decision (paragraph 78). It seemed that the distribution of leaflets in Iran was 'an extremely precarious task and to fail to guard properly against it would appear to me to be unlikely to the extent whereby even against the lower standard I consider it not to be credible' (and see paragraph 79).

29. The F-tT did accept that the Appellant had left Iran illegally. It also accepted that 'he has used social media to make posts against the government of Iran on a sur place activity basis'. The F-tT continued 'Of course that does not mean that he was acting in the way he claims in Iran or has been sur place activity albeit of a fairly low level using Facebook. That level of abuse [sic – possibly "use"] of Facebook has been for a relatively short period of time but nonetheless I find it has been [sic]'. The F-tT then said 'Change of name claimed is not an anomaly in this case and not one that finds [the Appellant] being of credibility' [sic] (paragraph 81).

30. The F-tT did not accept that the Appellant had only rung his mother once. The reasoning in support of this conclusion in paragraph 82 is, with respect, not only badly expressed but incoherent. It may not add anything to the reasoning in paragraph 71 (see paragraph 24, above), and does not, in the event, matter.

31. There was no 'ground of fearing any persecution in Iran for imputed or actual political opinion upon return to Iran'. His asylum claim could not succeed. Nevertheless, the F-tT considered that there was 'a case to consider here in further depth with regard to sur place activity and leaving Iran illegally' (paragraph 83).

32. The F-tT then referred to *BA*. It accepted that the Appellant had attended 'as a Kurdish supporter in the UK at events and had forwarded on Facebook posts principally created by others'. His representative had not submitted that the Appellant had 'a sufficient profile at the moment to have brought him to the attention of the authorities'. The F-tT was 'grateful' for the concession.

33. The question was 'the pinch point' on return to Iran. There was a pinch point for someone who, like the Appellant, had left illegally and who had 'some involvement whereby he will have anti-government items on his Facebook which he appears to have adopted and forwarded'. The F-tT had also taken *HB* into account. The Appellant had used a different surname on his Facebook account 'and must accept that he has attended some event on 26 January 2020'. His representative accepted that he didn't obtain 'any significant profile through that nor through his Facebook usage'. *HB* referred to *SSH and HR*. The F-tT was aware that there is discrimination against Kurds in Iran. The F-tT was also aware of the 'Hair-Trigger approach to those who are suspected of or perceived to be involved in the Kurdish political activities or support for Kurdish rights. There is a low threshold of suspicion'.

34. Iran is 'known to be an intolerant country with regard to dissent'. There was country guidance about Kurds which the F-tT had considered (paragraph 90).

35. The F-tT referred, first, to paragraph 86 of *HB* which considers residence in the KRI (paragraph 91). As the decision made clear, there was no suggestion that the Appellant had lived in the KRI. The F-tT nevertheless appears to have thought that this was a 'fact-specific' factor in this case, an interpretation of paragraph 91 which is reinforced by paragraph 92. The first sentence of paragraph 97 is a finding that the Appellant had lived in 'the Kurdish lands' all his life, so does not resolve this puzzle (see paragraph 38, below).

36. The F-tT then referred to paragraphs 90 and 92 of *HB*. It was clear to the F-tT that the Appellant would be questioned on his return. The F-tT had found that he was not involved in 'Kurdish activity' when he was in Iran. If he were questioned and his Facebook were looked at, 'then we have a situation where he has two different names. There would have been some forwarding of other people's posts and perhaps, if he has not already deleted it, the odd photograph of him attending an event in London' (paragraph 95).

37. He would not be at risk at all as a Kurd who had been refused asylum (paragraph 96).

38. In paragraph 97, the F-tT found that the Appellant had lived 'in Kurdish lands for his lifetime', that he was Kurdish, but had carried out no activities there. As he was not involved in anti-government activities in Iran it would be 'folly' for him to claim now to the Iranian authorities that that is why he left. The F-tT considered that he would not do so. The F-tT took into account the 'very low level of what would be found on his Facebook if he uses the correct name and returns to Iran and explaining his use of Facebook, or retaining his forwarded messages, then there will be an issue for him, but I do not find the hair trigger approach of the Iranian authorities will have him subject to any form of perception that will cause an adverse reaction on the authorities' which would meet the necessary threshold.

39. The appellant in *HB* had done more than the Appellant. Paragraph 114 of *HB* showed that a person would be asked if they had a Facebook page, 'but because of this issue of his name change, having no passport and the level of what his Facebook usage has been, I simply don't find that [the Appellant] has the "cluster of factors" that would lead to a significant adverse reaction to him by the authorities'. The F-tT continued, 'He would not be expected to lie about his political belief but my view is that what he has done in the UK is to create a fanciful and exaggerated interest in Kurdish activities which he does not in fact support and does not follow other than in an attempt to remain in the UK'. He would just as quickly lose interest in those groups and in Kurdish rights 'as he gained then by making up this fanciful explanation about his father's death and why he became interested in these rights'. The F-tT was therefore satisfied that there 'would not be the pinch point and that he would not become subject to the interests of the Iranian Authorities to the extent whereby he would be required to lie about his interests in Kurdish rights (for I find he doesn't have one but has made one up to try)…'

40. The F-tT noted, finally, that the Appellant's representatives had properly not pursued an article 8 claim.

The grounds of appeal to the UT

41. There were three grounds of appeal to the UT. The F-tT gave permission to appeal on all grounds.

    i. The F-tT had failed 'properly' to consider the Appellant's Facebook evidence. The Appellant had supported his asylum claim with Facebook evidence in his adopted name and had supported his appeal with additional screenshots of Facebook posts in his own name. He was clearly identifiable from the additional evidence and he can be identified in the photographs. He is shown holding 'plagues' (perhaps 'plaques' or 'placards' is intended) saying 'No to the Islamic regime' and 'Iran is not for sale'. The posts were critical of the Iranian regime. The posts related to his political activity in the United Kingdom.

    ii. The F-tT had failed 'properly' to consider material evidence: the country guidance about the 'pinch point' on return. The Appellant would be questioned, and would reveal his Facebook activity which would show that he was opposed to the regime. That would lead to a real risk of persecution. The deletion of a Facebook account would not eliminate the risk. The Appellant could not be expected to answer questions about his activity in the United Kingdom dishonestly. The authorities would not care whether or not the Appellant's activities were sincere.

iii. In any event, the F-tT had erred in law in making its findings about credibility.

The Secretary of State's response to the grounds of appeal

42. In a letter dated 11 April 2022, the Secretary of State responded to the grounds of appeal. The Secretary of State's response to ground 2 was to direct the attention of the UT to the later country guidance case, *XX*. The relevant paragraph of the response ends with the following sentence: 'Whilst it is of course accepted that this caselaw wasn't before [the F-tT] it submitted that given their approach was consistent with it there cannot be said to be a material error of law in their decision'. The Secretary of State asked for an oral hearing.

Determination 2

43. At the UT hearing, the Appellant was represented by Ms Patel, counsel who represented him in this court. The Secretary of State was represented by a Senior Home Office Presenting Officer. The UT described the background in paragraphs 1-8.

44. In paragraph 10, it summarised Ms Patel's submission that the later country guidance case was not relevant because it was promulgated after the F-tT hearing. The relevant country guidance cases were *HB* and *BA*. Both the names on the Appellant's Facebook account were his: one, his nickname, meant 'Without a Parent' and the current name on his Facebook page was his family name. The F-tT had failed to consider what the Appellant would say when questioned about his Facebook activity, and had failed to see that the Facebook posts were his, and had not just been forwarded. The Facebook material included photographs of the Appellant holding a 'plaque' and pictures which were derogatory of the regime.

45. The F-tT had not taken the relevant country guidance material into account. *HB* showed that it did not help to delete a Facebook account. In any event there was no evidence that he had deleted, or would delete, it. *XX* said that it would be too late, even if the posts were deleted, as the damage had already been done. The F-tT's credibility findings were wrong.

46. The Senior Home Office Presenting Officer submitted that the later country guidance case was relevant 'as it was a reflection of what the judge had made of the evidence and reached the same conclusions as the judge had'. It involved an assessment of the evidence at the same time as the F-tT hearing. What the Appellant had posted on Facebook did not matter. All that mattered was what the Iranian authorities saw. He was not on their radar. They would not have looked at his Facebook account. If a person's beliefs were not genuine, they could not rely on *HJ (Iran)v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596 and could not claim to have a social media profile when they did not. He could delete his Facebook account. He was posting and forwarding pictures which he did not create. The authorities would not know about them and there would be no risk at the pinch point. The change of name was relevant as the Appellant had taken someone else's account and its contents.

47. In reply Ms Patel submitted that the appellant in *XX* succeeded on similar facts. Even if the Appellant's activity was contrived, there was enough to put him at risk as he had drawn attention to himself. The F-tT had failed to analyse what would happen at the

two pinch points: when the Appellant applied for an emergency travel document, and on return.

48. In paragraph 13, the UT accepted the Senior Home Office Presenting Officer's submission that the later country guidance case was relevant. The guidance in the later country guidance case supported the F-tT's approach. The challenges in the Appellant's grounds 'must properly be viewed in the light of that guidance…I agree with [the Senior Home Office Presenting Officer] that it is the much more detailed guidance on that matter [in the later country guidance case] which is to be considered when having regard to the lawfulness of [the F-tT's] decision' (paragraph 13).

49. The UT briefly considered whether determination 1 was consistent with the country guidance cases which were current at the date when determination 1 was promulgated. Those cases were *HB*, *BA* and *SSH and HR*. Paragraph 14 asserts that the F-tT had 'plainly had full regard to the relevant and current country guidance in assessing risk on return, assessing at [84] to [86] the appellant's profile at the "pinch-point" on return to Iran in line with the guidance in *BA* and going on, at [87] to [96], to consider the various risk factors in in *HB* and *SSH*'.

50. That assertion is not further explained, except, perhaps, that in paragraph 17, the UT rejected Ms Patel's submission that the F-tT had not properly considered the contents of the Facebook posts. The UT held that there was 'no proper basis for that suggestion. [The F-tT] was not required to make detailed references to the individual posts. It is clear that he had regard to the evidence before him and that he assessed the Facebook evidence before making his findings. He found it relevant that the posts relied on initially had all been made in a Facebook account in a different name to that by which [the Appellant] was known and that that would not have brought him to the attention of the Iranian authorities in his current identification and he found that the subsequent posts in a different Facebook account in his own name were of a low level and consisted for the most part of forwarded pictures and messages'.

51. In paragraph 18 the UT considered and rejected a submission which Ms Patel made about *XX*. In paragraph 20, the UT upheld the F-tT's decision. The findings were based on 'a full and detailed assessment of the evidence in the light of the country guidance and country information. He provided clear and cogent reasons for reaching the conclusions that he did and the grounds of challenge are not made out'.

The grounds of appeal to this court

52. There were three grounds of appeal to this court. As a result of the concessions which I have described in paragraph 3, above, the only live ground is the first ground.

    i. The UT should have concluded that the F-tT had failed to apply the current country guidance cases to the Appellant's case.
    ii. The UT failed properly to apply *XX* to the Appellant's case.
    iii. The UT erred in law in taking into account the later country guidance case, that is, *XX*, which was not in existence when determination 1 was promulgated.

The relevant country guidance cases

53. By the hearing, the narrowing of the issues meant that it was not necessary for counsel to refer us to more than a few passages in the country guidance cases. Apart from paragraph 65 of *BA* and paragraphs 108-121 of *HB,* most of the relevant material can be found in the usefully full headnotes of those cases.

BA

54. In *BA*, the UT considered the risks, on return, to Iranians who had been involved in demonstrations in London against the Iranian regime. Its broad conclusion was that, while returnees are screened at the airport on arrival, not all those who took part in such demonstrations were at risk. Whether a person would be at risk would depend on a range of factors. The mere facts of illegal exit or return from the United Kingdom would not, by themselves, be enough. One relevant factor was the level of a person's political involvement.

55. Ms Patel relied on paragraph 65 of *BA*. The main topic of that paragraph is whether the Iranian authorities can, and do try to, identify Iranians who take part in demonstrations in the United Kingdom. The passage on which she particularly relied was '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'. In answer to a question from the court, Ms Patel clarified that the point she took from this passage, which could be generalised to questioning by the authorities on a person's return to Iran, was that the Iranian authorities are not interested in whether a person's manifested dissent is genuine or feigned; what they care about is that the person has expressed opinions which are hostile to the regime.

SSH and HR

56. The UT reached two main relevant conclusions in *SSH and HR*. First, an Iranian man who did not have a passport could return to Iran on a laissez passer, which he could get from the Iranian Embassy. That would prove his identity and nationality. Second, if he had not previously been the subject of adverse interest from the authorities, neither illegal exit from Iran nor the fact that he was a failed asylum seeker would give rise to a real risk.

HB

57. In *HB* the UT considered the position of Kurdish Iranian nationals. The UT endorsed the statements in *SSH and HR* about the risks caused by illegal exit and/or being a failed asylum seeker. While Kurds face discrimination in Iran, it does not amount to persecution or to ill treatment breaching article 3. But since 2016, the authorities have become increasingly suspicious of Kurds. They are reasonably likely to be subjected to heightened scrutiny on return. The mere facts that a person was Kurdish, had no passport and had left Iran illegally did not create a relevant risk. Nevertheless, being Kurdish, when combined with the other factors listed in paragraphs (6)-(9) of the headnote of *HB*, could create a real risk. Being Kurdish is a 'significant risk factor'. Paragraph (6) refers to residence in the KRI and is not relevant in this case.

58. Paragraphs (7)-(10) of the headnote are as follows:

> '(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.'

59. In paragraphs 108-121, the UT considered HB's social media posts and what would be likely to happen when he was questioned on his return. He had made Facebook posts before and after the F-tT hearing (paragraph 9). The posts covered about ten months and were copied in a 59-page bundle. There was no agreed summary but bits of some were translated. Not every post needed a translation. They expressed support for the Kurdish political cause and opposition to the Iranian regime. The UT listed samples in paragraph 112. Five included doctored photographs which were plainly insulting to Ayatollah Khomeini. The Secretary of State submitted that the authorities were unlikely to know about the appellant's internet profile (paragraph 115). The UT, however, was satisfied that the authorities would find out about the posts when the Appellant returned to Iran. He would be questioned. It was routine for the authorities to look at a returnee's internet profile, Facebook and emails. He would be asked whether he had a Facebook page and it would be checked. He would be asked to log on to his Facebook page and emails. His Facebook posts would show his support for Kurdish rights and that he had insulted the regime. This would be reasonably likely to be seen as crossing a line as both political and religious dissent, and would expose him to a real risk. In paragraph 117, the UT listed a 'cluster' of other risk factors, which admittedly do not apply in this case, but concluded that the Facebook material would be enough on its own (paragraph 117).

60. In paragraphs 118-120, the UT considered what the Appellant might say when questioned and whether that issue was relevant to the outcome of the appeal. The UT decided that that issue was irrelevant 'given what would in any event be discovered' (paragraph 120). *HB* appears to have been a case in which the Appellant's political views were genuine (see the second sentence of paragraph 120).

The submissions

61. Ms Patel submitted that the cumulative effect of the points made in the headnote of *HB* is that there was little if any scope for an evaluation by the decision-maker, as, if those were satisfied, a claim for asylum/humanitarian protection must succeed. If paragraph (7) of the headnote was met, there was no scope for an evaluation. She relied on paragraphs 118-121 for the likely sequence of events when the Appellant returned to Iran. She was asked whether paragraph (9) modified the effect of paragraph (7), which does require an evaluation. Her response was that (7) should be read as a 'stand-alone risk category'. In any event, the evaluation posited by paragraph (9) was an assessment of whether the material was political and of how it would be viewed by the regime, not an assessment of whether the material was 'low-level' or not. As soon as the content was political, (7) and (10) applied.

62. The court explored with Ms Patel the effect of the concession by Ms Mason, the Appellant's representative, at the F-tT hearing, and recorded by the F-tT (see paragraphs 22, 32 and 33, above). She submitted that the concession only related to the question whether the Appellant's activities in the United Kingdom would, in themselves, have given him a profile which would have attracted the attention of the Iranian authorities. The concession had no bearing on what would happen to the Appellant on his return to Iran, when his Facebook posts were likely to be examined. He was Kurdish and the posts were political. That was enough to create a real risk. It did not matter whether the Appellant's political gestures were genuine or not (see paragraph 65 of *BA*). The F-tT's findings about the Appellant's Facebook posts were inadequate, but they were sufficient to show that, applying the country guidance, he would be at risk on return.

63. The court should either substitute for determination 2 a decision that the appeal succeeded outright, or remit the matter to the F-tT. Ms Patel accepted that some of the F-tT's findings would have to be preserved. I understood that concession to relate to the findings which were not the subject of any challenge on this appeal.

64. Mr Wyard submitted, first, that whether the Appellant would be at risk on return was an evaluative judgment for the F-tT, based on the country guidance applied to the facts found by the F-tT. Mr Wyard then tilted at a windmill with the submission that just because the Appellant was Kurdish did not mean that he was at risk. I say that, because that was not a suggestion which Ms Patel had made. His second submission was that the F-tT had expressly referred to, and had applied, the relevant country guidance.

65. He relied on Ms Mason's concession to the F-tT (see paragraph 62, above), and on the F-tT's finding of fact that, contrary to his primary case, the Appellant had not been involved in any political activities before he left Iran. The F-tT had taken everything into account; and found that there was not enough to expose the Appellant to risk at the 'pinch point' when he returned to Iran. Mr Wyard's reply, when asked whether the Appellant's Facebook posts were against the government, was that he could not help

with the Facebook posts. He then said that he had to accept that the F-tT's findings were not 'fully reasoned'; but, he added, there was no reasons challenge on this appeal. On risk, the F-tT 'must have reached an evaluative finding that the threshold was not exceeded'.

Discussion

66. I would be inclined to accept Ms Patel's submissions about the effect of paragraphs (7) and (9) of *HB*. A Kurd who returns to Iran with political material on his Facebook account would be likely to be at risk because his Facebook account would be examined, and the material would be found. But, in any event, even if that is not correct, and paragraph (7) is to be read subject to paragraph (9), I agree that the evaluation required by paragraph (9) is not an evaluation of the level of the material, but an evaluation of whether it was political, and, if so, of how it would be seen by the regime.

67. In paragraph 73 (see paragraph 25, above), the F-tT appears to have accepted the Appellant's evidence that he attended one demonstration and one event (see paragraph 18, above). It is not clear however, whether the F-tT also accepted that the demonstration was outside the Iranian Embassy, or that the Appellant had been 'saying things against the regime and showing photographs of the President of Iran'. Nor did the F-tT make any finding about the nature of the 'event', although the decision records the Appellant's claim in his asylum interview that it was an event on 26 January 2020 to support the anniversary of the Kurdish Republic. What the F-tT did find, in paragraph 84, was that 'He did attend as a Kurdish supporter in the UK at events…'. That finding is somewhat opaque.

68. Material in determination 1 suggests that the Appellant must have put his photograph on his Facebook account after the decision, that he had posted 12 photographs on Facebook 'in the current year' (paragraph 21, above), and that he had changed the name on this Facebook account. There are no findings in determination 1 about the exact nature of the Facebook posts. Ms Mason had conceded that attending one demonstration and one event in the United Kingdom was not enough to put the Appellant on the authorities' radar. She had not, however, made any concession about what the authorities would find when they looked at the Appellant's Facebook account, or about how they would react to what they found.

69. The F-tT's findings about this are limited. In paragraph 81, the F-tT found that the Appellant had used social media to 'make posts against the government of Iran'. Much of the rest of paragraph 81 is difficult to interpret, if not unintelligible. The last sentence is all but meaningless. In paragraph 84, it found that the Appellant had 'forwarded on Facebook posts principally created by others'. In paragraph 86, it found that the Appellant had had 'some involvement whereby he will have anti-government items on his Facebook which he appears to have adopted and forwarded'. In paragraph 95, there is a finding that the photographs on the Appellant's Facebook account would show that 'he has two different names' and a half-finding that 'There would be seen some forwarding of other people's posts, and perhaps, if he has not already deleted it, the odd photograph of him attending at an event in London'. This is a half finding because there is material in paragraph 97 which appears to imply (although this is not clearly expressed) that a distinction between the Appellant's case and that of HB is that HB's Facebook account did (and the Appellant's did not) have photographs of himself.

70. There is therefore a crucial gap in the F-tT's reasoning. The reader of determination 1 does not know, other than in the vaguest terms, what investigation of the Facebook account would show. Such findings or hints as there are suggest that the material on the Appellant's Facebook account would provoke a hair-trigger response from the Iranian authorities, as the material is both hostile to the government and is said to show the Appellant at an unidentified but potentially relevant event. Ground i. (see paragraph 41, above) summarises the Appellant's case about what the material would show. Nor does determination 1 explain whether the change of the name on the Appellant's Facebook account is significant, and, if so, in what way.

71. In the light of even the F-tT's limited findings, the F-tT's conclusion that there would 'be an issue' for the Appellant on return, but that it would not elicit the authorities' 'hair trigger' reaction is inexplicable. It was only if the F-tT was able to say that the Iranian authorities would find nothing in the Appellant's Facebook account which was, or which they would construe as, political and hostile to the regime, that the F-tT could have found that he would not be at risk on return. It may be that there is something unusual in the Facebook material which would justify the F-tT's conclusion, but a reader of determination 1 is left with no idea what that material might be. I consider that the F-tT erred in law, as claimed in ground i., by not giving the Facebook material the anxious scrutiny which it should have had. It also erred in law by failing, in the light of its limited findings and the country guidance cases, to explain how it was able to conclude that the Appellant would not be at risk on return.

72. It follows that the UT also erred in law in holding in paragraph 17 of determination 2 (see paragraph 49, above) that the F-tT, in effect, was not required to make any more findings about the Facebook posts than it had done.

73. For the avoidance of doubt, I also consider that ground i., contrary to Mr Wyard's submissions, is wide enough to include a reasons challenge.

Conclusions

74. I would therefore allow the appeal on ground i.

75. By a narrow margin, I consider that the appeal should be remitted to a different judge in the F-tT for him or her to consider the question of risk to the Appellant if he were returned to Iran. Given the lack of clear findings about the Facebook material, I do not consider that it would be right for this court to substitute a decision that the appeal be allowed outright.

76. My provisional view is that the F-tT's finding that the Appellant's account of having taken part in activities in Iran which would expose him to the risk of ill-treatment on return was not credible should be preserved, together with its findings in paragraph 73 about the fabricated nature of his interest in Kurdish politics. The result is that the only issue on remittal will be whether, on the evidence which the Appellant adduces, his sur place activities, whether appearing from his Facebook account or otherwise, have been such as to create a risk on return. I would not preserve Ms Mason's concession, not because it was not, if properly understood (see paragraph 61 above), correct on the basis of the evidence before the F-tT first time round, but because it should not be assumed

that the evidence will be identical on remittal. The Tribunal on remittal will of course be required to have regard to the latest country guidance.

77. If the parties disagree with my provisional view, they may make written submissions about which of the F-tT's findings should be preserved.

78. My provisional view also is that the only further order this court should make about remittal is that the F-tT should hold a case management hearing in order to decide what form the remitted hearing should take. Again, if the parties wish to make written submissions to the contrary, they may do so.

Lord Justice Singh

79. I agree with both judgments.

Lord Justice Underhill

79. I agree that this appeal should be allowed. As Elisabeth Laing LJ explains, the only live issue before us is whether the First-tier Tribunal's decision was wrong in law by reference to the country guidance cases that were then applicable. I believe that it was, because the Judge gives no adequate explanation of what material was on the Appellant's Facebook account or why the material to which he refers would not activate the "hair-trigger response" referred to in *HB* if it were identified when he was questioned on return. I also agree with her that for the same reason it would not be right to allow the appeal outright and that it should be remitted for the issue of the risk posed by the Appellant's *sur place* activities, whether appearing from his Facebook account or otherwise, to be considered afresh.