**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/07053/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 25 February 2021** | **On 19 March 2021** |

**Before**

**UPPER TRIBUNAL JUDGE McWILLIAM**

**Between**

**ZS**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms K Reid, Counsel, direct access
For the Respondent: Mrs H Aboni, Home Office Presenting Officer

**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.

**DECISION AND REASONS**

The Appellant is a citizen of Pakistan. His date of birth is 20 February 1988.

The Appellant came to the UK as a student on 10 April 2011. He was subsequently granted periods of leave as a student. He was granted leave to remain as the spouse of a British citizen which expired on 29 May 2016.

On 22 October 2014 the Appellant was convicted of conspiracy to import class A drugs. He was sentenced to five years' imprisonment. The Secretary of State made a deportation order against him. The decision to deport the Appellant was served on him on 5 December 2014. The Appellant signed a disclaimer waiving his right to oppose deportation. On 31 March 2015 he was served with a deportation order. Removal directions were set for 9 February 2016. On 5 February 2016 the Appellant lodged representations. Following this, removal directions were cancelled. On 16 February 2016 he was served with a decision to refuse a human rights claim. On 19 February 2016 the Appellant notified the Secretary of State that he wished to make an asylum claim. This was refused by the Secretary of State in a decision of 28 June 2016.The Appellant appealed against the decision on human rights grounds. His appeal was dismissed by First-tier Tribunal Judge Sweet. This decision was set aside by Upper Tribunal Judge Craig in a decision dated 29 September 2017 ("the error of law decision").

## The error of law decision

The salient parts of Judge Craig's decision are as follows:

> "8. There are a number of grounds raised on behalf of the appellant although only one has been pursued with any vigour before this Tribunal. I can deal very briefly with the grounds raised which were not seriously pursued today. The first is that he would be at risk from non-state agents. In my judgment, on the basis of the evidence which had been before the First-tier Tribunal and the submissions which had been made this ground could not succeed.
>
> 9. I deal also with the Article 8 claim which was made within the grounds. I note that when giving permission to appeal Judge Kelly stated that while it was arguable that 'the effect of the appellant's deportation upon his spouse is also inadequately reasoned', he added that
>
> > 'it is doubtful that it is material to the outcome of the appeal given the length of the appellant's sentence of imprisonment (five years) and the consequent requirement under Section 117C of the 2002 Act for there to be compelling circumstances that are 'over and above' the consequences for his spouse'.
>
> In my judgment, Judge Kelly was right to express his doubt as to the materiality of any breach there might have been in this regard. This appellant was sentenced to more than four years' imprisonment for an extremely serious drugs offence and having considered all the facts set out within the file, although the consequences for his spouse will undoubtedly be unpleasant, there is no factor at present that is sufficiently compelling as could possibly warrant the granting of further leave to remain to this appellant (and the cancelling of the deportation order) on the grounds of his family life.

10. The ground that Judge Kelly considered was properly arguable and material was that the judge failed to give adequate consideration to whether or not on return the appellant would be at risk of being tried again for (or for offences akin to) the offence of which he had been convicted and that he would be at risk if convicted of receiving the death penalty. This argument had been advanced certainly to some extent before Judge Sweet but his consideration of it was, to say the least, brief. He dealt with this argument in one paragraph, paragraph 63, as follows:

> '63. Counsel for the appellant has provided some evidence of the double jeopardy provisions within Pakistan and confirmation that the offence for which the appellant has been convicted and sentenced in the UK carries the death penalty there. I am not persuaded that the appellant is of any interest to the authorities or to the alleged mafia in Pakistan, because of my views of his overall credibility and my concerns about the strength of the evidence that the authorities are interested in him. Furthermore, the respondent has provided legal advice in the refusal letter that the appellant will not be subject to double jeopardy on return. He has been away from Pakistan since April 2011. It is unlikely that the authorities will be interested in him on his return'.

11. The basis upon which the appellant's claim is advanced certainly before this Tribunal is as follows. Although Pakistan has double jeopardy provisions whereby in some cases there is a prohibition against retrying somebody for the same offence of which he or she has been convicted previously by a 'court of competent jurisdiction', it is by no means certain that these provisions would provide protection to this appellant. In the absence of such protection, the appellant would be at risk of being tried for what is a capital offence in Pakistan and there is a real risk that if convicted he would thereafter be sentenced to death. There was evidence before the First-tier Tribunal, which has been referred to before me, that although there had been a moratorium on imposing the death penalty in Pakistan for about six years this moratorium ended in December 2014 and in the following year some 320 people were executed. Amongst the offences which carry the death penalty (as appears from the respondent's own country information updated on 11 May 2016 (at 6.1.1) are the following:

> 'Importing, exporting into and from Pakistan dangerous drugs - Section 13 of the Dangerous Drugs Act, 1930.
>
> Importing, exporting inter-provincially or manufacturing drugs – Section 14 of the Dangerous Drugs Act, 1930 [and]
>
> Drug smuggling – Section 9 of the Control of Narcotics Substances Act, 1997'.

12. In this particular case, as is apparent from the sentencing remarks of the judge, which are contained within the file, the UK authorities were alerted to the conspiracy to import drugs from Pakistan by the Pakistan authorities. I set out the relevant passages from the sentencing remarks as follows:

> 'In 2013, the Pakistani authorities intercepted a package which they found contained heroin. With commendable forethought and cooperation, they contacted the United Kingdom customs and police. There then followed a very thorough investigation into packages that were being sent from Pakistan to various addresses in the United Kingdom. Those packages contained perfectly innocent …

> [re various defendants, including this appellant], the roles of those four defendants played were as recipients of packages. They may not have been aware of the full extent of the conspiracy; they may not have been aware of the quantity of drugs that were coming in… There is evidence that some of them may have had more telephone contact or perhaps been involved in more packages but it is very difficult to be precise…'

13. It is clear from elsewhere within the sentencing remarks that the role which the appellant and others played was as the recipients of packages which were sent from Pakistan and therefore, at least arguably, could be said to have been involved in the export of drugs from Pakistan which according to the country information on Pakistan pursuant to Section 13 of that country's Dangerous Drugs Act, 1930 potentially carries with it the death penalty.

14. This Tribunal was also shown material which was before Judge Sweet concerning publicity which had been given to the arrest and conviction of the various defendants in this case, including the appellant, which included publicity given on the Metropolitan Police's own website regarding these convictions. The defendants including this appellant are described by name and his address is given as well as his date of birth. His photograph is also shown. Curiously (although this is not material to the issue I have to consider) it seems that the sentence which he received is set out incorrectly because he is said to have been sentenced to eight years' imprisonment whereas in fact he was only sentenced to five years' imprisonment. This is not material because the relevance of this publicity is not as to its precise accuracy (which if there was to be a trial would be determined at a trial in Pakistan) but that (it is claimed) it supports the appellant's case that there would be a real risk that the Pakistani authorities know about the activities of which he has been convicted and might very well decide to prosecute him further in Pakistan.

15. As already noted, the judge dismissed this argument at paragraph 63 and essentially gave two reasons, being first that the respondent 'has provided legal advice in the refusal letter that the appellant will not be subject to double jeopardy on return'; and secondly that he had been away from Pakistan since April 2011 and that it was 'unlikely that the authorities will be interested in him on his return'.

16. As a matter of fact that statement is wrong because the appellant had in fact returned to Pakistan briefly in 2014 before he was arrested but further the fact that the respondent had 'provided legal advice' (although that is probably not the most accurate way in which what is said in the refusal letter should be described) does not absolve the judge from making his own findings as to this matter. The appeal after all was an appeal against the decision contained within the refusal letter and it is not an adequate answer to note that the respondent does not agree with the argument.

17. The appellant's claim before this Tribunal is that the 'advice' contained within the refusal letter (which is at page 192 of the appellant's bundle) that the claim that he would be at risk of being tried for a drugs offence 'is inconsistent with the country information above because in Pakistan there is no double jeopardy' is wrong. The relevant parts of this advice received from the Foreign & Commonwealth Office (FCO) are as follows:

> *'Following consultation with a law firm in Pakistan, a letter dated 12 February 2008 from the Foreign and Commonwealth Office (FCO) stated that:*
>
> > *'We [the Pakistan law firm] have reviewed the provisions of law relating to double jeopardy to ascertain whether any individual*

*who has been convicted in the UK and has served time can be tried and sentenced for the same crime on his return to Pakistan and would advise as:*

*Under Section 403 of the Criminal Procedure Code, 1898 (the 'Code') no person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall during the pendancy [sic] of the acquittal or conviction be liable to be tried again for the same offence. However, a person so acquitted or convicted may be tried for (a) any distinct offence for which a separate charge might have been made i.e. where more than one offence are committed by the same person; (b) a different offence arising out of the consequences of the act which constituted the first offence but which consequences together with the act constitute a different offence and (c) any other offence constituted by the same acts which constituted the first offence but which the court which first tried him was not competent to try. …'*

[Various other points are then made before the advice continued as follows]:

*'To ascertain whether... [a] person convicted by a court in UK is covered by Section 403 of the Code it needs to be determined whether the conditions set out for invoking Section 403 of the Code are met... The Code is silent on the issue of whether the term 'court of competent jurisdiction' as used therein extends to cover a foreign court of competent jurisdiction. However, where the legislature has intended to extend cover of any statute to foreign courts it has done so by specific reference i.e. in the Control of Narcotic Substances Act, 1997 specific reference is made to a 'foreign court of competent jurisdiction' and it is therefore safe to conclude that a 'court of competent jurisdiction' for purposes of Section 403 of the Code has to be a court within the territorial jurisdiction of Pakistan...*

*Likewise, the constitutional guarantee provided by Article 13(A) of the Constitution will, in our opinion, not extend to an offence which has been tried and convicted outside Pakistan as the doctrine of dual sovereignty permits successive prosecutions by two states for the same conduct.' (Country of Origin Information Report, Pakistan, August 2013, Para 11.66 – 11.67).''*

18. In my judgment, it is certainly at least arguable from a consideration of the FCO advice that the respondent's conclusion that the appellant's fear that he might be subject to the death penalty if he was returned to Pakistan is 'inconsistent with the country information above because in Pakistan there is no double jeopardy' misunderstands that advice. It is arguable that while there is a general prohibition on double jeopardy, this prohibition would not apply in this case, not just because the conviction by a court in the UK would not be covered but also because what he could be charged with within Pakistan might be considered as coming within the category where 'more than one offence' had been committed by the same person, being importing drugs into the UK (for which he was convicted in the UK) and exporting those (and possibly other) drugs from Pakistan. I note that it was clear from the sentencing remarks that the judge did not rule out there having been more occasions on which the defendants had been involved in the various drugs offences.

19. In my judgment, at the very least, the judge ought to have considered very carefully the evidence provided and his conclusion, contained in just the one paragraph, that it was 'unlikely' that the authorities would be interested in his return and that he would not be subject to double jeopardy because that was the advice of the respondent, is inadequately reasoned.

20. On behalf of the respondent, Mr Clarke did point out that certainly in the skeleton argument that had been before the First-tier Tribunal the specific point was not taken with regard to the FCO advice, but Mr Butterworth confirmed that (as he would have been expected to do) he had expanded on the skeleton argument before Judge Sweet, and that while he did not specifically refer to the FCO advice as set out within the refusal letter, nonetheless he did refer the judge to the evidence regarding the prevalence of the death penalty in Pakistan and did not accept that the appellant would be able to claim the protection of any prohibition against double jeopardy.

21. Furthermore, this is a case where if the appellant's fears are well-founded, he would or might be subject to execution upon return, and in those circumstances any judge dealing with his case has to apply anxious scrutiny. The judge stated in terms within his decision (at paragraph 15) that the respondent's bundle had contained the refusal letter (of which he relied upon the conclusion of the respondent but seemingly without giving separate consideration to the FCO advice on which it was based) and he was under an obligation to consider the conclusion carefully in light of the advice, which he does not appear to have done. At the very least the decision that the appellant would not be at risk on return for the reasons he gave is inadequately reasoned.

22. As I made clear during the course of the hearing, this Tribunal takes very seriously indeed the prevalence of offences involving the importation or distribution of class A drugs and it would only be in exceptional circumstances that an Article 8 claim could succeed preventing deportation, which does not apply in this case. However, it is also the case that Judge Sweet's finding that Section 72 of the Nationality, Immigration and Asylum Act 2002 applies because the event of which the appellant has been convicted is sufficiently serious that he should not be entitled to asylum, is sustainable. Nonetheless he is entitled to protection under Article 3 of the ECHR in circumstances where there is a real risk that he would suffer serious harm on return. His claim is that he would be at real risk of serious harm in that he could be executed on return. He would also arguably be entitled in these circumstances (if this is a real risk) to protection under Article 2. However much revulsion is felt towards foreign criminals who commit offences of this type and however strong the need to deter others who might otherwise be tempted to commit such offences, he is still entitled to the protection afforded by Articles 2 and 3 of the ECHR. In my judgment that argument needed to be considered adequately by the Tribunal and regrettably it was not.

23. Accordingly, it follows that the decision of Judge Sweet must be set aside as containing a material error of law and the decision must be remade.

24. Having canvassed with both parties the course that should now be followed it was accepted by both parties that as the facts in this case did not have to be reconsidered and the Tribunal was only concerned with whether or not the appellant would be at risk on return of facing execution, it would be appropriate to retain the appeal in this Tribunal and accordingly I will make appropriate directions."

Judge Craig made directions in relation to the service of further evidence relating to the issue of double jeopardy.From what I can see there have been a number ofhearings and directions issued relating to this case.

The matter again came before Judge Craig on 15 December 2017. There is a Note of Hearing and Further Directions prepared by Upper Tribunal Judge Craig. At paragraph 2 he recorded that the

> "…..sole issue before the Tribunal is as to whether or not the appellant, who was sentenced to five years' imprisonment for his involvement in conspiracy to import class A drugs might be at risk of being prosecuted again in Pakistan and sentenced to death. … These are the issues which will have to be canvassed in due course and among the directions I made was that it was not intended at the resumed hearing to hear any further evidence from the appellant or members of his family. I decided and remain of the opinion that the only possible reason why it might be unlawful to return this appellant to Pakistan is if he is at real risk of being executed on return. There are no other reasons arguably so compelling that he should not be deported".

An extension of time was given for the Appellant to serve the evidence of a country expert, Dr Livia Holden. The matter was listed for a further case management hearing.

The matter again came before Judge Craig on 17 April 2018. On that occasion it was not possible for the Appellant to provide expert evidence within the time frame originally envisaged and that the Respondent had not been able to make submissions relating to it. Judge Craig made further directions giving the Respondent permission to adduce further evidence and to make further submissions but stating that this must be lodged with the Tribunal and served on the Appellant by no later than Friday, 15 June 2018.

The matter again came before Judge Craig on 27 July 2018. On this occasion the Secretary of State's representative informed Judge Craig that the Respondent's intention was to adduce further evidence relating to the Appellant's co-defendants in the criminal trial who have been deported to Pakistan because it is the Respondent's case that in the absence of any evidence that anything untoward has happened to them as a result of their activities it was extremely unlikely that the Appellant would be treated differently.

Judge Craig made a number of further directions which are as follows:

> "1) The respondent is given permission to adduce evidence as to the dates on which the appellant's co-defendants were deported to Pakistan, so long as this evidence is filed with the Tribunal and served on the appellant by no later than Friday 10 August 2018 (it is recorded that on behalf of the respondent Mr Melvin indicated that he would be in a position to supply this evidence

within seven days). [I record that this evidence has been filed in accordance with this Direction]

2) Both parties are given permission to adduce evidence if available, as to what, if any, actions have been taken by the Pakistan authorities in respect of the appellant's co-defendants, and in particular whether any of them have subsequently faced prosecution in respect of drugs offences said to be have been committed by them before their return, so long as such evidence is lodged with the Tribunal and served on the other party by no later than Friday 7 September 2018.

3) The appellant is given permission to adduce evidence, if available, with regard to any person deported to Pakistan who is said subsequently to have been charged with drugs offences alleged to have been committed before their return, again so long as this evidence is lodged with the Tribunal and filed with the respondent by no later than Friday 7 September 2018.

4) The appellant may also produce a supplementary report from Dr Holden, if so advised, again so long as this report is lodged with the Tribunal and served on the respondent by no later than Friday 7 September 2018.

5) This appeal will be listed for hearing on the first available date, to be notified to the parties, on or after Monday 24 September 2018.

6) If and to the extent that the appellant wishes to rely upon the evidence of Dr Holden, she must be available at the hearing for cross-examination. [I record that on 9 August 2018 the appellant wrote to the Tribunal that Dr Holden had advised that she does not attend Court Hearings and requesting a further 6 weeks in order to instruct an alternative expert who does. I accordingly amend the direction I made at 4) above and extend the time by which the appellant may lodge and serve a supplementary report (which may be by an alternative expert) to Friday 22 September 2018, as the appellant has requested. The Hearing will not now be listed before Monday 15 October 2015]."

On 1 October 2020 the matter came before me. It was listed for a CMR. The Appellant intended to rely on Article 8 ECHR in relation to his family life with his daughter who was born on 15 August 2020. His evidence is that he is the child's full-time carer. His wife is in full-time employment. The Secretary of State's case as set out in Mr Jarvis's written submissions is that this is a new matter (Section 85(4) – (6) of the 2002 Act) and accordingly the Appellant needs the Secretary of State's consent in order to enable the Upper Tribunal to determine the matter. There is considerable written argument asking the Upper Tribunal to depart from its decision in Birch (Precariousness and mistake; new matters) [2020] UKUT 86, in which the Upper Tribunal concluded

that the prohibition on considering new matters in Section 85 of the 2002 Act does not apply to proceedings in the Upper Tribunal.

The Appellant was not successful in his attempt to challenge the decision of the First-tier Tribunal in relation to Article 8 of ECHR or Section 72 of the 2002 Act. As properly identified by Judge Craig, the only issue for the Upper Tribunal to determine is that relating to double jeopardy and the death penalty. Should the Appellant now wish to raise a claim under Article 8, it is necessary for him to make an application to the Secretary of State, who will consider it within the framework of paragraph 353 of the Immigration Rules. In any event, Ms Reid conceded that in respect of raising a new matter in the light of Mr Jarvis's written submissions in respect of Birch, the Appellant has an uphill struggle.

Ms Reid relied on a skeleton argument of 11 February 2021. There was Respondent's preliminary "new" matter submissions of 20 May 2020 drafted by Mr I Jarvis, the Respondent's written submissions of 14 June 2018 prepared by Mr T Melvin and the Respondent's preliminary submissions also prepared by Mr T Melvin of 30 September 2020.

At the hearing before me Ms Reid confirmed that the expert was not willing to attend the hearing to give evidence. The Appellant has not been able to instruct another expert because of financial constraints. He does not have the benefit of legal aid.

The Appellant's evidence

Ms Reid indicated that the Appellant intended to give evidence. I queried this in the light of the Appellant not being an expert in Pakistani law. Ms Reid drew my attention to paragraph 22 of the Appellant's witness statement. This reads as follows:-

> "I have clearly demonstrated that on the basis of the evidence available I face a real risk of suffering serious harm on return to Pakistan from the United Kingdom and on that basis I believe that I in fact qualify for humanitarian protection. My case was well-reported and documented in the national press and associated media and my family will face serious and dangerous repercussions if I was returned there. Indeed, the police have visited my family on numerous occasions in Pakistan and numerous threats have been made against my family as witnessed by my father [AS] and people in the surrounding area to where my family resides."

The Appellant gave evidence adopting his witness statement as his evidence-in-chief. The Appellant clarified in examination-in-chief that he received a call from his father whilst he (the Appellant) was in prison, stating that the police had visited the family home. The police believed that the Appellant had already returned to Pakistan. They had visited the family home twice since, in 2015 and 2016. There have been no visits since 2016.Mrs Aboni indicated that the Secretary of State did not accept the Appellant's evidence. She did not ask him any questions in cross-examination.

The Appellant relied on a certificate prepared by an advocate in Pakistan, Muhammad Sharif Arian. The date on the document is illegible. It reads as follows:

> "This is to certify that I am the council of Mr Zahid Shah S/O Syed Amin Shah, whose date of birth 09-01-1987, holding Pakistani passport No. CU5149993, who return from United Kingdom to Pakistan on 01-03-2017 and arrested on 03-03-2017, the charge is importing & exporting heroin from Karachi-Pakistan to United Kingdom, who is currently under trail in Karachi Jail."

**Dr Holden's evidence**

Dr Holden states that the law in Pakistan provides constitutional guarantees against repeated prosecution or punishment for the same offence (Article 13(a) of the Constitution and Section 403 of the Criminal Procedure Code). In principle, it is required that the accused was tried and that the trial was held by a "competent jurisdiction".

According to "Country of Origin Information 2008 the term 'court of competent jurisdiction' does not include a court located outside Pakistan because 'where the legislature has intended to extend cover of any statute to foreign courts if (sic) has done so by specific reference'.

In accordance with Article 3 Pakistan Penal Code 'any person liable, by any Pakistan Law, to be tried for an offence committed beyond Pakistan shall be dealt with according to the provision of this Code for any act committed beyond Pakistan in the same manner as if such act had been committed within Pakistan'. She states as follows:-

> "14. Further it must be signalled that the extent of the double jeopardy principle is questioned within Pakistani legislation, specifically concerning drugs-related offences. In 1998, the Secretary of the Law and Justice Commission was requested to examine whether trial in drug-related offences under the Customs Act 1969 and subsequently under the Control of Narcotic Substances Act 1997, tantamount to double jeopardy, prohibited under Article 13 of the Constitution? The Law and Justice Commission noted the ambiguity of the law since prosecution for the same offence is possible both by ordinary courts and special courts created under the newly enacted Control of Narcotic Substances Act 1997.
>
> 15. On the basis of the above-mentioned information I am of the opinion that to date the protection against double jeopardy in Pakistan, although adequately mentioned by the Constitution and the Criminal Procedure Code, remains uncertain for what concerns specific aspect of drug-related offences for which special courts have been created. Additionally, the prevalent interpretation regarding the meaning of the term 'competent

court' is that this does not cover 'foreign country jurisdiction', unless specified."

At paragraphs 16 to 18 Dr Holden considers how plausible or likely it is that the Pakistani authorities would try the Appellant for the earlier drug offences despite him having already been sentenced in the United Kingdom. She states:-

"16. According to the above-mentioned information the law does not prevent Pakistani authorities to try the Appellant in Pakistan for earlier drugs offences for at least two reasons:- 1) the double jeopardy does not extent (sic) to foreign country jurisdiction unless clearly specified by the legislature, 2) the present legislation in Pakistan contains certain ambiguities specifically regarding the prosecution of drug-related offences in connection with the creation of special courts under the Control of Narcotic Substances Act 1997.

17. Available information from a 2015 report by Maybritt Jill Alpes of the University of Amsterdam indicates that returnees to Pakistan are likely to be the victim of money extortion, detention and imprisonment or threats of detention and imprisonment.[4]According to the United States Department of State (2012): Country Report on Human Rights Practices for 2012 Pakistani police and prison officials frequently extort money from prisoners and their families. Irrespectively from whether or not the Appellant is a convicted criminal in the eyes of Pakistani law enforcement authorities, in my opinion, he would be in a vulnerable situation and likely danger of being the victim of undue pressure by state and non-state actors. To the best of my knowledge as a failed asylum seeker returning to Pakistan the Appellant and his family will be the victim of extortion, physical violence and threat of detention and imprisonment. In my opinion the level of these risks ranges from high probability to very high probability.

18. Although, I am not in the position to say whether or not the Appellant will be tried if removed to Pakistan, in my opinion there is an almost certain probability that the Appellant will be detained or threatened to be detained and submitted to physical violence. Hence, the deplorable conditions of prisons and the occurrence of torture during detention should be taken into account when deciding on the deportation of the Appellant to Pakistan. Additionally, since the legislation does not extend the double jeopardy principle to jurisdiction outside Pakistan and since there is a significant ambiguity within the present legislation regarding drug smuggling in Pakistan (see also next paragraph), I am of the opinion that the fear of the Appellant to be tried in Pakistan is highly plausible."

Dr Holden goes on to consider the offence for which the Appellant would likely be tried and Pakistan's commitment to eradicate drug smuggling which has strengthened since it has been identified as one of the main income sources of terrorism.

Dr Holden was specifically asked to what extent the Appellant was likely to be of adverse interest to the authorities and she stated:

> "21. I am not in the position to say whether or not Pakistani judiciary will be influenced by the conviction of the Appellant by the British court. However, Pakistan's commitment to fight against drug trafficking has been reiterated constantly by political leaders in the past twenty years by enacting special legislation and by establishing new law enforcement authorities dedicated to the control of narcotics."

In the same paragraph she states that:

> "Given the Pakistani authorities have already collaborated with British authorities to apprehend the Appellant and since Pakistani law does not prevent the prosecution of the Appellant, I am of the opinion, that certain passages of the sentencing remarks may also be of adverse interest to the Appellant in Pakistan."

De Holden concludes that the decision of the Respondent disregards "the information regarding the extent of protection afforded by the double jeopardy principle in Pakistan as well as the inherent ambiguity of Pakistan law allowing for double jeopardy in particular for drug-related offences".

In the expert's opinion the Secretary of State has not taken into consideration that the Pakistani authorities collaborated with the British authorities in prosecuting the Appellant, which is consistent with Pakistan's aggressive policy for the control of narcotics.

## The Secretary of State's evidence

The Secretary of State relied on a letter to the Tribunal marked for the attention of Upper Tribunal Judge Craig from Mr T Melvin of 1 August 2018. It records that the Appellant and his co-defendants in the criminal trial were deported between September 2015 and February 2017. Mr Melvin stated that as far as he is aware, the Home Office has not been provided with any credible evidence that any of the co-defendant's have been detained or face prosecution again for the crimes that they have been convicted of and sentenced for in the UK.

## The background evidence

The Secretary of State relies on background evidence as set out in the Reasons for Refusal Letter and in Judge Craig's **e**rror of **l**aw **d**ecision**.** However, the Respondent relies primarily on the Country Policy and Information Note

Pakistan: Prison conditions Version 3.0 November 2019("the 2019 CPIN")**.** The salient parts read as follows:

4.2 Double jeopardy

4.2.1 Section 403 of the Code of Criminal Procedure Code, 1898, prescribes that no person, who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall or awaiting the outcome of the acquittal or conviction, be liable to be tried again for the same offence. However, a person so acquitted or convicted may be tried for (a) any distinct offence for which a separate charge might have been made, i.e. where more than one offence was committed by the same person; (b) a different offence that occurred as a consequence of the first offence; (c) any other offence constituted by the same acts which constituted the first offence but which the court which first tried him was not competent to try[2].

4.2.2 Foreign and Commonwealth Office (FCO) officials at the British High Commission in Islamabad, in correspondence dated April 2019 with the Country Policy and Information Team (CPIT), indicated that the double jeopardy principles were upheld in Pakistan's courts where a decision was reached in a foreign jurisdiction, providing the court reaching the decision was considered to be one of competent jurisdiction. The FCO could not find an example of a court in Pakistan concluding that a foreign court was not of competent jurisdiction. As examples, the FCO cited 2 cases in which Pakistan courts had upheld the decisions of cases heard in the Royal Court of Jersey and the UK Crown Court[3].

4.2.3 Regarding offences committed by outside of Pakistan, the FCO letter noted:

's.188 Criminal Procedure Code provides for the jurisdiction of criminal courts and tribunals to extend to offences committed by a citizen of Pakistan abroad. Most of the case-law concerning this provision deals with offences committed in the tribal and administered territories which do not otherwise fall within the jurisdiction of the Pakistani courts. In Abdul Qadir Shah v Muhammad Qasim PLD 2014 Balochistan 28, the High Court held that in an instance where an offence of murder was committed outside of the territorial restrictions of Pakistan (in a border town in Afghanistan) by Pakistani citizens, the court did have the jurisdiction to proceed in trying the case so long as the procedural requirement of s.188 was fulfilled by the Federal Government authorising the courts to do so. This was allowed in this instance because evidence was available in the territory of Pakistan and not Afghanistan. In Muhammad

Zubair v Government of Pakistan 2014 PLD 31 Islamabad (a UK extradition application) it was argued on behalf of the Requested Person that he had a right to be tried in Pakistan where he would have certain rights not provided for in UK law. The Islamabad High Court held that where the Federal Government had not granted permission under s.188 (and no such permission had been granted in that case) there could be no proceedings in Pakistan for an offence committed in the UK.'[4]

4.2.4 An August 2014 International Journal of Humanities and Social Science (IJHSS) article indicated that Article 3 of the Pakistan Penal Code (PPC), relating to 'punishment of offences committed beyond, but which by law may be tried within Pakistan', could be used to put a person on trial in Pakistan for drug trafficking offences that had been committed abroad. It stated:

'It should be noted that in Pakistan, trafficking of more than a kilogram of a drug is punishable by death, and the sale of adulterated drugs (not for medical purposes) carry lengthy prison sentences. Further, such offences committed by a Pakistani national, even if the crime was committed outside Pakistani borders, can be tried under Pakistani courts. According to Chapter I, Article III of the Pakistani Penal Code (Act XLV of the Code of 1860), 'Any person liable, by any Pakistan Law, to be tried for an offence committed beyond Pakistan shall be dealt with according to the provision of this Code for any act committed beyond Pakistan in the same manner as if such act had been committed within Pakistan.' Article III is of significant importance to the issue of drug trafficking, as trafficking frequently involves the sale of contraband across borders.'[5]

4.2.5 On 12 July 2019, the Pakistan Penal Code (Amendment) Ordinance, 2019, was promulgated by the President. The Ordinance amends Article 3 of the PPC, in which the following proviso was added: 'Provided that where the accused has been extradited into Pakistan or brought into Pakistan under any arrangement with a foreign country or authority other than extradition or where against an accused any evidence is used in court which has been obtained from a foreign country, the court, upon conviction, may punish such accused with any punishment provided for that offence except punishment of death'.[6]

[2] Code of Criminal Procedure, 1898, (s403), url.
[3] FCO letter to CPIT, 12 April 2019, Annex A.
[4] FCO letter to CPIT, 12 April 2019, Annex A.

[5] IJHSS, 'The Treatment of Drug Offences in Sharia-Based Countries', (page 59), August 2014, url.
[6] The Gazette of Pakistan, 'Ordinance No. VI of 2019', 15 July 2019, url."

**Annex A**

In the 2019 CPIN at 4.2.2 the source is a FCO letter to CPIT of 12 April 2019 which appears at Annex A of the document. It is necessary for the purposes of this decision to set out part of Annex A;-

"You have included the following enquiries:

Are there any facts and figures related to the willingness of the Pakistan authorities to pursue overseas offences? You have made it clear that this is to be considered in the context of cases where there has already been a conviction in the UK. You ask whether the UK courts are considered to be courts of 'competent jurisdiction'. You have also asked about whether there is any information as to the range of sentence passed with respect to rape cases.

**Double jeopardy**

Principles of double jeopardy are dealt with under Article 13 of the Constitution and s.403 of the Criminal Procedure Code. I am not aware of any equivalent to China's Article 10 CL. Such research as we have been in a position to conduct would suggest that the double jeopardy principles are upheld where a decision has been reached in a foreign jurisdiction (as long as the court reaching the decision is considered to be one of competent jurisdiction – we have not found an example of a court in Pakistan concluding that a foreign court was not of competent jurisdiction for these purposes). In the case of Rashid Hassan v The State 2010 Pr.CR.L J. 1902 the Sindh High Court examined and upheld an acquittal rendered by the Royal Court of Jersey. Article 13 and s.403 were specifically addressed. Further, with respect to consideration of the question whether a UK court is considered to be one of competent jurisdiction, regard can be had to the case of Javed Akhtar v The State 2017 SCMR 1514. In that matter the Supreme Court upheld the validity of a sentence passed in a UK Crown Court and reiterated the principle of Comity.

**Offences committed outside of Pakistan**

s.188 Criminal Procedure Code provides for the jurisdiction of criminal courts and tribunals to extend to offences committed by a citizen of Pakistan abroad. Most of the case-law concerning this provision deals with offences committed in the tribal and administered territories which do not otherwise fall within the jurisdiction of the Pakistani courts. In Abdul Qadir Shah v MuhammadQasim PLD 2014

Balochistan 28, the High Court held that in an instance where an offence of murder was committed outside of the territorial restrictions of Pakistan (in a border town in Afghanistan) by Pakistani citizens, the court did have the jurisdiction to proceed in trying the case so long as the procedural requirement of s.188 was fulfilled by the Federal Government authorising the courts to do so. This was allowed in this instance because evidence was available in the territory of Pakistan and not Afghanistan. In Muhammad Zubair v Government of Pakistan 2014 PLD 31 Islamabad (a UK extradition application) it was argued on behalf of the Requested Person that he had a right to be tried in Pakistan where he would have certain rights not provided for in UK law. The Islamabad High Court held that where the Federal Government had not granted permission under s.188 (and no such permission had been granted in that case) there could be no proceedings in Pakistan for an offence committed in the UK.

**Practical considerations & opinion**

From the above it could be taken that the 'appetite' to reconvict for offences committed outside of Pakistan and subject to proceedings elsewhere does not appear to be high and would in any event be severely constrained by the provisions referred to. As I have previously indicated, I do not have access to any facts or figures and would not claim that the above in any way amounted to anything approaching exhaustive research. Over and above the legal restraints which would need to be overcome, there are clearly also practical considerations which would be relevant to the viability of any renewed proceedings. This is a system in which rape convictions (for example) are difficult to achieve. There is significant emphasis on a contemporaneously given ocular account (hence in part my query about where the victim may reside) and there is also an expectation of forensic evidence. Where that evidence has been acquired in the UK, it seems improbable in the extreme that it would be supplied to the Pakistan for proceedings here – both because the individual had already been convicted and because of death penalty concerns.

**Sentence**

There is no information available as to the actual sentences passed in these types of cases. However, it worthy of note that strict conditions are required to be fulfilled before a court could take the view that a death sentence could be considered. Section 375 of the Pakistan Penal Code defines the constituent elements of rape and Section 376 provides for sentencing possibilities, which includes imprisonment of not less than 10 years up and up to 25 years and the death penalty. Under Section 376, the death penalty is applicable in aggravated cases falling under any of the following descriptions:

1. When rape is committed by two or more persons in furtherance of common intention of all.

2. When the rape is committed of a minor or a person with mental or physical disability.

3. When the rape is committed by a public servant including a police officer, medical officer or jailor, taking advantage of his official position.

4. Where the rape is committed resulting in grievous bodily harm that involves loss of any part of the victim's body or impairment or disfigurement of such part as defined under sections 333, 335 and 337 of the Pakistan Penal Code.

It may also be worthy of note that, although we have no data to support this, it is our observation that courts are extremely reluctant to consider a death penalty in the absence of a judicial confession.

There is a more recent report; Country Policy and Information Note Pakistan: Actors of protection Version 1.0 June 2020 ("the 2020 CPIN") which also deals with double jeopardy and says broadly the same as the earlier 2019 CPIN.

**Submissions**

Mrs Aboni relied on the Reasons for Refusal Letter and the various documents prepared for the purposes of the hearing. She drew my attention to the absence of evidence of any deportee having been retried. The expert does not engage specifically with this issue. There is no evidence to corroborate the Appellant's evidence that the police visited his home. She relied on the CPIN 2019 with reference to Annex A. She asked me to attach little weight to the letter from the advocate in Pakistan and to treat the isolated evidence with caution. The background evidence does not support the Appellant's case.

Ms Reid in submissions acknowledged the lack of evidence of specific cases to support the Appellant's case. However, she said that details of individuals were not within the grasp of the expert. She highlighted the advocate's certificate that supports that one of the co-defendants has been arrested. She said that the Appellant's evidence before the First-tier Tribunal was that he came about the certificate from his family in Pakistan, who had made enquiries. She referred to the prevalence of the death penalty supported in the background information. The law in Pakistan allows for people to be charged with separate offences arising from the same matter under two separate pieces of legislation. She said that Annex A clearly refers to offences of rape and does not consider drug offences. It is therefore of limited evidential value.

**Findings and reasons**

It is baffling that Dr Holden is prepared to produce a report, but not prepared to give live evidence. I do not know whether solicitors were aware of her position before instructing her to prepare a report.

The first issue to determine is whether it is reasonably likely that this Appellant will be retried on return to Pakistan. At paragraph 18 of Ms Holden's report she states that she is not in a position to say whether the Appellant will be tried and the remainder of that paragraph is concerned with her view that the Appellant will nevertheless be detained or threatened to be detained and subjected to physical violence or threat of physical violence. She goes on to talk about the conditions in prisons in Pakistan. The Appellant's case is not that he will be mistreated as a failed asylum seeker, contrary to the evidence of Dr Holden. His case is that he will be retried and faces the death penalty.

Dr Holden gives reasons why the law in Pakistan would not prevent the Appellant from being retried but ultimately states she is not in a position to say whether he will be tried or not. This undermines her ultimate conclusion at paragraph 18 in respect of this matter that she is of the opinion that "the fear of the Appellant to be tried in Pakistan is highly plausible".

Dr Holden relies on a Country of Origin Information Report dating back to 2008 in which the terms "court of competent jurisdiction" does not include a court located outside Pakistan. However, this conclusion is undermined by the more recent background evidence to which there is no response from Dr Holden, specifically paragraph 4.2.2 of the 2019 CPIN and Annex A (that the FCO could not find an example of a court in Pakistan concluding that a foreign court was not of competent jurisdiction).

While I take on board Ms Reid's submission in relation to Annex A, namely that the British High Commission was concerned with rape cases, the issue concerning whether UK courts are considered to be a court of competent jurisdiction and the advice given was not with reference only to rape convictions. The research conducted by the FCO suggests that the double jeopardy principles are upheld where a decision has been reached in a foreign jurisdiction and that the FCO has not found an example of a court in Pakistan concluding that a foreign court was not of competent jurisdiction. This information is not specific to an offence of rape. It is supported by the fact that Dr Holden was unable to give an example of any individual having been prosecuted in Pakistan in breach of double jeopardy principles.

Dr Holden relies on Article 3 of the Pakistan Penal Code, which allows the law to try an individual for an offence committed beyond Pakistan. However, this simply supports the Pakistani government having extra-territorial jurisdiction.

Dr Holden highlights that the Law and Justice Commission noted the ambiguity of the law since prosecution for the same offence is possible by both ordinary courts and special courts created under the newly enacted Control of Narcotic Substances Act 1997. While this may well be the case, I note that the Commission was requested to examine the issue in 1998 and my attention has not been drawn to any individual having been prosecuted in Pakistan for the same offences since then, never mind evidence that a deportee has been retried for an offence.

Whilst there may be some ambiguity in Pakistani law, particularly in the light of the 1997 legislation, there is simply no evidence of deportees being retried for offences on return to Pakistan. Despite a commitment by the authorities in Pakistan to prosecute drug traffickers there is no evidence that the Pakistani authorities wish to or intend to prosecute individuals who have already been prosecuted in overseas courts.

Dr Holden's evidence is wholly unpersuasive and significantly out of date.

I have taken into account the evidence from the Appellant about visits to his home in Pakistan by the police. This was evidence that he gave before the First-tier Tribunal. The First-tier Tribunal rejected the Appellant's evidence. Again, I refer to the error of law decision. There was no successful challenge to the credibility findings. In any event, considering that evidence in the round, if it is the case that the Appellant's family was visited by the police, it is not reasonably likely in my view that this concerned the Appellant's involvement in the 2014 offences.

I have taken into account the letter from the advocate in Pakistan concerning one of the co-defendants. However, I accept the Secretary of State's submission in respect of this one isolated piece of evidence. Its reliability is undermined when considered in the context of the evidence as a whole. There is no background evidence which can point to any forcibly returned offender facing punishment from the Pakistani authorities for the same offence. I attach little weight to this evidence.

I have taken into account the letter from Mr Melvin of 1 August 2018. This piece of evidence is not wholly reliable bearing in mind it indicates that the Appellant has been removed when that is clearly not the case. However, it is not material.

The Appellant has failed to establish that he is at risk of being retried in Pakistan. It is not necessary to consider the possibility of the death penalty being imposed should be convicted.

Taking into account all the evidence, the Appellant has failed to establish that his return to Pakistan would be in breach of the UK's obligations under Articles 2 or 3 of ECHR. Thus, his appeal is dismissed.

## Notice of Decision

The appeal is dismissed

## 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

Upper Tribunal Judge McWilliam 16 March 2021