



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02255/2019**

THE IMMIGRATION ACTS

**Heard at Field House
On 15th December 2022**

**Decision & Reasons Promulgated
On the 28 February 2023**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

**'XX (IRAN)'
(ANONYMITY DIRECTION CONTINUED)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: *Mr G Lee*, instructed by Turpin & Miller LLP Solicitors
For the Respondent: *Ms A Ahmed*, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of his protection and human rights claims.

The History of the Claim

2. In a decision of this Tribunal promulgated on 20th October 2021, we concluded that an earlier First-tier Tribunal, Judge Abebrese, had erred in law in allowing the appellant's appeal. In reaching that conclusion, we set aside the FtT's decision without preserved findings of fact. We canvassed with the legal representatives at that hearing whether they wished us to

remit the matter to the FtT but they confirmed that they wished us to retain remaking in the Upper Tribunal. We specifically considered §7.2 of the Senior President's Practice Statement, taking into account the parties' views, the fact that the appeal had already been considered twice by the FtT, and our ability to determine the remaking expeditiously. We agreed to the parties' request.

3. There had been an earlier undisturbed FtT decision of Judge Price, published on 16th December 2005, in which Judge Price had rejected the appellant's asylum and human rights claims. The appellant later made further submissions that the respondent accepted as a fresh claim, but nevertheless refused his protection and human rights claims in her decision dated 5th February 2019.
4. There is a protracted litigation history with previous abortive hearings and case management hearings. We do not dwell on these in any detail, except to make two points. First, there had been an earlier adjournment whilst the respondent sought to clarify her position in light of the archiving of a Country Policy and Information Note or "CPIN", "Double Jeopardy," January 2018. The appellant places particular emphasis on the fact that the CPIN has been archived, saying that it undermines the refusal decision, and that his evidence since the CPIN on the relevant risk of double-jeopardy should be preferred. Second, this Tribunal and the FtT had issued directions (albeit different in content) concerning the appellant's claim to have worked with the Security Service (MI5) and the extent to which that organisation would be willing to confirm the same, or the respondent would be willing to make appropriate enquiries. No such confirmation from the Security Service had been forthcoming, nor is there any relevant material to which the respondent has access. I deal with these matters later in this decision.
5. I turn to the documents which the parties provided to me and the issues which I identified and agreed with the representatives that I should decide.

Documents and Issues

6. I considered a consolidated bundle prepared by the appellant running to 680 pages, which I refer to as "AB". This bundle included numerous statements written by the appellant himself when he was not legally represented. As Mr Lee accepted, the statements comprised a mixture of evidence of the fact, with legal submissions and it was practically impossible to extract the evidence of fact from his legal submissions.
7. I accepted that it was not appropriate for them to be redrafted and so whilst I have considered the statements, a substantial proportion of them includes assertions and legal submissions rather than evidence. The appellant also provided a supplementary bundle ("SB") which included an expert report of Dr Mohammad Nayyeri, relevant to the issue of the likelihood of the appellant being re-prosecuted if he were returned to his country of origin, Iran. The supplementary bundle also contains excerpts

from a website produced by the appellant, which I do not name as it would otherwise risk 'jigsaw' identification. I am satisfied (and Ms Ahmed accepted) that the website itself exists, having been created by the appellant in or around 2017.

8. The appellant gave evidence in English, without the need for an interpreter. He adopted his witness statements and Ms Ahmed cross-examined him.
9. The respondent also relied on a position statement of 17th August 2022 and the appellant relied upon a skeleton argument written by Mr Lee of 14th December 2022.
10. Mr Lee had set out in the skeleton argument the issues which Ms Ahmed accepted were the correct ones.

Issue (1)

11. The first issue was whether the appellant had rebutted the presumption under Section 72 of the Nationality, Immigration and Asylum Act 2002. The appellant accepts that the crime, of which he was convicted, of rape, was a particularly serious crime, but he disputes, for the purposes of Section 72(2), that he continues to constitute a danger to the community of the UK. The question was therefore whether he had rebutted the presumption. If he has not rebutted the presumption, then I am bound to dismiss his protection claim, noting the authority of Essa (Revocation of protection status appeals) [2018] UKUT 244 (IAC). The gist of the appellant's appeal on issue (1) is that he has a psychologist's report indicating that he is at low risk of further offences, which he says is corroborated by the fact that he has been removed from the Sex Offenders' Register, with letters relevant to risk from the Metropolitan Police.
12. The respondent says that the appellant has consistently denied responsibility for the rape for which he was convicted and he has protested his innocence. He never gave any indication of having insight into the impact of his actions on his victim, nor has he undertaken any rehabilitation courses. The fact that the offence was a single offence, and was committed twenty years ago does not prevent the appellant from continuing to constitute a danger.

Issue (2)

13. The second issue was whether the appellant has a well-founded fear of persecution based on a combination of his claimed engagement with the Security Service and his hosting an environmental campaigning website. He accepts that the prime focus of the website is environmental campaigning but he says that the website is unequivocally critical of the Iranian and other neighbouring regimes and the impact that the regimes' actions have had upon the local marine environment. The appellant refers

to these two characteristics in the context (but not as separate claims) of the Iranian regime's likely suspicion and/or hostility to those returning from countries such as the UK after a long period of time, in circumstances where the Iranian regime would be aware of the appellant's conviction for rape in the UK.

Issue (3)

14. The third issue was whether the appellant faced a real risk of serious harm contrary to Article 3 ECHR, (not relied on as a Refugee Convention reason) as a result of the Iranian regime's likely attitude towards his conviction for rape, or that his removal would be in breach of his article 8 rights. The appellant says that his case does not need to go as far establishing that he will be the subject of further prosecution for the same offence (double jeopardy), with the possible sanction for rape in Iran of the death penalty. Although he claims there is a real risk of both prosecution and the death penalty, he says that his claim should succeed because at the very least, on return, he will be at the risk of detention and interrogation, bearing in mind the combination of the other factors relied upon for Convention reasons.
15. In terms of the appellant's Article 8 claim, while the appellant has family members in the UK, he does not rely on them in an Article 8 sense. For the purposes of his claim of a right to respect for his private life in the UK, the appellant refers to the period of time that he has spent in the UK (even if much of it has been without leave) and his integration following his release from prison in 2005. He relies on his circumstances as constituting very compelling circumstances for the purposes of Section 117C(6) of the 2002 Act.

Findings

16. I do not recite the representatives' submissions or the evidence given, except where necessary to resolve competing submissions and to resolve any areas of factual dispute.
17. I turn first to Judge Price's 2005 decision. I bear in mind that the decision is a starting point and not a legal 'straitjacket' and that I may depart from the earlier decision on a principled and properly reasoned basis (see R (MW) v SSHD (fast-track appeal: Devaseelan guidelines) [2019] UKUT 00411 (IAC)). I bear in mind, as well, that facts pertinent to the appellant were not brought to the attention of Judge Price, particularly the appellant's assertion that he had dealings with the Security Service. Bearing in mind the 'Devaseelan' principles, where these could have been brought to the attention of Judge Price, the new evidence should be treated by me with the greatest circumspection. The appellant answers this by saying that his failure to refer to his activities before is explained by his natural reticence to reveal matters that he had understood to be

confidential. I am also conscious, however, of other matters that were not before Judge Price and which post-dated his decision, namely the appellant's environmental website, set up in 2017.

18. In Judge Price's decision, a copy of which was at pg. [374] AB, he recorded the appellant's immigration history (and I find) as follows. The appellant entered the UK on 31st December 1992, with leave to remain as a student. He successfully extended his leave up to October 1999. It was in this period before his later arrest on suspicion of rape that he now says that he was involved with the Security Service. On 9th October 2000, the appellant was arrested on suspicion of rape and was convicted at the Central Criminal Court on 24th October 2001, and sentenced to seven years' imprisonment. A deportation order was made on August 2005, against which the appellant appealed. The appellant claimed before Judge Price to fear persecution for a Refugee Convention reason, namely as a member of a 'particular social group', of convicted sex offenders, which would cause particular offence in Iran, under a conservative Muslim regime. He relies on the UK press coverage of his conviction at the time. He also claimed to have been an outspoken critic of the Iranian regime, with the evidence going back as early as 1993 about his speaking out against the completion of a nuclear power plant in Iran.
19. Judge Price referred at §13 to the documents before him. He noted that the appellant had failed to comply with directions and that the only papers before him were those lodged at the hearing itself, which included a lengthy document in which the appellant reiterated his claimed innocence and complained about the Prison Service. It contained substantial references to the law, but little by way of factual information. Judge Price recorded his concern at §§14 to 16 of his decision that whilst the appellant had been released from custody since a previous hearing, the respondent had made no attempt to review his current circumstances and it might make sense for the original deportation decision to be withdrawn, but it was not.
20. Judge Price referred to the appellant's claim to have a sister in Bristol and four cousins in the UK and two sisters, two brothers and a wider his family supporting him in Iran. Judge Price noted that the appellant had shared a flat in London with a former Iranian government minister, and Judge Price accepted that the Iranian Consulate in London was aware of his conviction. Judge Price recorded that his family members in Iran claimed to have been threatened by religious gangs as a result of his conviction; and also at §35, that the appellant no longer had his passport, which he had sent to the Iranian Embassy. I note in passing his oral evidence to me that he believed that the respondent or the UK Criminal Courts had lost his passport when it was taken from him upon the last day of his criminal trial, on his conviction.
21. Judge Price referred, at §43, to the submission that although those assessing him stated that he was at low risk of offending, the assessors were concerned that the risk assessment result was invalid because the

appellant was attempting to conceal some of his emotional and personal difficulties, and he had scored high for the so called "lie scale" in the risk assessment test.

22. Judge Price concluded:

"55. I do not accept that he or anyone else has received any letters from the authorities indicating that they would have an interest in him on his return.

56. The further limb in his asylum claim is the courageous and novel proposition advanced by him and endorsed by Counsel that because of his prison sentence - seven years for a very serious rape means that he is part of a social group, as recognised by the Refugee Convention. One has only to utter this statement to recognise that it is wrong. He does not come within the terms of the Refugee Convention and will not be at risk on return.

57. As to any claims under Articles 2 and 3 there is no evidence that sexual offenders, who have been sentenced outside Iran will be of any interest to the authorities on return or more importantly receive treatment that is likely to engage the high threshold of Articles 2 and 3. No objective evidence has been produced to show that he will be at risk on return. The one article he has produced does not assist him.

58. I accept that the Iranian community in London may well be aware of his behaviour and that this is likely to be known in Iran. He runs no real risk on return under this heading.

...

60. I accept there is a low risk of offending and I also note the comments made by the expert dealing with lack of candour in the appellant's interview.

...

65. As to his Article 8 claim, given the number of years he has spent in the UK (some eight years before he was in prison) he is bound to have established some form of personal life but even given that he has a sister in this country (we have no evidence on this) this does not go beyond mere emotional ties and yet he has a large family in Iran."

23. From these statements, I draw together the following points on Judge Price's decision. First, I accept that the evidence before Judge Price as to double-jeopardy was limited. There was specific reference to only a single article at §57, as opposed to the detailed expert report on which the appellant now relies. I bear in mind that the appellant could have adduced such expert evidence to Judge Price and apparently did not, but nevertheless I do not regard it as appropriate to attach less weight to the expert's report now produced as a consequence. This is a consequence of

what appears to be a lack of preparation on the appellant's part rather than the expert's report being contrived for the purposes of bolstering a claim.

24. Second, Judge Price had found that the Iranian community in London may well be aware of the appellant's behaviour and that this was likely to be known in Iran. Ms Ahmed submitted in the hearing before me that this was not the same as a statement that the Iranian Embassy in the UK would have been aware or that on return to Iran, Iranian officials, particularly those questioning returnees, would be aware. I do not accept that that is a distinction that Judge Price has drawn. Very broadly speaking, Judge Price accepts that both the Iranian community in London and in Iran would be aware and that there is no distinction between private individuals on the one hand, and the Iranian state, on the other. Judge Price's findings were made in the context of his reference at §23 to a person in the Iranian Consulate who would be aware of the appellant's criminal conviction.
25. Third, Judge Price had accepted that there was a low risk of offending at §60, but also noted the concerns about the appellant's candour in the risk assessment process.

Issue (1) - Section 72

26. Having considered Judge Price's previous 2005 decision as my starting point (but not as a straitjacket), I turn now to the issue of whether the appellant has rebutted the Section 72 presumption of whether he constitutes a danger to the community of the UK. Mr Lee accepted that the fact that the appellant has never accepted his guilt and has continued to protest his innocence is a potential risk factor, but also points out that the appellant has not offending since he was released on parole in August 2005. I have also considered the report of an expert psychologist, Dr Tombros, which I will discuss later, and correspondence from the UK police. Ms Ahmed relies upon the authority of Kamki v SSHD [2017] EWCA Civ 1715 and in particular the Court of Appeal's analysis of the First-tier Tribunal's conclusions in relation to an OASys Report, where the appellant in that case had also been convicted of rape and there was an assessment in the OASys Report that he was at low risk of reoffending, but that as the appellant in that case had preyed on vulnerable women, the risk of harm to them in similar situations, if there were reoffending, would be very serious. Combining the two dimensions of risk, of probability of reoffending and the magnitude of harm if there were a reoccurrence, the overall assessment was of a high risk of harm to vulnerable females if he were released into the community. I bear in mind, even with a low risk of reoffending, the consequence of a repetition of offending for women in the appellant's victim's situation, namely a lodger whom the appellant raped while she was asleep. The date of the actual offence is unclear from the conviction documents and the sentencing remarks before me, but the

appellant has referred in a statement at pg. [389] AB to it being in October 2000, and there is no contrary evidence. The offence was therefore committed over 22 years ago.

27. I do not belittle the seriousness of the offence in any way, but it is important to note that it is the sole offence which the appellant has committed. No OASys Report has been drawn to my attention, in contrast to the Tribunal in the case of Kamki. As to the report of Dr Tombros, a consultant clinical psychologist, a copy of which was at pgs. [385] to [397] AB, the report is of some age, 21st November 2011 but there was no suggestion that the appellant's risk has increased since that date. Dr Tombros's expertise is unchallenged. Dr Tombros, at the date of the report, was at consultant level, with occupational experience in hospital work. This included regular clinics with probation services for mentally disturbed offenders and, as the expertise makes clear, with a range of offenders, from petty criminals to rapists and murderers. Dr Tombros has had experience of working with numerous sex offenders in order to assess their risk in the context of their applications for parole. I accept his unchallenged expertise. Dr Tombros had examined the appellant in person in hospital as well as having previously seen him in April 2005 in the context of his successful application for parole. The report records at §1.4, pg. [396] AB that the appellant's licence expired in January 2007. There is no suggestion that the appellant had breached the terms of his parole. Also of note, Dr Tombros expressly considered that the appellant maintained his innocence in relation to the index offence at §1.5, when assessing the appellant ultimately to be of no risk of sexual reoffending at present (§3.2, pg. [397] AB). The report also detailed the appellant's studies since his release from prison, in computers, mathematics, Spanish and French and having been in a relationship which lasted for three years. The report also acknowledged that the appellant had refused to take a sex offender's therapy programme because he believed he was not a sex offender but nevertheless Dr Tombros analysed the appellant as being of no risk at present, by reference to a risk assessment matrix, which the respondent has not criticised. I accept Mr Lee's submission that the report has been produced with full knowledge of the appellant continuing to maintain his innocence and nevertheless with the conclusion that in 2011, he posed no risk of sexual reoffending at present. I attach significant weight to the report.
28. I also bear in mind the two communications from the police. The first was an email from Detective Constable Greenway dated 15th June 2019 (pg. [13] AB) which confirms that the appellant had applied to be removed from the Sex Offenders' Register and that DC Greenway would write a supportive letter confirming that he had no involvement in crime since his conviction and that she would support his application to come off the Register. She followed this up with the letter of 23rd June 2021 at pg. [1] AB which states:

"Having considered your application it has been determined in accordance with Section 91C of the Sexual Offences Act 2003 that you should no longer

remain subject to the notification requirements of part 2 of the Act. Your notification requirement cease on the date of your receipt of this letter.”

29. Mr Lee refers in his skeleton argument to the process governing the removal of an offender from the Sex Offenders’ Register, which requires an assessment of future risk. The guidance on the review of indefinite notification requirements issued under Section 91F of the Sexual Offences Act 2003, includes the criterion at §5 of internal pg. [6]:

“If ... the offender has been able to satisfy the police that it is not necessary for the purpose of protecting the public from the risk of sexual harm for that offender to remain subject to indefinite notification, he or she should be issued with a discharge letter.”

30. It was in those circumstances that the discharge letter was issued. It follows that the police’s view in 2021 was that it was not necessary for the purposes of protecting the public that the appellant remain subject to indefinite notification.

Section 72 - Conclusion

31. Drawing that more recent evidence together with the previous assessment of Dr Tombros, who was conscious of the appellant continuing to maintain his innocence, which might otherwise raise concerns about the risk of his reoffending and also taking into account the seriousness of the offence and the consequences of harm if it were to be repeated, I am satisfied that the appellant has rebutted the presumption that he represents a danger which would otherwise exclude his protection claim for the purposes of Section 72 of the 2002 Act. His offence was a single one, over 22 years ago and he was assessed in 2011 as posing no risk. The police correspondence of 2021 is consistent with that lack of risk being unchanged.
32. In summary, the appellant has rebutted the Section 72 presumption.

Issue (3) - Article 3

33. I turn next to the Article 3 risk, because it is simpler than some of the other claims. Although the assessment needs to be in the context of the overall circumstances, the issues are discrete. They are twofold: first, whether the Iranian state is, or there is a real risk that the Iranian state would become, aware of the appellant’s conviction. Second, if they were aware or there is a real risk that they would become aware, whether the appellant would be at risk as a result, because of re-prosecution or further interrogation and detention (see §§23 and 25 of SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC)). I have no hesitation in concluding that the Iranian authorities are already aware. Ms Ahmed initially sought to distinguish between private Iranian individuals, as opposed to the Iranian state, in Judge Price’s findings. Were that a distinction that Judge Price had intended to draw, I would have expected

him to say so. He had made his findings in the context of the appellant's case before him that the Iranian Embassy was aware of his conviction.

34. Moreover, taking Judge Price's decision as a starting point, the appellant has provided me with additional evidence, which was not before Judge Price, the provenance of which is not disputed, at pgs. [263] to [266] AB. This includes correspondence from the Chargé d'Affaires at the Iranian Embassy, addressed to the governor of the prison at which the appellant was being held, indicating that the appellant had sent a letter to the Iranian Embassy stating that some of his belongings, including his legal papers, had not been forwarded to his new place of detention, and asking for the appellant's personal effects to be handed to him at his new prison. To Ms Ahmed's point that the letter does not suggest that the Chargé d'Affaires knows the precise details of the offence or would not have discussed it with other consular officials, there is an additional letter, which starts at pg. [267] AB, from the Criminal Cases Review Commission, setting out a provisional statement of reasons, in which the CCRC apparently confirmed why in its view, the appellant's conviction and sentence should be maintained. The CCRC letter was addressed to the head of the legal department of the Iranian Embassy. Therefore at least two individuals in the Iranian Embassy were involved. The head of the legal department had knowledge of the details of the appellant's conviction and sentence. The Chargé d'Affaires knew of his imprisonment.
35. To Ms Ahmed's challenge that it is for the appellant to prove that individual officials within the Iranian Embassy have discussed the appellant's convictions more widely within the Iranian state, so that border officials at Tehran Airport would be aware, there is a practical difficulty of how the appellant would be able to adduce the evidence of the internal discussions within the Iranian regime.
36. More importantly, the appellant must only prove that there are substantial grounds for believing that there is a real risk for Article 3 purposes. Given the involvement of both individuals, one of whom was evidently at a senior level as head of legal affairs, when the appellant comes to apply for an Emergency Travel Document to return to Iran, the fact of the appellant's conviction will become readily apparent. Even if he was being untruthful about not having handed over his passport to the respondent, any passport issued prior to his imprisonment has expired. There was no suggestion that he has a new passport. I accept Mr Lee's submission that as per §124 of XX (P)AK - sur place activities - Facebook) Iran CG [2022] UKUT 00023 (IAC), that the point of applying for an ETD is likely to be the first potential "pinch point" referred to AB and others (internet activity - state of evidence) Iran [2015] UKUT 00257 (IAC). It is not realistic to assume that internet searches will not be carried out until the appellant's arrival in Iran. Even if, which I do not accept, that the Iranian Embassy officials were unaware of the appellant's conviction, despite their previous dealings with him, I accept Mr Lee's further submission that a basic internet search of the appellant's name brings up a news article which refers to him expressly and provides the nature of his offence in detail, as

well as his nationality. Put another way, any Iranian Embassy official, conducting a basic internet search in the event that the appellant applies for an ETD, as is likely to be the case as per §124 of XX (P)AK, will find details of the appellant's name, nationality and his criminal offence.

37. The next question is what, if anything, such a revelation would prompt the Iranian regime to do. Ms Ahmed sought to distinguish the appellant from those whom the Iranian government perceives as being engaged in political activity in opposition to the Iranian regime, or proselytising Christian converts. Put simply, she argued that because of the patriarchal (i.e. sexist) nature of Iranian society, rapists of 'Western' women would not attract such adverse interest, where the perpetrator, an Iranian man, protested his innocence. She added that the risk of adverse interest was even less, given that the offence was so long ago.
38. In answering the question of the Iranian state's response, I also need to consider the risk of re-prosecution. There are two sources of conflicting evidence, the respondent's CPIN and the expert report of Dr Nayyeri, relied on by the appellant.
39. Dealing with the CPIN first, Ms Ahmed invites me not to draw any adverse inference from the fact that the CPIN has been withdrawn. She relies upon evidence which was the subject of an application under Rule 15(2A) to which Mr Lee made no objection from the unnamed country policy and research manager for the Country Policy and Information Team within the respondent which stated that the CPIN had been archived because it was general practice to archive CPINs that were over two years old, not because the information was obsolete. The refusal letter at §61, pg. [633] AB cites §2.4.1, as follows:

"Assessment of risk. Double jeopardy (or re-prosecution) is covered by Article 7 of the Iranian penal code. It states that any Iranian national who commits a crime outside Iran and is found in or extradited to Iran shall be prosecuted and punished in accordance with the laws of the Islamic Republic of Iran. Article 7(b) states that crimes punishable by Ta'zir (crimes for which punishments are not fixed and are instead left to the discretion of the Sharia judge) are specifically excluded from re-prosecution provided the person is not tried and acquitted in place of a commission of the crime, or in the case of conviction that punishment is not, wholly or partly carried out against him (2.4.1).

40. The refusal letter continues to cite §2.4.4 of the CPIN:

"A (Hudad) or (Hadd/Hodoud) crimes are those with fixed and severe punishments for which the grounds for, type, amount and conditions of execution are specified in holy Shar'a. Qisas (or Qesas) is the main punishment for intentional bodily crimes against life, limbs and abilities. Crimes punishable by Hudad (which include illicit sex and sodomy, or punishable by Qisas, for example murder, may be liable to re-prosecution in Iran when a private party who sustained damages resulting from a crime committed by an Iranian abroad or the victim of the crimes makes a complaint to the Public Prosecutor office and the Penal Court.

Where a person can demonstrate that their circumstance are such that the Iranian authorities are likely to be aware of their activity or the victim of a crime or others who have sustained damages are likely to make a complaint ... then they may be at greater risk of prosecution for the same offence (2.4.7).”

41. At pg. [636] AB, the refusal letter refers to a legal expert identified and contacted on behalf of the respondent by the Foreign and Commonwealth Office in Iran, who stated in a report dated March 2017 that:

“Whilst according to the provisions of the aforesaid Article 7 of the Islamic Penal Code, Iranian Courts will not have the jurisdiction to retry a matter which occurred outside Iran, there are, however notable exceptions as respect for this principle are subject to limitations ... Hence, when at issue offences of the kind susceptible to such types of punishment such as hodood (crimes which have been specifically dealt with by the Koran...), qisas (...law of retaliation) and diyat (blood money) Article 7(b) (of the Penal Code) cannot be generally applied. This means, for example, if an Iranian national is accused of murder is tried and punished outside Iran he can be subjected both in theory and in practice to an other trial and punishment in Iran for the same crime on his return since crime is punishable by qisas (5.1.4).”

42. The refusal letter concludes:

“62. It is accepted that in light of the fact that you have been convicted in the UK for rape, that in accordance with Article 7 of the Islamic Penal Code, Iran, the crime that you have committed and been convicted of in the UK is one that would constitute a crime punishable by Hudad and as such, if, in these circumstances, you would be at risk of being re-prosecuted on your return to Iran in which double jeopardy in this instance would therefore apply if the Iranians (sic) were aware of your conviction.

63. However, it is not accepted you would be at risk of being prosecuted on a second occasion on your return to Iran ... As demonstrated above, in order to establish you would be re-prosecuted for a crime punishable by Hudad on your return to Iran and therefore to be considered at risk of double jeopardy, the crime for which you were convicted must be one in which a private party who sustained damages resulting from a crime committed by an Iranian abroad or a victim of the crime complains the Public Prosecutor office and the Penal Court and requests an examination. In which case, all the criteria for approving the case, such as hearing the witnesses in confession and other Islamic evidences would be required by the court or one in which the person can demonstrate that their circumstances are such that the Iranian authorities are likely to be aware of their activity.”

43. Mr Lee makes the following arguments, relying in part on the expert report of Dr Nayyeri.
44. First, the more recent material on which the respondent relies, a Norwegian Country of Origin Information Centre (‘Landinfo’) report entitled

'Iran: Criminal Procedures and Documents,' December 2021, is based on the 2018 UK CPIN, which has been withdrawn by the respondent.

45. Second, Mr Lee takes issue with the sources of some of the 2018 CPIN's evidence and the weaknesses in that evidence. Article 7(a) of the Islamic Penal Code confirmed that rape is an offence potentially meriting re-prosecution under Iranian law, which Ms Ahmed accepts. Articles 7(b) and 7(c), as exceptions to the double jeopardy rule, do not apply. The question then is whether further prosecution under Article 7 is likely to apply in practice. §5.1.1 of the CPIN, at pg. [163] AB, refers to an article from a 2004 journal of financial crime by Mansour Rahmdel, attorney at law in Tehran, that Iranian law did not recognise a risk of double jeopardy on the basis that foreign judgments had no validity, but also suggested that the ambiguity of Article 7 had led some judges to make differing interpretations. At §5.1.2, pg. [163] AB, the CPIN refers to a report prepared in October 2008 by the Swedish Embassy in Tehran which stated, amongst other things, that before initiating a further prosecution, there must be a private complaint and the crime must be 'hudud' or 'qesas'. However, the author of the report relied on by the Swedish Embassy is unidentified, and their expertise is uncertain. In a similar vein, §5.1.4 of the CPIN, cited earlier, relies on an unidentified legal 'expert,' contacted by the FCO.
46. Third, and in contrast to the CPIN's largely unnamed sources, Dr Nayyeri's credentials were detailed. While she criticised the content of his report, Ms Ahmed did not criticise his expertise. He is an Iranian lawyer and a member of the Iranian Central Borough Association in Tehran, with an existing attorney's licence and with substantial work experience of dealing with clients, courts, prisons, police and other government departments. He has a law degree, to master's level, in Iran. He was awarded a Chevening Scholarship by the British Council. He has a second master's degree, in law, awarded by Birkbeck University of London in 2011 and a PHD, in law, from Kings College London in 2020. He holds or has held multiple academic positions in the UK, as a visiting lecturer at King's College London and at the London School of Economics. He is currently a permanent law lecturer at the University of Kent. He has given advice on Iran and the Iranian legal system to numerous judicial and non-judicial bodies and his works have been cited by the UN Secretary General and the UN Special Rapporteur on the situation of human rights in Iran. I accept, without hesitation, Dr Nayyeri's expertise.
47. Ms Ahmed's challenge was to Dr Nayyeri's compliance with his duties as an independent expert. She submitted that he had crossed the line and had advocated on the appellant's behalf, by making what she said were unsupported assertions, critical of the 2018 CPIN. She relied on §§6.2 and 6.6. of the Senior President's Practice Direction of the FtT (IAC), May 2022, which required an expert to give details of any literature or other material upon which the expert has relied and to state which facts are within their own knowledge. Ms Ahmed submitted that in this case, Dr Nayyeri did

not give details of the literature or other material on which he relied, and had simply made assertions criticising the CPIN.

48. I note that Article 7 of the Penal Code is accessible to review and has been cited. The issue is its application in practice. Ms Ahmed's challenge is relevant to §10, pg. [6] SB of Dr Nayyeri's report, for which there is no citation or source:

"In all criminal cases in Iran where there is a private complaint, the Iranian authorities ... are obligated to accept and examine the complaint of a private party. But while private complaint is said to be both a sufficient condition for prosecuting crimes ... it is not a necessary condition for certain crimes. For example, in the category of haqq-ul-lah (literally rights/claims of God) which corresponds to public offences, initiation of a criminal investigation does not require a complaint by a private individual or victim. This is in contrast to haqq-ul-naas (right/claims of people) category which corresponds to private offences which do require a complaint by a private individual or victim."

49. At §11, Dr Nayyeri then refers to Article 11 of the Criminal Procedure Code, relevant to the duty on public prosecutors to investigate 'haqq-u-lah' cases. The difficulty with that analysis is that on the one hand, there is a distinction between the three categories of cases in Articles 7(a) to (c) of the Penal Code. Article 7(a) is said to be relevant to the appellant's crime of rape. There is an altogether different distinction between 'haqq-al-lah' and 'haqq-ul-naas' cases. I have not been referred to where else in any Code, that distinction is explained; and how the distinction is applied in reality, other than in high-level terms at Article 11 of the Criminal Procedure Code. The issue of re-prosecution in practice (as opposed to in theory, under Article 7) is of key importance. This is because there is no suggestion that the appellant's victim will ever make a private complaint in Iran, so re-prosecution would depend on the Public Prosecutor office taking the initiative.
50. At §13, pg. [6] SB of his report, Dr Nayyeri refers to Article 120 of the Criminal Procedure Code, which he says supports his view that for the crime of rape, the Public Prosecutor office is obliged to investigate, regardless of whether or not there is a private complaint. Given the importance of that proposition, one would expect the precise provision to be set out. It is not.
51. In summary, the reader of Dr Nayyeri's report is left with a citation of a specific provision which is not set out (Article 102 of the Criminal Procedure Code), and different distinctions drawn in Article 7 of the Penal Code and Article 11 of the Criminal Procedure Code ('haqq-al-lah' and 'haqq-ul-naas' cases). While Dr Nayyeri's conclusion is clear (that there is a practical risk of re-prosecution), I accept Ms Ahmed's criticism that his reasoning is not. The weakness in his reasoning is not necessarily indicative of bias or stepping into the role of advocacy, but I do attach less weight to that aspect of his report, as a result. Where Dr Nayyeri's analysis is clearer, and I attach more weight to it, is in his discussion about

the lack of transparency in Iranian Court processes. Dr Nayyeri explained that core decisions in Iran are not systematically reported, or publicly available. In addition, the nature of offences for which double-jeopardy is potentially applicable is limited, because many 'hudud' crimes are not criminalised in Western countries, such as adultery or consumption of alcohol. There may only be a limited number of cases where double-jeopardy occurs. Moreover, at §42 pg. [11] SB, Dr Nayyeri also referred to the rareness of offenders being returned to Iran or returning voluntarily and therefore the incidences are likely to be rare, although I am conscious first, that the appellant has been prosecuted in the UK; and second, that I am considering his claim in the event that he is returned. However, Dr Nayyeri's analysis points to the reason why there is limited evidence available about double-jeopardy.

52. Drawing the evidence together, on the one hand, the respondent relies for its proposition that there is no real risk of re-prosecution, even if sanctioned under Article 7 of the Penal Code, on the 2018 CPIN, which in turn focussed on a 2008 Swedish report, relying upon an unnamed source. On the other hand, for the appellant, I have Dr Nayyeri's report, whose expertise is unchallenged, but where I accept the criticism that his analysis does not explain adequately the legal basis for re-prosecution, or its likelihood, and where he acknowledged that it was difficult to make general comments on the risk, because of the lack of available data. The evidence from both parties is problematic. Ultimately, even bearing in mind the lower evidential standard, I am not satisfied that the appellant has shown that there is a real risk that he would, on return, be re-prosecuted for his rape offence, notwithstanding the Iranian authorities' awareness of it.
53. However, that is not the end of the matter for the purposes of Article 3. There is the broader issue of whether, even if not eventually prosecuted, the appellant has shown that there are substantial grounds for believing that there is a real risk that the appellant's conviction, the Iranian state's knowledge of it, and his other personal circumstances, would lead to detention, even temporarily, and 'enhanced questioning' of the kind that could be in breach of Article 3. For this, Mr Lee referred to §25 of SSH and HR (illegal exit; failed asylum seeker) Iran CG [2016] UKUT 00308 for the proposition that imprisonment in Iran was likely to meet the test of Article 3 because the conditions in detention facilities are harsh and potentially life threatening. There is a special court at or near Tehran Airport. While attendance at court itself did not amount to a breach of Article 3, the Article 3 risk relates to prolonged questioning and detention.
54. At this point, I turn to consider not only the risk relating to the appellant's conviction for rape, but also his wider circumstances. Mr Lee described it as a "cascade of factors." First, I have already found that the Iranian authorities would swiftly become aware of the appellant's conviction, on carrying out a basic internet search.

55. Second, there is the issue of the appellant's creation and maintenance of a website. I do not propose to name it, but on carrying out a basic internet search of the website name, the appellant's name appears as a company director through Companies House, i.e. it is quickly apparent that the two are linked. On the one hand, I accept Ms Ahmed's submission that the primary focus of the website is environmental campaigning. On the other hand, I also accept Mr Lee's submission that the website is seriously critical of the Iranian government. It complains about the impact of illegal industrial fishing and the failure of the Iranian government to stop such marine activities. It discusses the political reality in Iran of checks and balances, between the three constitutional bodies of the executive, judiciary and legislature, as nothing more than a 'myth'. It talks of the problems of power being invested in a supreme leader, which has resulted in poor decision making and little or no accountability amongst senior civil servants, with nepotism, inefficiency, rampant corruption, and embezzlement of public funds. An Iranian Embassy official carrying out a basic search of the appellant's name would swiftly discover this, as well as his conviction for rape, in the circumstances of having lived in the UK for over twenty years. While the website may not otherwise have attracted particular attention, the appellant has a relatively high profile as a convicted rapist, having attracted UK media attention.

Article 3 - Conclusion

56. I am satisfied, in this context, and setting aside any issue of whether the appellant has or has not had any involvement with the Security Service, that were he to apply for an ETD and then return to Iran, the appellant shown that there is a real risk of interrogation and extensive detention breaching Article 3. There is, as Mr Lee compellingly argued, a "cascade of factors," aside from any issue of involvement with the Security Service. The real risk of a breach of Article 3 exists, even though I do not accept, as proven, that he would be re-prosecuted for rape.

Issue (2) - The Refugee Convention claims - Conclusion

57. The appellant does not rely on his rape conviction as a Convention reason. Instead, he relies on two characteristics, both of which he says amount to either actual or imputed political opinion. The appellant says that his environmental beliefs are genuine and they are what prompted him to create his website in 2017. I note that the appellant has maintained an interest in environmental matters for many years and his evidence as to the genuineness of his interest has not been substantially criticised. This is not a case where the appellant's belief in environmental matters was ever challenged on the basis of it being in bad faith, as per Danian v SSHD [1999] INLR 533. I have already outlined that were the appellant returned to Iran, I have little doubt that the contents of his website would have already been checked. I conclude that the material is sufficiently critical, over a sustained period of time, so as to be regarded by the Iranian regime as serious. I am satisfied that with the background of his conviction and the suspicion with which he would be regarded, the appellant's fears are

genuine and well-founded, in the sense there is a reasonable degree of likelihood of persecution, even if his campaigning is not particularly high profile. The appellant's claim for refugee status, on the basis of the website material alone, also succeeds.

58. I have also considered separately the appellant's claimed involvement with the Security Service. I should make clear at the outset that I have not considered any security-restricted material. I do not draw any adverse inferences from the fact that the Security Service neither confirms nor denies the appellant's claims. That is hardly surprising. The respondent, for its part, has confirmed that it has no material in its possession, which is of any relevance. I also am conscious that the appellant has repeatedly sought an order for disclosure from the Security Service itself, which I refused, given the practicability and likelihood of any material being disclosed. As a consequence, I am faced with limited evidence on which to assess the appellant's claims, based on his account, many years after the claimed events and with limited details.
59. The respondent's primary challenge is the lateness of the appellant raising the issue and the lack of corroborative evidence, such as his claimed notebooks. His claimed activities were when he was a student between 1992 and when he was later detained in 2000. He did not explicitly raise the issue until 2017. However, the appellant argued that his lawyers hinted at it in a letter to the respondent of 14th July 2006, at pg. [63] AB, which had stated that new evidence had emerged recently, which was unavailable at the time of the appeal, which the appellant was not allowed to disclose. The appellant claimed that the respondent never responded to this letter, despite his lawyer sending a chasing letter, which he no longer has. He also pointed to the loss of personal belongings after he was imprisoned, which contained his notebooks of contemporaneous notes of places and times of meetings. His more general explanation was that he felt inhibited in referring to his involvement because it was secret.
60. I bear in mind the standard of proof for a Refugee Convention claim. I also bear in mind paragraph 339L of the Immigration Rules, given the absence of documentation. I note the potential plausibility of his account, which I do not repeat in detail (which in any event is limited), of his claim that the Security Service contacted him when he was a student, because he mixed in social circles of those connected with the Iranian Embassy in London and he was asked about the identities of people coming and going from the Embassy. He cannot be criticised for the Security Service's unwillingness to comment. The account, albeit extremely limited, is on the face of it, potentially plausible.
61. Against those factors, I bear in mind the lateness (2017) of the claim, when he had previously claimed asylum, including appealing before Judge Price. No new evidence has emerged since Judge Price's decision and he has faced deportation for many years. I do not accept that such an extensive delay is adequately explained by a natural inhibition to discuss secret matters. I also do not accept that the appellant has established his

general credibility. He appears, in his evidence, to be genuinely convinced of his involvement. However, he appears just as genuinely convinced of his innocence of the crime of rape, of which he is guilty. While he has provided an explanation for the loss of notebooks, he has been inconsistent about why he no longer has his passport. There are therefore elements of his account that are not consistent.

62. In summary, on the basis of the limited evidence before me, the lateness of the claim and my concern about the appellant's credibility, I am not satisfied that the appellant has a genuine, let alone a well-founded fear of persecution based on his claims of involvement with the Security Service.
63. The appellant's claim on refugee status succeeds, in the context (but not as a protected characteristic) of his conviction for rape, on the basis of his actual political opinion, namely his criticism of the Iranian regime. I reject his claim based on alleged involvement with the Security Service.

Issue (3) - Article 8 - Conclusion

64. I turn finally the question of Article 8. Mr Lee does not rely upon any right to respect for family life, but rather the period of time that the appellant has been present in the UK, including with some family members (but not in an Article 8 family sense) as to which I have limited evidence, and his obstacles to integration in Iran. In summary, Mr Lee submitted that the UK has been the appellant's home since the early 1990s, albeit without leave for many years and the obstacles to his integration are his conviction for rape, his 'sur place' opposition activities, and the societal hostility that both would prompt, even setting aside adverse state attention. While the appellant cannot rely on 'Exception 1' (see Section 117C(4) of the 2002 Act), I have considered whether there are very compelling circumstances for the purposes of Section 117C(6), through the lens of Exception 1. He has not had leave to remain in the UK for the majority of his life. He is likely to have re-integrated in the UK, bearing in mind his family links in the UK, as well as his studies, over such a long period. The central issue is his ability to integrate in Iran, as an 'insider', in the context of the undoubted public interest in his deportation.
65. The facts which underpin the real risk of a breach of Article 3 and the appellant's well-founded fear of persecution are capable of amounting to very significant obstacles to the appellant's integration in Iran, although I am conscious that the standard of proof is higher for Article 8, than Article 3 or his Refugee Claim. For Article 8 purposes, the facts remain of his rape conviction and his *sur place* activities. I bear in mind the possibility of some family support from relatives in Iran, but also the absence of any real work experience since the appellant's conviction. Given the readily accessible information about his rape conviction in Iran, and his *sur place* activities, while the public interest in his deportation is weighty, I conclude that there are very compelling circumstances over and above Exception 1, for the purposes of Article 8, which outweigh the public interest. Those are the very significant obstacles to his integration in Iran as insider (his

absence for 22 years, the ostracism he will face, and the lack of any substantive work record) and beyond that, his genuine fear on his return, which will inhibit any development of private life in Iran.

Conclusions

66. On the facts established in this appeal, there are grounds for believing that the appellant's removal from the UK would result in a breach of his rights as a refugee and under Articles 3 and 8 of the ECHR.

Decision

67. The appellant has rebutted the presumption under Section 72 of the 2002 Act.

68. The appellant's appeal on asylum grounds is allowed.

69. The appellant's appeal on human rights grounds is allowed.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **16th February 2023**

ANNEX: ERROR OF LAW DECISION



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/02255/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 13th October 2021**

**Decision & Reasons Promulgated
On**

Before

**THE HONOURABLE MR JUSTICE SAINI
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE KEITH**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**'XX (IRAN)'
(ANONYMITY DIRECTION MADE)**

Respondent

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

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

Representation:

For the appellant: Mr D Clarke, Senior Home Presenting Officer

For the respondent: Mr A Burrett, instructed by Turpin and Miller Solicitors

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which we gave orally at the end of the hearing on 13th October 2021.
2. We refer to the appellant as the “Secretary of State”, and to the respondent as the “Claimant”, to avoid any confusion with how the parties were referred to previously by the First-tier Tribunal.
3. This is the Secretary of State’s appeal against the decision of Judge Abebrese promulgated on 20th April 2021, in which he allowed the Claimant’s appeal against the refusal of his human rights and asylum claims. The Secretary of State refused his claims in a decision dated 25th February 2019. In that refusal, the Secretary of State considered a broad range of issues, including the proposition that the Claimant was at risk of persecution because of his membership of a particular social group, as a person who had been convicted of rape. It was claimed, amongst other matters, that he would suffer persecution based on that characteristic in his country of origin, Iran. The Secretary of State rejected his asylum claim and his claims under articles 2, 3 and 8 ECHR. The Claimant appealed against that decision.

The First-tier Tribunal’s decision

4. At §3 of his decision, the judge referred to section 72 of the Nationality, Immigration and Asylum Act 2002. He reiterated the Claimant’s need to rebut the statutory presumption that he constituted a danger to the community of the UK because of his conviction for rape. The Claimant’s contention that he was a member of a particular social group as a convicted rapist had previously been considered and rejected by an earlier judge, Immigration Judge Price, in a decision promulgated on 16th December 2005. The judge also noted, at §10, a preliminary issue whereby the Secretary of State had made application for an adjournment of the hearing. This was on the basis that the Presenting Officer did not have the Claimant’s bundles, the second of which was 233 pages long. The Claimant resisted the application and the judge decided that the matter should proceed, having offered some additional time to the Secretary of State. During the hearing, the judge received an email from HMCTS staff, notifying him that the Secretary of State’s earlier application to adjourn the hearing had already been granted. The judge decided to continue because he had already refused the adjournment application.
5. The judge noted at §16 that the Claimant was relying on a risk of mistreatment, by reference to article 3, but that he was not relying on article 8. The Claimant was also pursuing his asylum claim. The judge concluded that the Claimant was no longer a danger to the community of the UK. The judge also concluded that were the Claimant returned to Iran, he would be at risk of further prosecution, or “double jeopardy.”

6. The judge allowed the Claimant's asylum appeal and his claim under article 3 for the same reasons. The judge then conducted an analysis of the obstacles to the Claimant's integration in Iran. The judge referred to section 117B of the 2002 Act (relating to article 8 claims) and the consequences of removal resulting in "unjustifiably harsh" consequences for the Claimant.
7. The judge allowed the Claimant's appeal on all grounds.

The grounds of appeal and grant of permission

8. The Secretary of State appealed the judge's decision on four grounds.
9. First, the judge's refusal to adjourn the hearing was procedurally unfair in circumstances where the Claimant's second bundle had not been served until the day before the hearing and the Presenting Officer had not had the opportunity to consider it. Moreover, whilst the judge indicated that he had allowed some time, that would have been minimal due to the constraints associated with the live hearing. The merits of the adjournment application were reflected in the fact that the Secretary of State's earlier application, which the Presenting Officer had renewed at the hearing, had been granted.
10. Second, the judge had erred in failing to consider the previous decision of Judge Price in relation his findings that the Claimant had failed to rebut the presumption under section 72 of the 2002 Act that he constituted a danger to the community of the UK. The judge did not explain why Judge Price's findings about the Claimant's lack of insight into his offending should be departed from. Moreover, the judge had concluded at §16 that the Claimant had accepted responsibility for committing rape, in contrast to the Claimant's evidence to the judge, as recorded at §12, without explaining how that apparent contradiction was resolved.
11. Third, the judge had failed to give adequate reasons for finding at §17 that if the Claimant were returned to Iran, he would be at risk of further prosecution. The Claimant had adduced no evidence to support that contention and had failed to identify what evidence before the judge was different from the evidence before Judge Price.
12. Fourth, the judge had erred in his apparent consideration of article 8 factors when at §16, he had confirmed the claimant was not seeking to rely on article 8.
13. First-tier Tribunal Judge Landes granted permission on 20th May 2021. The grant of permission was not limited in its scope.
14. The Claimant provided a rule 24 response on 10th August 2021. The Claimant asserted that most of the papers had been sent the year before the hearing (which had been delayed due to the Covid pandemic) whilst a supplemental bundle was served on 30th March 2021, a week before the hearing on 7th April. The fact that the Presenting Officer had not had the

opportunity to read the papers did not justify an adjournment of the hearing. The judge had given the Presenting Officer the opportunity to take as much time as he wanted to read the papers. It was difficult to understand why the Presenting Officer felt compelled to take no additional time or what the restrictions on time were. The judge had considered full arguments from both sides as to the merits of the adjournment application and was entitled to give effect to the overriding objective.

15. In relation to the second ground, any judge could depart from an earlier determination with good reason to do so (see the authority of Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702.) There were good reasons for departing from Judge Price's decision, namely the passage of time since that decision in 2005. Any challenge on grounds of perversity faced a very high hurdle. The issue for the judge to consider in relation to section 72 was the danger to the UK community, which was evidenced by the Claimant's lack of offending since his conviction.
16. In relation to the third ground, the judge was entitled to find that the Claimant was at risk of double jeopardy, based on the submissions and evidence before him. The Secretary of State had not identified any error in the judge's credibility assessment. The Secretary of State's grounds of appeal ignored the Country Policy and Information Note - Iran: Fear of punishment for crimes committed in other countries ('Double Jeopardy' or re-prosecution) (January 2018) and the decision of the Upper Tribunal in Iran (AB and others Internet activity - a state of evidence) Iran [2015] UKUT 00257.
17. In relation to the fourth ground, the Secretary of State had failed to understand that the article 8 submissions concerned exceptional reasons and that the Claimant was not relying upon article 8 outside the Immigration Rules. In any event it was an immaterial error bearing in mind that the Claimant had succeeded on both article 3 grounds and on his asylum claim and was bound to succeed on the same basis, on article 8.

The hearing before us

The Secretary of State's submissions

18. By way of background, Mr Clarke referred to the unusual length of the Secretary of State's decision to refuse the Claimant's protection and human rights claim (44 pages long), which was detailed and had considered the whole range of factors. These included whether the Iranian authorities would be aware of the Claimant's conviction and the decision letter had referred to Judge Price's decision that they would not be so aware. The detail of the refusal decision was in stark contrast to the brevity of the judge's reasoning in §§16 and 18. There was, in reality, no engagement with the arguments that had been raised in the refusal letter and whilst Devaseelan did not oblige the judge to have taken Judge Price's reasons as some form of a straitjacket, equally, where he was departing

from those earlier findings, the judge needed to explain why. Where evidence was now relied on that was not brought to the attention of Judge Price, although relevant, §40 of Devaseelan provided guidance that such facts should be treated with the greatest circumspection. Mr Clarke returned to this when developing the specific grounds.

19. Turning to the specific grounds, whilst Mr Clarke did not seek to dispute the timing of the service of the Claimant's two bundles, as described by Mr Burrett (who had appeared below), the Presenting Officer had made clear that he was not able to review the Claimant's bundles. The judge's reasoning was limited to a reference to representations by the parties, which were not explained further. There was no explanation for how much extra time had been offered. There was no reference to the fairness of the hearing. In summary, it was unclear from the decision why the judge had refused the adjournment application, or that he had considered whether the Secretary of State was deprived of a fair hearing. Given the contrast between the factual issues discussed in the Secretary of State's refusal decision and the brevity of the judge's findings and conclusions, the judge would have been assisted by the Presenting Officer having time to review the Claimant's bundles.
20. In relation to the second ground, whilst Judge Price had considered the Claimant's earlier appeal by reference to a different statutory framework (section 72 did not exist at the time), the real nub of this ground was the judge's failure to explain why he regarded the Claimant as no longer presenting a danger, in contrast to Judge Price's finding that he lacked insight into his offending. The ground was also a perversity challenge, given the Claimant's evidence (§12) and the judge's findings which were directly contrary to that evidence (§16). The judge's conclusions in relation to section 72 were therefore unsafe.
21. In relation to the third ground, the Secretary of State had consistently disputed the evidence about the interest of the Iranian authorities in the Claimant's conviction, as distinct from the Iranian community's interest. Judge Price had rejected the interest of the Iranian authorities at §§55 and 58. The Claimant had never suggested to Judge Price that he had received visits while in prison from Iranian officials and the judge had ignored the guidance in Devaseelan about approaching such evidence with the greatest of circumspection.
22. In relation to the fourth ground, the key point was that the Claimant had never pursued an article 8 claim, but the judge had considered it. Had he pursued it, the judge's analysis at §19, in the context of a seven-year prison sentence (so that the test of "very compelling circumstances" under section 117C of the 2002 Act applied) was inadequate.

The Claimant's response

23. Mr Burrett reiterated that the main bundle had been served a year before the eventual hearing before the judge. The Presenting Officer had been

offered more time and had not taken up that offer. The judge had heard full arguments. Had there been nuances or complexities in the arguments, the judge may have been required to explain them more fully. There were no such nuances or complexities in the adjournment issue and the reasons given were adequate.

24. In relation to the second ground, Judge Price's decision was only shortly after the Claimant's release from prison. The Claimant's circumstances had substantially developed since then and this was a paradigm case where the judge was entitled to depart from the earlier decision. In particular, the judge had before him correspondence from the Metropolitan Police, in support of his application to be removed from the Sex Offenders Register.
25. In Mr Burrett's words, the "ridiculous argument" that the Claimant was a member of a particular social group, because his conviction for rape, had been rejected by Judge Price. When we queried what the protected characteristic as relied on before the judge was, Mr Burrett said that it was based on imputed political opinion, although, as we later discuss, the judge's decision is, at best, unclear on this point. Mr Burrett urged us to consider that the crux of the Claimant's case was in relation to article 3.
26. In relation to the fourth ground, the judge's reference at §16 to the Claimant not relying on article 8 should be read as Mr Burrett as making no concession about, or withdrawal of, any article 8 claim.

Discussion and conclusions

The first ground

27. Our general observation is that we are acutely conscious that judges must often deal with adjournment applications and they have wide case management powers to do so. In that context, an appeal court/tribunal will accord a substantial margin of appreciation to a judge and not readily accept they did not consider all material factors. Like all case management decisions, it will be rare that an appellate court or tribunal will interfere. Also, the reasons for a case management decision do not need to be set out in elaborate or extensive detail, if it is reasonably clear why that decision has been made, particularly if contested, and that all relevant factors have been considered. We also remind ourselves that it is not for us to substitute our view of what we would have done in the circumstances.
28. It may be that the reasons for the Presenting Officer not having read the bundle were ones for which he may be criticised (as to which we express no view), but ultimately, the question for the judge was whether the Secretary of State would be deprived of a fair hearing if the adjournment application was refused (see Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC). The question for us is whether the judge's reasons were adequate, or his conclusions flawed.

29. We regard the judge's analysis at §§10 and 11, set out below, as inadequate and his conclusion flawed:

"10. The respondent representative [sic] made an application for an adjournment on the basis that he was not in possession of the respondent's bundle [that must, we assume, be a reference to the Claimant's bundle] and that the bundle was in any event 233 pages. He had not had time to read the documents properly and that included the bundle which he had not had sight of the total amount of papers in the appeal amounted to over 700 pages. The application was resisted by Mr Burrett and I heard full representations from [sic] both parties. I determined that the matter should proceed having offered some additional time to the respondents.

11. During the course of the appeal hearing an email arrived from the Tribunal admin section that the appeal had been adjourned I had already determined the issue so I proceeded to hear the appeal."

30. It is clear from the application that on any view, the documentation was substantial (the supplementary bundle alone was 233 pages long) and potentially raised issues of significant complexity. In that context, the Presenting Officer had made clear that he had not had the opportunity to read the documents fully. Despite that, while the judge referred to full representations from both parties, his reasons do not give any sense of what those representations were or why the judge reached the conclusion that the application was refused. While the judge referred to the offer of some additional time, there is no detail as to the amount of additional time offered, or whether that was sufficient to allow consideration of the evidence. There is no discussion in the reasons that the Presenting Officer had refused to accept the offer of additional time.

31. While we do not set out any guidance for how an adjournment decision should be approached beyond the Nwaigwe authority, the judge ought to have at least explained not only the basis of the application, (which comprised most of the reasons at §10) but why it was refused and why the offer of time mitigated the risk of the Secretary of State being deprived of a fair hearing. A mere reference to additional time having been offered meant that we could not, as an appellate Tribunal, be satisfied that the judge had adequately considered all the relevant factors when reaching his decision.

32. The judge's error was compounded by the fact that separately, the Tribunal had also granted the adjournment. It is no answer, as the judge did, to conclude that because he had decided the issue, therefore he would simply ignore or disregard that separate decision and proceed with the appeal. The fact of the separate decision should have alerted him to the need to give a fuller explanation, not least to explain why the other decision was not appropriate and should be varied, as opposed to maintaining his own decision.

33. On the first ground alone, the judge's error was a material one, going as it does to whether a party has been denied the opportunity of a fair hearing. That error makes the rest of the judge's findings and conclusion unsafe, but for other reasons which we will come on to explain, there were material errors on all other grounds.

The second ground

34. Mr Burrett submitted that it was unarguably open to the judge to depart from Judge Price's 2005 decision, because of the passage of time. While the legal test that Judge Price was considering was different to section 72 of the 2002 Act, he considered the seriousness of the Claimant's offence and the basis of the Claimant's asylum claim.
35. The judge erred in two respects to take Judge Price's decision as his starting point. First, Judge Price had considered and rejected the Claimant's claimed fear of persecution based on his membership of a particular social group, as someone convicted of rape (§56). In contrast, it is, at best, far less clear what the judge regarded as the basis of the asylum claim. Mr Burrett suggested that when asked this by the judge, he had argued that it was based on an imputed political opinion, although he could not refer to any part of the judge's decision other than the "double jeopardy" risk at §7 (he described any other risks in relation to sur activities as a "red herring.") The judge allowed the asylum appeal "for the reasons expressed" (§18). Bearing in mind the asylum claim was put in similar terms and rejected by Judge Price, the judge failed to explain why he had reached a decision different from Judge Price, that such a claim based on membership of a particular social group, was possible. The brief references at §§15 and 16 do not explore properly what the basis of the asylum claim was.
36. We accept the force of Mr Clarke's submission that the judge also erred in failing to consider Judge Price's concern that the Claimant lacked willingness to accept responsibility for his offence (§61). The judge proceeded to note the Claimant's evidence at §12 that he "did not rape his lodger," but then at §16 concluded that the Claimant "accepted his crime and sentence even though at the time during his evidence he appeared not to be accepting it." The judge's conclusion plainly failed to explain the Claimant's consistent refusal to accept responsibility, in view of Judge Price's decision and the evidence before the judge. At the very least, the conclusion is not sufficiently explained. On the face of it, the conclusion meets the high bar of perversity.

The third ground

37. We turn next to the question of the judge's reasons as to why the Claimant may be at risk of "double jeopardy." Mr Burrett suggested that the judge was unarguably entitled to reach that conclusion based on the Iranian penal code and CPIN. However, Mr Clarke pointed us to the central focus of the refusal decision that the Claimant was unlikely to come to the

attention of the Iranian authorities. We accept Mr Clarke's submission that when considering what might have changed the between 2005 and his decision, the judge should have at least considered why the evidence about a claimed prison visit, pre-dating Judge Price's decision, had never been referred to in the hearing before Judge Price. That is a clear example of where Devaseelan guided tribunals to consider such new evidence with circumspection. There was no such consideration by the judge.

The fourth ground

38. Given the simplicity of the issue, we deal with this final ground swiftly. Mr Burrett's suggestion that the phrase "the appellant is not relying upon Article 8" at §16 is to record the lack of a concession turns the plain meaning of that phrase on its head. Notably, in his appeal form to the First-tier Tribunal, the Claimant did not rely upon article 8. The phrase in §16 is consistent with this. The judge's subsequent analysis by reference to section 117B of the 2002 Act, (which is headed, in that Act, "Article 8: public interest considerations applicable in all cases") is inconsistent with the statement in §16. It is no answer to say that because an asylum claim or article 3 claim should succeed, that a claim never pursued or appealed can permissibly be added as a ground on which a party succeeds. In any event, we also accept Mr Clarke's submission that had an article 8 claim been pursued, in the context of the legal test because of the Claimant's length of sentence of imprisonment) (seven years) the judge's analysis at §19 was wholly inadequate. The judge did not even refer to the applicable legal test under section 117C of the 2002 Act, nor is there any indication that he applied it.

Decision on error of law

39. For the above reasons, we conclude that the judge erred in law. All four grounds of appeal are sustained. In light of the errors, the judge's findings and conclusions are unsafe and cannot stand.

Disposal

40. Having considered § 7.2 of the Senior President's Practice Statement, we canvassed the views of the parties, both of whom urged us to retain remaking in the Upper Tribunal. We agreed to their request, taking into account their views; the fact that the appeal has already been considered twice by the First-tier Tribunal; and our ability to determine remaking expeditiously.

Directions

41. The following directions shall apply to the future conduct of this appeal:

41.1 The Resumed Hearing will be listed at Field House on the first available date, time estimate one day, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.

41.2 The Claimant shall no later than 4 PM 14 days prior to the Resumed Hearing file with the Upper Tribunal and serve upon the Secretary of State's representative a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which he intends to rely. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only.

41.3 The Secretary of State shall have leave, if so advised, to file any further documentation she intends to rely upon and in response to the Claimant's evidence; provided the same is filed no later than 4 PM, 7 days before the Resumed Hearing.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and we set it aside, without preserved findings of fact. Remaking is retained in the Upper Tribunal.

The anonymity directions continue to apply.

Signed **J. Keith**

Date: 20th October 2021

Upper Tribunal Judge Keith