Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/01060/2016

THE IMMIGRATION ACTS

Heard at Field House
On 22 November 2017

Decision & Reasons Promulgated
On 27 November 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

F N
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Respondent: Mr Dhanji, counsel
For the Appellant: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. Throughout this decision I refer to the parties as they were in the First-tier Tribunal notwithstanding it was the Secretary of State who was first granted permission to appeal to this Tribunal. Thus I refer to the Secretary of State as the respondent.

2. This matter comes before me for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge Beg ("FTTJ Beg") promulgated on 1 June 2017, in which she dismissed the appellant's appeal against the refusal of asylum and allowed his appeal on human rights grounds, pursuant to Article 8.

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3. No anonymity direction was made by the FTTJ but given my findings he is entitled to anonymity in these proceedings. I make a direction accordingly.

Background

4. The appellant is a citizen of Afghanistan born on 1 March 1994. He arrived clandestinely in the UK on 31 March 2008, at the age of 14 and claimed asylum a few days later. His asylum claim was refused on 3 October 2008 and he was granted discretionary leave to remain as an unaccompanied minor, until 1 September 2011. He applied for further leave to remain before the expiry of that leave. This was refused on 1 June 2012 and his appeal was dismissed by First-tier Tribunal Judge Jhirad on 20 July 2012. His appeal rights became exhausted on 23 August 2012. Further submissions were made on 21 December 2012 but these were refused. A further application for leave to remain was made on 5 February 2015; this was refused on 26 October 2015. He submitted further submissions on 11 January 2016. Those were refused on 18 January 2016 and it is the latter decision which gave rise to the appeal before FTTJ Beg this year.

5. The respondent sought permission to appeal and this was granted on 18 September 2017 in the following terms:

> "1. The Respondent seeks permission to appeal against a decision of the First-Tier Tribunal (Judge) promulgated on the 1st June 2017 who allowed the Appellant's appeal against the decision to refuse to grant him asylum and humanitarian protection.
> 2. It is arguable that the Judge made an error of law by not taking into account the "public interest considerations" set out in s117B of the Nationality, Immigration and Asylum Act 2002.
> 3. The grounds and the decision do disclose an arguable error of law."

6. The appellant also sought permission to appeal against the dismissal of his appeal on protection grounds. That application was made out of time and a reason was given for the delay. A witness statement by the appellant was provided in support to explain the delay. First-tier Tribunal Judge Page decided, on 8 November 2017, not to admit the application because it had been lodged out of time, although the Judge expressed the decision in the following terms: "… I am not satisfied that there are grounds to merit an extension of the fourteen day statutory time limit. This application has been made substantially out of time and consequently permission to appeal must be refused."

The hearing

7. Before the start of the hearing before me, the appellant's counsel, Mr Dhanji, produced a copy of the appellant's application to the Upper Tribunal to extend time. A copy had been provided to Ms Ahmad. He made oral submissions in support of the application for permission to appeal to the Upper Tribunal out of time. Mr Dhanji accepted that the application to the First-tier Tribunal had been made 13 days out of time and that this was "a long period of delay"; he referred to the appellant's explanation in his witness statement: he had been fasting during Ramadan and had been unwell and unable to travel to meet his solicitors after the promulgation of the FTTJ's decision. He referred to the three-stage test in **SSHD v SS**

(Congo) [2015] EWCA Civ 387. He accepted this was not a delay of two or three days but this was an appeal on protection grounds; the impact on the appellant, if he were unable to pursue the appeal, would be considerable, with potentially very serious consequences. He had no information as to when counsel had been instructed to draft the grounds of appeal, following the receipt of instructions from the appellant but the appellant should not be punished for any delay by his representatives.

8. Ms Ahmad, for the respondent, opposed the application. She agreed the principles in **SS (Congo)** applied. She submitted that a delay of 13 days was significant. She did not accept that the reason given by the appellant for the delay was a good one: he could have instructed his solicitors by telephone with regard to an appeal. There was no medical evidence to support his claim to have been unwell while fasting. That said, she accepted that the consequences for the appellant of being unable to appeal were serious.

9. I decided to extend time for the following reasons. An application had been made to extend time and reasons had been given for the delay. The First-tier Tribunal judge had failed to follow the authorities, **SS (Congo)** at [93] – [95] and **R (Onuwu) v FTT (IAC) [2016] UKUT 185 (IAC),** in that he had not considered the consequences for the appellant of not admitting the application out of time. The respondent's submission that the delay constituted a serious breach: it was one of 13 days. The appellant had, however, provided a witness statement which contained an explanation: he had not been sufficiently well during Ramadan, as a result of fasting, to engage meaningfully with his solicitors such as to give them formal instructions on whether to pursue an appeal. Whilst it was submitted by the respondent the appellant could have contacted his solicitors by telephone, I note he speaks Pashto and it is unlikely he could have communicated in English sufficiently well as to understand the impact of the FTTJ's decision over the telephone: the FTTJ had allowed the appeal on human rights grounds but not on protection grounds. This was a serious breach, being one of 13 days. I bear in mind there was no medical evidence. I accept that a face to face meeting would have been required to explain the impact of the decision on the appellant's future. The solicitors would not have known, at that time, whether the respondent would seek to appeal the human rights decision but might reasonably have assumed that would be the case. As it happens the respondent did seek such permission and it was granted. Thus the consequences of the dismissal of his protection claim are sufficiently serious as to warrant consideration. His asylum claim could not be described as hopeless or non-existent. It was in the interests of justice and in accordance with the overriding objective to extend time.

10. Having extended time as regards the appellant's application for permission to appeal, I granted permission to appeal, it being arguable that the FTTJ had failed to give adequate consideration to the age of the appellant (he was a minor) when applying the principles in **Devaseelan [2002] UKIAT 00702** to the earlier decision of the First-tier Tribunal. All grounds were arguable.

11. Mr Dhanji then submitted that the respondent's application for permission to appeal to this tribunal had been made out of time to the First-tier Tribunal. He submitted that, if the respondent had been sent the FTTJ's decision on 1 June 2017, as was the case for the appellant, the respondent had lodged her application out of time by one day. He referred to Rule 33(2) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. He accepted that the use of the phrase "provided with" in the procedure rules was unclear but submitted it could be defined as "sent". On this basis, the respondent's application had been made out of time by one day and no application had been

made to extend time; nor had a reason been given for the delay. He noted that the First-tier Tribunal Judge had failed to address the issue of timeliness when granting permission to appeal.

12. Ms Ahmad responded that she needed to investigate this issue; from her instructions the decision had been received by the respondent on 2 June 2017 and the application had therefore been made in time. In reply, Mr Dhanji said he was instructed to oppose the grant of any extension of time, if it were required, but “not to go beyond that”.

13. Sitting as a First-tier Tribunal Judge, and applying the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, I decided that the respondent’s application had been made in time and that, even if it had not, it would be appropriate to extend time. In the latter situation, the grant of permission to appeal would have been conditional on time being extended. My reasons are as follows. Rule 33 states as follows:

> “an application under paragraph (1) must be provided to the Tribunal so that it is received no later than 14 days after the date on which the party making the application was provided with written reasons for the decision.”

14. The meaning of “was provided with” in the latter part of Rule 33(2) is not defined. Nor is there any explanation in any Practice Direction. It is arguable that it should be given the meaning “sent” but this word is used elsewhere in Rule 33, for example at Rule 33(4) in relation to an amended notice of decision which suggests the intention was that “was provided with” had a different meaning. I have considered whether the words “was provided with” might have been used to cover other modes of delivery, such as ex tempore, by post, by email or by hand. I give weight to the fact that the term “was provided with” is in passive voice. This suggests delivery or receipt, rather than merely the sending, giving or despatch of the decision. Such an interpretation is consonant with the guidance in **R (on the application of Javed) [2014] EWHC 4426** where it was found that merely sending a notice of curtailment of leave to the last known address was not sufficient; the respondent had to “be able to prove that notice of such a decision was communicated to the person concerned, in order for it to be effective.”

15. If I had not found the application had been made in time I would have extended time for the following reasons. The guidance in **SS (Congo)**, endorsed in **Onuwu** at [13] is that

> “If a judge concludes that a breach is not serious or significant, then relief will usually be granted and it will usually be unnecessary to spend much time on the second or third stages; but if the judge decides that the breach is serious or significant, then the second and third stages assume greater importance.”

In the present case, the breach is not significant; it cannot either be described as serious because the impact on the parties has been minimal. Both parties assumed (as did the Judge granting permission to appeal) that the application had been lodged in time; both parties had prepared for the hearing of the respondent’s appeal before me. Mr Dhanji accepted the appellant had not raised the issue earlier and that the appellant was prepared to deal with the respondent’s appeal against the FTTJ’s human rights findings. I bore in mind there had been no application to extend time and no reason had been given for the delay, contrary to Rule 33(5)(c), and the apparent assumption of the respondent that time started to run from the date of receipt of the FTTJ’s decision rather than the date it was sent. I also bore in mind the lack

of clarity in the Procedure Rules on the issue. There is no authority on the definition of "was provided with" in Rule 33. Also relevant is the guidance in **SS (Congo)** that "The important point made in *Denton* was that if there is a serious or significant breach and no good reason for the breach, this does not mean that the application for relief will automatically fail.". In the third stage of my assessment I bore in mind all the circumstances of the case to deal justly with the issue: there was a need for litigation to be conducted efficiently and at proportionate cost and for the enforcement of compliance with rules, practice directions and court orders. In the present case, the appellant's solicitors had written to this Tribunal requesting that the respondent's appeal and the appellant's application for an extension of time were considered at the same hearing. There was no indication in that correspondence that the appellant intended to challenge the timeliness of the respondent's application for permission to appeal; nor had the respondent been notified of it prior to the hearing before me. I considered adjourning the hearing to enable the respondent to take instructions but considered this would cause inappropriate delay, contrary to the overriding objective. Taking all the circumstances into account and, in particular, that the breach was not serious or significant, time could be extended without injustice. Put another way, it was in the interests of justice to extend time.

16. For these reasons, I heard the parties' representatives' submissions on whether or not the FTTJ had made errors of law in her decisions to dismiss the appeal on protection grounds (as contended by the appellant) and to allow the human rights appeal (as contended by the respondent).

Submissions – Human Rights Grounds

17. Ms Ahmad relied on the grounds of appeal. In essence it was submitted that FTTJ Beg should not have departed from the original findings of FTTJ Jhirad in dismissing the appeal on all grounds. FTTJ Beg had ignored at [42] the respondent's submissions with regard to paragraph 276ADE. She had failed to consider s117B and had not provided reasoned findings on proportionality pursuant to Article 8. She had thus misdirected herself in law. In addition she had failed to give adequate reasons having allowed the appeal on Article 8 grounds: the appellant had not demonstrated strong emotional ties with his uncle in the UK. The findings on this issue were contradictory given the adverse credibility findings. The FTTJ had failed to reconcile the evidence as to the existence of family in Afghanistan. It was speculation to find the appellant would have difficulties re-settling in Afghanistan; in any event this could not amount to very significant obstacles. Nor had the FTTJ given appropriate weight to the appellant's application for an Afghan passport. The FTTJ ignored the findings of FTTJ Jhirad as to the feasibility of return. Ms Ahmad accepted the FTTJ had not been provided with the respondent's guidance on the application of Appendix FM and paragraph 276ADE in the Rules but the principles were relevant and she had not adhered to them. The guidance in **Miah (section 117B NIAA 2002 - children) [2016] UKUT 131 (IAC)** had not been followed (although it was accepted FTTJ Beg had not been referred to it).

18. For the appellant, Mr Dhanji submitted the FTTJ did not materially misdirect herself in law; nor did she fail to give adequate reasoning. This was not an appeal being pursued on the basis of perversity. The FTTJ had asked herself at [41] and [42] the correct questions pursuant to the Immigration Rules: would the appellant face very significant obstacles to integration in Afghanistan. She properly directed herself and went on to explain why she found there were such obstacles. She highlighted that the appellant had left Afghanistan at the age of 13; he was now 23. She concluded that the passage of time, his westernisation and his lack of work

experience in Afghanistan and his lack of immediate family would cause him to face very significant obstacles. There was no conflict in the fact finding that his mother and brother live in Pakistan. It was accepted that the conclusion was not one which other judges might have reached but it was reached properly and applying the law correctly. The decision pursuant to paragraph 276ADE(1)(vi) contained no error of law. There had been no requirement to go outside the Rules.

Discussion – human rights grounds

19. This appeal is pursued by the respondent on two grounds: that there has been a material misdirection in law and that FTTJ Beg failed to give adequate reasons for her findings.

20. It is submitted for the respondent that FTTJ Beg should not have departed from FTTJ Jhirad's findings (**Devaseelan [2002] UKIAT 00702**); she should have dismissed the appeal on human rights grounds. Paragraphs 39-42 of **Devaseelan** indicate how a second adjudicator should approach the determination of another Adjudicator who has heard an appeal by the same appellant. In summary (from paragraph 39):

    a. The first adjudicator's determination should always be the starting point.

    b. Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator.

    c. Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator.

    As regards matters which could have been before the first Adjudicator but were not, a summary of the relevant Tribunal guidance is as follows:

    d. Factors personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection. The force of the reasoning underlying this guideline is greatly reduced if there is some very good reason why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him.

    e. Evidence of other facts – for example country evidence – may not suffer from the same concerns as to credibility, but should be treated with caution.

21. In the present case, therefore, FTTJ Beg was entitled to take into account the appellant's current circumstances in deciding whether he fulfilled the criteria in paragraph 276ADE(1)(vi), namely whether there were very significant obstacles to his integration on return. In any event, the changes to the Immigration Rules in July 2012 were not considered by FTTJ Jhirad who only considered the appellant's appeal in the context of the Article 8 jurisprudence, outside the Rules. The FTTJ Beg was entitled to treat FTTJ Jhirad's decision as the starting point and to consider events after July 2012 when that appeal was heard.

22. I am unable to accept the submission that FTTJ Beg ignored the submissions of the presenting officer. FTTJ noted the submissions of the presenting officer and it can be inferred she took

these into account. For example, the FTTJ accepted the appellant did not fulfil the criteria in paragraph 276ADE(1)(v) and considered instead 276ADE(1)(vi).

23. The respondent asserts FTTJ Beg failed to take into account the public interest factors in s117B but FTTJ Beg decided the appeal under the Immigration Rules and, having found the appellant fulfilled the criteria in paragraph 276ADE(1)(vi) did not go on to consider the appeal outside the Rules. There was no requirement on her to consider the public interest factors: the Immigration Rules have been drafted with those in mind.

24. The respondent's contention as regards the adequacy of the FTTJ's reasoning appear to focus on consideration of the appeal outside the Immigration Rules and pursuant to the Article 8 jurisprudence. However, FTTJ Beg did not do so.

25. Mere adverse credibility findings regarding his asylum claim were not sufficient, without more, for an adverse credibility finding on all issues. While it is averred the appellant provided "very limited evidence", FTTJ Beg heard from the appellant himself and three further witnesses as to the nature and quality of the appellant's private life in the UK and his circumstances on return; she cited that evidence at length at [13] – [20]. This is not limited evidence, albeit the majority of the witness evidence related to the appellant's appeal on protection grounds.

26. Whilst this is not a perversity challenge, I note FTTJ Beg found "none of the witnesses credible" at [38]. However, she made this finding in the context of considering the appellant's appeal on protection grounds. It was open to her to find that the evidence of the witnesses as regards the appellant's private life was reliable and this can be inferred from her subsequent paragraphs in which she refers to that evidence and relies on it to make her finding as regards the appellant's ability to meet the criteria in paragraph 276ADE(1)(vi).

27. There is no suggestion by the respondent that FTTJ Beg has failed to record the evidence accurately. Nor is there a challenge to the findings of fact or that those findings are perverse. This appeal is founded on a contention that the reasoning is inadequate. I remind myself that the decision was made pursuant to the Rules and not outside the Rules. There was therefore no need for FTTJ Beg to make findings as to whether the appellant's relationship with his uncle engaged Article 8. The sole issue to be decided was whether there were very significant obstacles to the appellant's integration into Afghanistan. FTTJ Beg took various facts into account in so finding: the appellant's mother and brother live in Pakistan; there were no immediate members of his family in Afghanistan to support him; he had close emotional ties with his uncle, his uncle's family and cousin in the UK; they had supported him since his arrival here as a minor and he was treated as a member of the family; he was dependent on his uncle. In **Sanambar v SSHD [2017] EWCA Civ 1284** the Court of Appeal said that consideration of the issue of obstacles to integration requires consideration of all relevant factors some of which might be described as generic. Factors such as intelligence, employability and general robustness of character could clearly be relevant to that issue. In the present case, the FTTJ had noted the appellant's closeness to his uncle's family, with whom he had lived for the nine years since his arrival in the UK; the evidence was that the appellant's uncle treated him as his own son. They continued to live together. That was a factor FTTJ Beg was entitled to take into account in considering the obstacles to integration on return.

28. The appellant had left Afghanistan at the age of 13, as a child. FTTJ Beg noted the appellant had some family members in his home area (his maternal aunt and her family) as well as members of the Niazi clan in his home village. The appellant's evidence was that he no longer had a family home there. The appellant had never worked in Afghanistan. He spoke Pashto and English. He had spent his teenage years in the United Kingdom. FTTJ Beg made a reasonable inference that the appellant had developed "some western habits and lifestyle … after nine years" in the UK. I do not accept the respondent's submission before me that, at the age of 13, when he left Afghanistan, the appellant was "a significantly advanced teen-age … fully accustomed to his Afghan heritage, roots, and culture". The appellant was barely a teenager at 13, when he arrived in the UK. He cannot be said, as is submitted for the respondent, to have become fully accustomed to his Afghan heritage, roots and culture at that age; he was a minor and looked to his immediate family for guidance and supervision. I do not accept the submission that it was "speculative and unreasoned to conclude ... that it would be "difficult to re-settle"". That finding is justified on the evidence. It would undoubtedly be so.

29. In <u>**SSHD v Kamara**</u> **[2016] EWCA Civ 813** (a deportation case) it was held that the concept of integration into a country was a broad one. It was not confined to the mere ability to find a job or sustain life whilst living in the other country. It would usually be sufficient for a court or tribunal to direct itself in the terms Parliament had chosen to use. The idea of "integration" called for a broad evaluative judgment to be made as to whether the individual would be enough of an insider in terms of understanding how life in the society in that other country was carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private and family life.

30. The respondent has referred in her grounds of appeal to some background material on trans-national ties between Afghans in the UK and those with kinship relations: The Afghan Muslim Community in England, Department of Communities and Local Government Crown Copyright 2009). However, there is no reference to this in the respondent's reasons for refusal letter; nor was a copy provided to FTTJ Beg. This is new background material. FTTJ Beg cannot be criticised for having failed to take it into account.

31. I remind myself that this is not a challenge on the grounds of perversity. While the decision of FTTJ Beg is one which might not have been reached by other judges in the First-tier Tribunal I am unable to find that she misdirected herself in law or that her decision is not adequately reasoned. She gave various reasons for her decision and those reasons are sustainable on the evidence before her. There is no material error of law in her decision to allow the appeal on human rights grounds pursuant to paragraph 276ADE(1)(vi).

Submissions – protection grounds

32. Mr Dhanji adopted the grounds of appeal to this Tribunal. These are, in summary:

    a. FTTJ Beg had misdirected herself as regards <u>**Devaseelan**</u>; she failed to take into account FTTJ Jhirad had not taken into account the appellant's minority in making adverse credibility findings. That decision was erroneous in law therefore and should not have been taken as FTTJ's starting point. Her rejection of the appellant's

counsel's submission on the issue were erroneous. FTTJ Beg should have borne in mind the failure of FTTJ Jhirad to apply the Joint Presidential Guidance Note No 2 of 2010 regarding the treatment of vulnerable witnesses.

b. There was a lack of clarity in the findings regarding the documentary evidence adduced by the appellant. These were from three sources. The respondent had failed to verify these documents. **PJ (Sri Lanka) [2015] 1 WLR 1322** applied such that the respondent could not mount a challenge. It appeared FTTJ Beg accepted the submission that **PJ (Sri Lanka)** applied but made a contradictory finding that the documents, whilst genuine, had unreliable contents.

c. FTTJ Beg failed to give adequate reasons for finding the claim was not credible. At [28]-[38] she made various findings but did not explain the basis on which she did so. The appellant's credibility was the central issue.

33. Ms Ahmad, for the respondent, submitted FTTJ Beg had considered the evidence provided after the decision of FTTJ Jhirad at [28]-[39]. She had referred to the challenge at [37]. It was submitted that FTTJ Beg gave no substantial weight to the earlier determination other than as the starting point. There was no material error of law. As regards FTTJ's consideration of the appellant's documents, it was open to her to find that the documents themselves were genuine but that the content was not reliable. FTTJ Beg had given reasons for failing to find the appellant credible. Her findings were open to her.

Discussion - protection

34. It had been submitted before FTTJ Beg that the respondent's initial decision to refuse asylum and FTTJ Jhirad's decision both failed to take into account the appellant's age at the time he claimed asylum and that "due allowance ought to be made for that" in the application of **Devaseelan**. It was submitted before FTTJ Beg that the decision of FTTJ Jhirad was vitiated by error of law. However, this ignores the appellant's attempt, without success, to appeal FTTJ Jhiran's decision. In **Chomanga (binding effect of unappealed decisions) Zimbabwe [2011] UKUT 00312 (IAC)** the Tribunal held that the parties are bound by unappealed findings of fact in an immigration judge's decision.

35. I have been referred to **LD (Algeria) [2004] EWCA Civ 804**, paragraph 40, where the Court of appeal refers to a necessary degree of flexibility and desirable consistency of approach, without imposing any unacceptable restrictions on the second adjudicators' ability to make the findings which he conscientiously believes to be right. I do not demur from that whilst noting that **LD** involved different parties to the earlier determination. The principle is nonetheless applicable.

36. In **AM (Belarus) v SSHD [2014] EWCA Civ 1506** the Court of Appeal also effectively approved the guidance given in **Devaseelan** and made the point that a tribunal, which heard a claim closer in time to the events on which it was based was in a better position to make general findings of fact and to assess credibility than a tribunal going over the same ground years later.

37. There is no reference in FTTJ Jhirad's decision to the vulnerable witness guidance which was in force at the date of that decision and which would have been applicable. That said, she was aware of the appellant's age and minority at all material times, not least because he was granted discretionary leave to remain as an unaccompanied minor. The appellant was an adult

at the date of hearing. FTTJ Jhirad noted the appellant's age at the dates of various events on which he relied in support of his claim [7]. At least some of the adverse findings were appropriately made irrespective of the appellant's age, eg that the authorities had not sought to to apprehend the appellant at his aunt's home, 2-3 minutes walk from his family home, the failure of family members to contact the appellant on the mobile phone given to him and which he retained during his journey to the UK. These are matters of plausibility unrelated to the appellant's age. These, taken together with the failure of the appellant's attempt to appeal FTTJ Jhirad's decision, lead to the conclusion that the principle in **Devaseelan** applies, namely the decision of FTTJ Jhirad was FTTJ Beg's starting point.

38. The guidance in **Devaseelan** is that, if issues and evidence on the first and second appeals are materially the same, the second Tribunal should treat the issues as settled by the first decision rather than being relitigated. I have considered the submissions of Mr Blundell, counsel for the appellant in the FTT, and his submissions, adopted by Mr Dhanji before me on the extent to which the guidance in **Devaseelan** was applicable. I agree that there is room for flexibility in its application. However, FTTJ Jhirad's decision was unappealable. Whilst res judicata does not apply in the context of asylum appeals (**Mubu & Ors (Immigration appeals – res judicata) [2012] UKUT 00398 (IAC)**), the hearing before FTTJ Beg was not a forum for relitigation. In **Mubu** it was held that the guidelines set out in **Devaseelan** **[2002] UKIAT 00702** **[2003] Imm AR 1** are always to be applied to the determination of a factual issue, the dispute as to which has already been the subject of judicial determination in an appeal against an earlier immigration decision involving the same parties. This is so whether the finding in the earlier determination was in favour, or against, the Secretary of State.

39. There was therefore no error of law in FTTJ Beg rejecting the submission that "the assessments undertaken by the respondent and the Jhirad Tribunal were vitiated by public law error, and should not be taken as the starting point. The Devaseelan guidelines, as interpreted in LD (Algeria) are, and must be, sufficiently flexible to accommodate that submission." The appellant had legal representation before FTTJ Jhirad. He applied for permission to appeal, presumably with the benefit of legal representation also. The decision of FTTJ Jhirad was found not to contain any arguably material errors of law. Against that backdrop, and given the authorities cited above, it was not a material error of law for FTTJ to take the first decision as her starting point.

40. I turn to FTTJ Beg's consideration of the appellant's documents. The respondent had contended that these documents were not genuine. For the appellant it was submitted that they corroborated the appellant's account and the respondent should have made enquires of the Afghan authorities to verify their authenticity. The appellant relied, before FTTJ Beg, on **PJ (Sri Lanka)** **[2015] 1 WLR 1322** to suggest the respondent could no longer, in the absence of verification, mount a challenge to the documents.

41. In **PJ (Sri Lanka)** it was held that, whilst the circumstances of individual cases might exceptionally necessitate an element of investigation by national authorities, such a step would frequently be unfeasible, unjustified or disproportionate due, amongst other things to logistical difficulties, cost, the prevailing local situation or potential risk to the claimant or his family resulting from enquiries. One highly relevant factor was whether the outcome of any enquiry was likely to be conclusive. In the unusual circumstances where an investigation should have been undertaken, the consequences would simply be that the respondent would be unable to challenge the authenticity of the document until a proper enquiry had been made. Paragraph 30 of **PJ (Sri Lanka)** makes it clear that the obligation to enquire is fact specific

and applies "when a simple process of enquiry will conclusively resolve its authenticity and reliability

42. In **MA (Bangladesh) and AM (Bangladesh) [2016] EWCA Civ 175,** the Court of Appeal said the statement in **PJ (Sri Lanka)** that 'the circumstances of particular cases might exceptionally necessitate an element of investigation' did not lay down a legal requirement that a case must be 'exceptional' before such a duty arose. Rather the situation, in which such a duty would arise, would occur only exceptionally. **PJ (Sri Lanka)** permitted an approach that was sequential in nature. National authorities might first consider whether a disputed document was at the centre of the request for protection before proceeding to consider whether a simple process of inquiry would conclusively resolve its authenticity and reliability. If those conditions were satisfied it might be necessary for a national authority to make an enquiry to verify a document, but it did not necessarily follow that such a duty would arise. Cases would be rare in which a court could be completely confident that a simple process of inquiry would conclusively resolve the issue. **PJ (Sri Lanka)** also required consideration of whether, in all the circumstances of the particular case, the Secretary of State was obliged to make enquiries into the authenticity and accuracy of the documents. There was uncontested evidence of MA's conduct, which was compelling evidence that his asylum claim was not genuine. For example, if he had a well founded fear of persecution as alleged, it was highly improbable that he would have remained in Bangladesh for three years after going into hiding, that he would have left the country on his own passport and made no asylum claim in the UK until 2012 after he was found to be working illegally. In the circumstances the Secretary of State was under no obligation to make further enquiries about Court documents allegedly confirming his conviction, which in any event might give no certainty of outcome, as to the authenticity of the documents in question.

43. In **VT (Article 22 Procedures Directive - confidentiality) Sri Lanka [2017] UKUT 368** the Upper Tribunal held (i) There is no general duty of inquiry upon the examiner to authenticate documents produced in support of a protection claim. There may be exceptional situations when a document can be authenticated by a simple process of inquiry which will conclusively resolve the authenticity and reliability of a document; (ii) There is a general duty of confidentiality during the process of examining a protection claim, including appellate and judicial review proceedings; (iii) The humanitarian principles underpinning Article 22 of the Procedures Directive prohibit direct contact with the alleged actor of persecution in the country of origin in a manner that might alert them to the likelihood that a protection claim has been made or in a manner that might place applicants or their family members in the country of origin at risk. (iv) The humanitarian objective of the Refugee Convention requires anyone seeking to authenticate a document produced in support of a protection claim to follow a precautionary approach. Whether an inquiry is necessary and is carried out in an appropriate way will depend on the facts of the case and the circumstances in the country of origin.

44. Thus the first issue is whether such an investigation should have been undertaken by the respondent. It was not submitted to FTTJ Beg (see, for example, the appellant's counsel's skeleton argument) that the process of enquiring into the authenticity and validity of the appellant's two documents issued in Afghanistan would have been a simple one. These documents were purportedly issued by the headman of the appellant's home village in Afghanistan and by the authorities (the police). On the face of the translated documents there appear to be no telephone numbers or other means of contacting the authors of these documents. Furthermore, FTTJ Beg would have been entitled to take into account, albeit she

did not do so, FTTJ Jhirad's decision on the appellant's credibility. This would not have suggested the outcome of any investigation by the respondent would give certainty as to the reliability of the content of the documents. Furthermore, the appellant claimed to be at risk of persecution by the authorities in Afghanistan. Given the guidance in the **PJ (Sri Lanka)**, **MA (Bangladesh)** and **VT**, the respondent cannot be criticised for having failed to attempt to authenticate the appellant's documents. to have done so would have alerted the authorities in Afghanistan to the appellant's asylum claim. Thus there was no material error of law in FTTJ Beg's approach to assessing the reliability of the appellant's documents.

45. I turn to the third ground of appeal: whether FTTJ Beg had given adequate reasons for her finding that the claim was not credible. I was referred to [28]-[38]. For the reasons stated above, FTTJ Beg was entitled to treat the first decision as her starting point. I agree that, considered carefully, there appear to be bare explanations for findings in these paragraphs. I deal with the specific grounds:

    a. At paragraph 28 FTTJ Beg finds the appellant's maternal uncle's evidence not to be credible because "he feared the Taliban when his own brother-in-law, that is the appellant's father, was a senior commander with the Taliban". I agree that this is not a finding which sustainable. It is based on presumption. Mere membership of the same family is not, without more, protection against risk.
    b. At paragraph 29, FTTJ Beg refers to the appellant's evidence that his father had been a senior commander with Hizb-e-Islami and the Taliban yet that neither the appellant nor his witnesses had been able to provide details of the appellant's father's work. The FTTJ found that the appellant's father's brother-in-law would have known more details about the appellant's father than simply that which had been conveyed to him by the appellant. This was a reasonable conclusion, particularly given that the appellant was a child when he left Afghanistan. Given the family relationship, it was reasonable to expect the witness would have personal knowledge of the appellant's father's activities even if only in broad terms. This issue goes to the core of the appellant's claim to be at risk as a result of his father's activities.
    c. I agree that the finding at paragraph 31 regarding the chance meeting of one of the appellant's witnesses and the appellant's mother is not based on the evidence. However, this is not a core issue in the appeal; it has little bearing on the outcome.
    d. I am unable to accept that the findings at paragraph 33 are not sustainable on the evidence. FTTJ Beg makes an adverse finding on the basis of the implausibility of the appellant's evidence as regards contact between his aunt in Afghanistan and his uncle in the UK. The remaining findings largely flow from that. With the exception of FTTJ Beg's finding that the appellant's mother moved to Pakistan for medical treatment (which is based on speculation and conjecture) the findings at [31] are adequate and sustainable.

46. While, some of FTTJ Beg's reasoning is flawed, taken in the round, her findings are sufficient and adequately reasoned and justify her conclusion on the appellants' credibility.

47. For these reasons, FTTJ Beg's decision on the appellant's adverse credibility and his entitlement to protection contain no material error of law. It should not be set aside.

Decision

48. The making of the decision of the First-tier Tribunal did not involve the making of any material error of law. It should not be set aside.

49. The appeals of the appellant and respondent to this tribunal are both dismissed.

A M Black
Deputy Upper Tribunal Judge Dated: 24 November 2017

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 their 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.

A M Black
Deputy Upper Tribunal Judge Dated: 24 November 2017