Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/14062/2019 (V)**

THE IMMIGRATION ACTS

Heard by a Remote Hearing	**Decision & Reasons Promulgated**
On the 22nd September 2021	**On the 20th October 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

AND

MR KHURRAM SHAHZAD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Diwnycz, Senior Presenting Officer.
For the Respondent: Mr R. O'Ryan, Counsel instructed on behalf of the appellant

DECISION AND REASONS

Introduction:

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Turner) (hereinafter referred to as the "FtTJ") who allowed the appellant's human rights appeal in a decision promulgated after a hearing on the 26 November 2020.

2. The FtTJ did not make an anonymity direction for the reasons set out at paragraph 2 of her decision. There has been no application made on behalf of the appellant for any anonymity direction to be made.

3. The hearing took place on 22 September 2021, by means of Microsoft teams which has been consented to and not objected to by the parties. A face-to-face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the appellant so that he could listen and observe the hearing. There were some issues regarding the video for the respondent's advocate and therefore it was agreed that Mr Diwnycz would give his submissions by audio means. The proceedings therefore continued by that method, and I am satisfied both advocates were able to make their respective cases by the chosen means.

4. Whilst this an appeal brought by the Secretary of State, I intend to refer to the parties as they were before the FtTJ.

Background:

5. The history of the appellant is set out in the decision of the FtTJ, the decision letter and the evidence contained in the bundle.

6. The appellant is a national of Pakistan. The appellant married the sponsor in Pakistan on 5 October 2001. After making 3 unsuccessful application for entry clearance, the appellant was granted a spouse Visa which enabled him to join his wife in the UK on 30 December 2011. The visa was valid until 5 March 2014.

7. On 29 January 2014 the appellant applied for indefinite leave to remain. The application was refused but, on the 29 May 2014, he was granted limited leave to remain in the UK until the 28 May 2016. This is on the basis that the appellant had completed level I of the English-language test. The appellant was granted limited leave to allow him to complete further tests to level 3 to then allow him the opportunity to apply for indefinite leave to remain.

8. On 16 May 2016 he applied for leave to remain however this is rejected as the appellant was said not have completed the mandatory sections of the application.

9. The appellant made a further application for leave to remain on 1 November 2016, but this was refused. The appellant appealed this decision. The First-tier Tribunal dismissed the appeal, and upon a hearing before the Upper Tribunal the appeal was also dismissed. Thus he was appeal rights exhausted with effect from 10 May 2018.

10. On 2 October 2018 the appellant made a further application for leave to remain at a time when he was in detention. The application was

refused on the basis that a paper application could not be submitted from detention. It was also stated that an application for asylum had been made on 2 October 2018 however this was subsequently withdrawn on advice from the appellant's solicitors.

11. On 21 November 2018 the appellant made an application for leave to remain as the spouse of the sponsor who was a British citizen. The application was refused in a decision letter dated 29 July 2019.

12. The FtTJ summarised the decision letter at paragraphs 10 – 15 of her decision. The summary is not challenged by the respondent, and I therefore replicated below.

13. The Respondent considered the application for leave to remain under the 10-year partner route as outlined in paragraphs R-LTRP of Appendix FM of the Immigration Rules (the 'Rules'). The Respondent accepted that the Appellant met the majority of the rules. The Appellant however did not meet the requirements of paragraph ELTRP2.1 to 2.2 as he had breached the immigration laws. The Appellant's previous leave to remain had expired on the 28th of May 2016. He has been in the UK without valid leave for 906 days.

14. The Respondent considered paragraphs EX.1 and EX.2 but concluded that these did not apply. The Appellant did not satisfy these paragraphs as there were not insurmountable obstacles which would cause very significant difficulties in the Appellant continuing to enjoy his family life with his wife outside of the UK. The Appellant married his wife in Pakistan, and it was noted that his wife had visited him in Pakistan multiple times. She would therefore have some familiarity with the life, culture and language in Pakistan. The Appellant would be able to assist his wife in integrating into society. The Appellant had been able to establish himself in the UK and as such it is reasonable to suggest that as adults the Appellant and his wife are capable of re-establishing their family life in Pakistan. The Appellant and his wife do not have children.

15. The Respondent considered private life under paragraph 276ADE(1)(vi) of the Rules however for the same reasons as outlined above, it was submitted that there were no significant obstacles to the Appellant's integration into Pakistan. The Appellant had spent 29 years of his life in Pakistan. The Appellant's mother also remains in Pakistan. The Appellant has not provided any evidence to suggest that she could not assist the Appellant or accommodate him upon return to Pakistan. The Appellant speaks Urdu, the language of Pakistan.

16. The Respondent considered whether there were any exceptional circumstances under paragraph GEN.3.2 of Appendix FM of the Rules. Consideration was given as to whether the removal of the Appellant would result in unjustifiably harsh consequences for the Appellant or his Sponsor. The Appellant's wife works in the UK and financially

supports herself and the Appellant. She claims that she cannot therefore relocate. The Appellant claims that his partner was born in the UK and knows little of the language or culture of Pakistan. The Appellant formed his relationship with his wife in full knowledge that he did not have permanent right to remain in the UK. The Appellant should have always prepared for the possibility of a return to Pakistan. Alternatively, the Appellant's wife does not have to relocate with the Appellant to Pakistan but could instead remain in the UK and continue to work and support him from the UK.

17. The Appellant also claims that he fears persecution from members of the Tabligi Jammat party and the authorities due to a land dispute. The Appellant had previously submitted a claim for asylum on the 2nd of October 2018 which was then withdrawn on the 20th of March 2019 with a signed declaration that *'I withdraw my application for asylum and Humanitarian protection in the UK on the basis that I have no well-founded fear of being persecuted and would not face serious harm on return to my country of origin'*. This is accepted.

18. Overall, it is not accepted that the Appellant and his wife would face unjustifiably harsh consequences in the event that the Appellant was required to leave the UK.

19. The appellant appealed that decision to the FtT (Judge Turner) on the 18 November 2020. In a decision promulgated on 26 November 2020 the FtTJ allowed the appeal on human rights grounds.

20. The FtTJ had the opportunity of hearing the oral evidence of the appellant and his wife and at [34]-[35] set out the documentary evidence that had been advanced by each of the parties.

21. The assessment of the evidence and findings of fact were set out at [38]-[61].

22. The FtTJ began her assessment by considering the earlier decision of Judge Mensah from 2017 as her starting point and reached the conclusion at [38] that the previous decision had little weight given the nature of the evidence before the tribunal compared with that before the previous tribunal.

23. The judge recorded the acceptance in behalf of the respondent that the appellant met the majority of the rules for the purposes of leave to remain that did not accept that the appellant satisfy the financial requirements. At paragraphs [40 – 42] the FtTJ set out the reasons given as to why the judge found that the appellant had submitted the relevant financial evidence at the time of the application and had satisfied the financial eligibility requirements.

24. At [43 – 59] the FtTJ set out her analysis of the issue of EX1 and whether the appellant faced "insurmountable obstacles" upon return to Pakistan. The judge considered that they fell into 2 categories; 1st

whether the appellant had given credible account of the land dispute and the 2nd related issues relevant to the appellant's wife if required to relocate to Pakistan.

25. When considering the issue of the land dispute, the FtTJ considered the evidence relied upon by the respondent which included the appellant's withdrawal of what was said to be an asylum claim but concluded that having considered the evidence and the immigration history that the appellant had followed the advice of his solicitors who'd advised accordingly and thus did not attach any significant weight to the withdrawal of any claim (at [45 – 47].

26. The FtTJ undertook an assessment of the evidence in support of the land dispute which included a witness statement from a solicitor that enquiries are made of Pakistani lawyer where the documentation was obtained (at [49]), and the contents of the documents[53], the evidence of the appellant which Judge found was "cogent and consistent" relating to the documentation and the allegation made (at [52]) and the background country material at [54] which the judge found was consistent with the appellant's claim. The FtTJ therefore accepted that the documentary evidence relied upon and on balance accepted his claim that he would be arrested upon return (at [55]).

27. At [56]-[57] the FtTJ considered the circumstances of the appellant's wife and at [59] concluded that the appellant and his wife would face insurmountable obstacles continuing their family life in Pakistan. At paragraphs [60 – 61] in the alternative and in the event that the judge had not found that there were any "insurmountable obstacles" the judge considered the application of GEN 3.2 and whether there were "in unjustifiably harsh consequences" and at [61] concluded that in light of the factors in favour of the appellant including the financial requirements and that but for an error in completing a form in 2016 he would have been granted leave to remain at that stage, there was no useful purpose served by requiring him to return to Pakistan to make an application to re-enter the United Kingdom. The FtTJ therefore allowed the appeal.

28. Permission to appeal was sought and permission was granted by FtTJ Grant on 18 December 2020 the following reasons:

> "The grounds submit, in terms, that the judge arguably misdirected himself in law as to the correct approach to previous decisions: and, furthermore made findings on an asylum claim actually withdrawn by the appellant during which the appellant confirmed that he has no fear upon return to Pakistan, something which should have informed the findings made when considering article 8. The misdirection as to previous decisions together with findings on matters amounting to an asylum claim have arguably vitiated all the findings for arguable error of law. The grounds may be argued."

The hearing before the Upper Tribunal:

29. In the light of the COVID-19 pandemic the Upper Tribunal issued directions on the 16 February 2021 and 8 April 2021 inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face-to-face hearing and that this could take place via Microsoft teams. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties.

30. I am grateful for their assistance and their clear oral submissions.

The submissions on behalf of the respondent:

31. Mr Diwnycz appeared on behalf of the Secretary of State. He relied upon the written grounds.

32. Ground 1 asserts that the FtTJ failed to consider the relevance of the previous determinations of the FtTJ (Judge Mensah) and UTJ Lane in the finding made at paragraph [38] where the judge stated:

> "38. Therefore, I find that the previous decision holds little weight in the circumstances given the evidence now before the tribunal compared to that before the previous tribunal, including the Upper Tribunal. In effect the previous tribunal could not make any real findings as the appellant had simply failed to adduce any evidence to allow any real conclusions to be reached. The appellant had simply failed to provide evidence to demonstrate that he did meet the requirements of the rules."

33. It is submitted that the judge's rejection of these decisions on the basis that the appellant had failed to provide the previous judges with sufficient evidence to inform their conclusions did not comply with the principles in Devaseelan.

34. The evidence that the appellant relied upon it should have been treated with the utmost circumspection. Instead the FtTJ allowed the appellant to relitigate his case and ignored the findings of Judge Mensah whose determination should have been the starting point. In his oral submissions Mr Diwnycz submitted that Judge Mensah could only make a decision on the material that she had been given and that she was correct to dismiss the appeal as demonstrated by the decision of Judge Lane to dismiss the challenge to her decision before the Upper Tribunal.

35. It is therefore submitted that the reasoning of Judge Turner was flawed to the extent that this infected his ultimate conclusions in favour of the appellant.

36. Ground 2 submits that the judge erred in law in his conclusion that the appellant would be faced with significant obstacles on return to Pakistan, based on his claim to be involved in a land dispute with members of the Tabligi Jammat Party. The judge ignored the

instruction of the appellant in withdrawing his application for asylum (at paragraph [14) which was clear that he not only wished to withdraw the claim but also that he had no fear on return. The appellant had previously submitted a claim for asylum on 2 October 2018 which was then withdrawn on 20 March 2019 with the signed declaration stating, "I withdraw my application for asylum and humanitarian protection in the UK on the basis that I have no well-founded fear of being persecuted and would not face serious harm on return to my country of origin."

37. It is submitted that the obstacles described in his current application amounted to a protection claim and should have been dealt with as such. The judge therefore in allowing the appeal has deprived the SSHD of fully examining what amounts to a claim for asylum including any documentation relied upon and misdirected himself in becoming the primary decision maker.

38. It is further submitted that simply stating at paragraph [45] that he did not place any significant weight on the fact that the appellant withdrawn his claim for asylum is insufficient as it failed to fully examine the reasons why the appellant was reluctant to properly claim asylum. In allowing the appeal under article 8 the judge erred in law by utilising article 8 as a general dispensing power.

39. In his oral submissions Mr Diwnycz, referred to the decision in JA (human rights claim, serious harm) Nigeria [2021] UKUT 97 (IAC) and directed the tribunal's attention to head note 3. He submitted that the appellant was not unaware that he could make a protection claim and that what he had done at the hearing was to reassert it through the "back door". He further submitted that the issue of "serious harm" should not have been an issue before Judge Turner and the appellant knew that he could raise these issues by making a proper protection claim.

40. The grounds submit that the criticism mounted by the judge against the Secretary of State at paragraph [50] is misdirected. Whilst the appellant may have provided the documentation referred to in 2018 when he claimed asylum, it would be unfair to hold the lack of verification of those documents against the respondent given that the appellant withdrew his claim for protection and clearly indicated that he had no fear of return.

41. It is further submitted that the judge erred in law by basing his conclusions as to the appellant's account on conjecture and supposition at paragraph 50 and 53. It is for the appellant to prove his case and he failed to give evidence to the effect that the judge has concluded and as such the FtTJ's reasoning is flawed.

42. No further submissions were made on behalf of the respondent.

The submissions on behalf of the appellant:

43. Mr O'Ryan of Counsel, who did not appear on behalf of the appellant at the FtT hearing, appeared on behalf of the appellant and relied upon the written submissions contained in his Rule 24 response dated 21 January 2021 and an addendum document sent by email on the day before the hearing.

44. Those submissions can be set out as follows. Dealing with the Devaseelan point raised, it is argued that the FtTJ was aware that the Respondent had previously been refused of leave to remain on 16/2/16, and that his appeal had been dismissed by the First tier and Upper Tribunal in the earlier proceedings.

45. It is submitted that the judge directed herself appropriately in law, and did treat the findings, such as they are, in the earlier proceedings as her starting point. However, the judge was entitled to find that the Tribunal in 2017 was effectively unable to make any findings of fact, due to the limited evidence available before it.

46. Of significant importance in the present proceedings, was the reliance by the Respondent on an FIR report, and a Proclamation to Appear document (Secretary of State's bundle pages [57-58]), and the witness evidence of Mr Singh, legal representative, who continues to represent the Respondent. Mr Singh gave evidence at paragraph 6 of his witness statement dated 16.1.20 that his firm instructed a lawyer Pakistan to attend at a police station to obtain copies of the FIR and any associated documents and said that the Pakistani lawyer obtained the documents and sent them back to Mr Singh. The evidence of Mr Singh was not challenged by the Presenting Officer (see FtTJ's decision, paragraph [35]).

47. Mr O'Ryan relied upon the decision of The Secretary of State for the Home Department v BK (Afghanistan) [20191 EWCA Civ 1358* where Rose LJ provided, quoting from the earlier case of Djebbar v SSHD [20041 EWCA Civ 804:

> "35 He then said this about the application or the guidelines.'
>
> > "30. Perhaps the most important feature of the guidance is that the fundamental obligation of every special adjudicator independently to decide each new application on its own individual merits was preserved."
>
> 36, Having set out the guidance and considered the criticisms made of it by the claimant in that case, Judge LI said:
>
> > [E] The great value of the guidance is that it invests the decision making process in each individual fresh application with the necessary degree of sensible flexibility and desirable consistency of approach, without imposing any unacceptable restrictions on the second adjudicator's ability to make the findings which he conscientiously believes to be right. It therefore admirably fulfils its intended purpose."

Rose LJ concluded:

> "I do not accept that in addressing the question of whether the finding of fact should be carried forward in that way, the tribunal is only entitled to look at material which either post-dates the earlier tribunal's decision or which was not relevant to the earlier tribunal's determination. To restrict the second tribunal in that way would be inconsistent with the recognition in the case law that every tribunal must conscientiously decide the case in front of them. The basis for the guidance is not estoppel or res judicata but fairness.

48. It is therefore submitted that the judge gave reasons for taking into account, and giving weight to, evidence which the Appellant had sought to rely upon following his unsuccessful appeal in 2017. Her reasons were adequate in law and did not contravene the guidance in Devaseelan and because the Appellant elected not to challenge the very significant evidence as to the provenance of the FIR and Proclamation to Appear documents. In his oral submissions, he referred to the guidelines in Devaseelan and that facts happening since the decision could be taken into account. When applied to this appeal, relevant facts since the early decision related to a different financial scenario.

49. In his oral submissions, he outlined that there were significant differences between the material before Judge Mensah and that before judge Turner and that the application was made at a time when his wife was working 2 jobs and that he met the requirements.

50. In respect of the 2nd ground, it was submitted that the appellant had, throughout his application for leave to remain on Article 8 grounds dated 21.11.18, argued that there were insurmountable obstacles to family life continuing outside of the United Kingdom, for reasons which included there being a risk of harm for him in Pakistan. Mr O'Ryan identified that from the documents as follows:(i)the application form, question 6.4, where the Respondent refers to enmity over ancestral land;(ii)questions 10.10 and 10.1 1 where he asserts that it is not possible for family life continuing outside of the United Kingdom for reasons set out in the covering letter (see below); (iii)question I L5, where the Respondent asserts that he will be arrested upon arrival in Pakistan and thereafter will be treated badly by the authorities;(iv)in the letter of representations accompanying the application dated 21.1 1.18, the Respondent asserts in detail that he faces a risk of ham in Pakistan due to the land dispute, and to the FIR document and the arrest warrant; and(iv)in his grounds of appeal against the Secretary of State's decision dated 2947.19, bringing his appeal to the first tier Tribunal the appellant continued to assert a risk of serious harm in Pakistan.

51. In the context of the application for leave to remain on article 8 grounds the appellant raised a risk of harm in Pakistan as a factor relevant to the question of whether there were insurmountable obstacles to family life continuing outside of the UK.

52. There was therefore nothing, jurisdictionally, which prevented the appellant from seeking to rely upon his risk of serious harm in Pakistan when arguing that there were insurmountable obstacles to family life continuing outside of the UK.

53. Therefore, the only question that was necessary for the judge to consider, was the weight to attach to the apparent assertion within the document at page 81, of the bundle, entitled 'Declaration or Withdrawal of Asylum, Humanitarian Protection and Human Rights Claims', that the appellant was withdrawing such claim on the basis that he had no well-founded fear of being persecuted and would not face serious harm on return to his country of origin.

54. The judge set out amply the background circumstances which led the appellant to sign this withdrawal document (see [45]). The judge did not misdirect herself in law as to what weight to attach to the withdrawal document; she was fully aware that the applicant had throughout, asserted a risk of harm, but had signed the document on the basis that he had not actually intended to make a protection claim, and the Secretary of State was also declining to process his application for leave to remain, whilst the protection claim remained extant (see [45] and the reference to various inter — party correspondences between Home office & legal representatives).

55. The question of what weight the judge attached to this withdrawal document was in any event a matter her; and the Appellant Secretary of State has not established any error of law on her part in the way which dealt with the document.

56. Mr O'Ryan further submitted that the appellant was entitled to argue that insurmountable obstacles to family life continuing outside the United Kingdom exist, by reason of a risk of serious harm in the country to which it is proposed the appellant be removed, even if the appellant has not made a protection claim in the United Kingdom (see decision of the Upper Tribunal in JA (human rights claim, serious harm) Nigeria [2021] UKUT 97 (IAC).

57. He therefore submits that the Secretary of State elected not to challenge key evidence in support of that part of the appellant's claim relating to risk of harm and set out in the evidence of Mr Singh, as to how an FIR report and a 'proclamation to appear' document were obtained (see paras [49-50]). The Judge held that the risk of serious harm was made out to a balance of probabilities; 'In the round, I find that the Appellant has provided cogent and consistent evidence about the documentation regarding the allegation made against him' (para [52]); and she found the appellant's case that he would be arrested upon return to be established, 'on balance' (para 55]).

58. Further, and admittedly contrary to the position adopted on behalf of the appellant at para 20 of his rule 24 response dated 21 January

2021, it was submitted that the Judge would in any event have been entitled to find the "serious harm" elements of the appellant's account as established, even if those elements had been established only to level of real risk; any element of an individual's human rights claim involving a putative breach of Article 3 ECHR may be treated as made out, if established only to the level of real risk of serious harm (see Kacaj (Article 3, Standard of Proof, Non-State Actors) Albania [2001] UKIAT 00018 8-15).

59. In relation to ground 3, it is submitted that the Secretary of State had been in possession of the FIR and the Proclamation to Appear documents since November 2018. The Secretary of State's consideration of those documents was not dependent upon the appellant making a protection claim. He clearly sought to rely upon those documents in support of his proposition that he was at risk of serious harm upon return to Pakistan, as part of his argument that there were insurmountable obstacles to family life continuing outside of the UK. He was entitled to rely upon those documents, and the Secretary of State's election not to make any enquiries as to the provenance of those documents, was a matter for her. The judge was not bound to place less weight on these documents, merely on the basis that the appellant had withdrawn a protection claim. The judge was entitled to note that the Secretary of State had not made any enquiries about the provenance of the documents,

60. Further and in any event, the judge was entitled to note, as argued above, that the provenance of the documents was established by reason of the unchallenged evidence of Mr Singh.

61. As to ground 4, it is submitted that the judge's reasons for finding that the appellant was at risk of serious harm in Pakistan were fully and adequately reasoned. The judge made reference to country information that was before her; she gave consideration to the likely consequences of the appellant's return to Pakistan (his likely arrest). The respondent's argument in her grounds of appeal is nothing more than a disagreement.

62. Mr O'Ryan submitted that the FtTJ had made an alternative finding at paragraphs 60 -61 and that the Secretary of State had not made any challenge to the judge's independent findings that appellant's wife would face significant obstacles/unjustifiably harsh consequences on return to Pakistan, and further that, as all the requirements for entry clearance to enter the United Kingdom under Appendix FM would be met, there was no sensible reason for the Secretary of State's requirement that the Respondent return to Pakistan to make an application for that purpose see— [56-61], and [64]. In his oral submissions, he pointed to the arguments being made to the judge relating to the decisions in Hayat and Chikwamba and which were reflected in her conclusions.

63. As there had been no challenge to those findings, any error of law as asserted by the respondent would not be material to the outcome.

64. Mr O'Ryan invited the tribunal to uphold the decision and to dismiss the appeal.

65. At the conclusion of the submissions reserved my decision which I now give.

Decision on error of law:

66. Dealing with the 1st ground of challenge the respondent submits that the FtTJ in her decision failed to consider the relevance of the previous decisions of FtT Mensah and UTJ Lane. The written grounds relied upon by Mr Diwnycz point to paragraph 38 and mount the criticism that the FtTJ rejected the previous decisions and failed to apply the principles set out in the decision of Devaseelan.

67. Having read the decision in full and in the context of the material before the tribunal I am satisfied that the FtTJ did not fall into error in the way that the grounds assert.

68. Whilst the respondent cites paragraph 38 in support of her grounds, I observe that they fail to refer to the entirety of paragraph 38. When reading that paragraph it is plain that the FtTJ had regard to both of the previous decisions. The judge began her assessment of the facts by expressly referring to the principles in Devaseelan stating " Devaseelan tells me that the previous decision is my starting point". There is no error of law demonstrated in that approach and it is entirely consistent with the principles set out in Devaseelan. The FtTJ then considered the earlier decision of Judge Mensah and noted that the appeal was made on article 8 grounds (as was the present appeal) and that the issues were whether the appellant satisfied the financial eligibility requirements under Appendix FM and whether there were insurmountable obstacles to family life continuing in Pakistan.

69. In my judgement the FtTJ was entitled to consider the nature of the previous appeal and the evidence that was before the tribunal. The judge stated that the earlier decision of Judge Mensah was one that was taken "on the papers" and that the judge did not hear any oral evidence, nor did Judge Mensah have the advantage of hearing submissions. The judge further identified that there had been limited documentary evidence provided and cited Judge's Mensah's view of the lack of material before her. Additionally the judge referred to the failure of both parties, including the Secretary of State, to file bundles of evidence.

70. In my judgement the FtTJ was entitled to take into account that during the present appeal the position was materially different, and that full evidence had been provided by both parties, that she had

the benefit of oral evidence from the appellant and his wife and that she had the advantage of "lengthy submissions from each of the advocates" and also their "detailed written submissions". I do not consider that the judge fell into error and the conclusion reached by the judge that she could attach little weight to the previous decision in light of the evidence that was now before her was one that was reasonably open to the judge to make. As the FtTJ stated, the evidence as to whether the appellant could meet the financial eligibility requirements (which the respondent did not challenge in the decision letter although appeared to do so at the hearing) was materially different and therefore the judge was entitled to consider the new and later evidence. As submitted on behalf of the appellant, the circumstances were different with the appellant's wife now working in two jobs and there was significant material factual differences from the earlier appeal.

71. Mr O'Ryan in his rule 24 response cited more recent case law building on the principles in Devaseelan. I have set them out earlier in this decision. In my judgement, those decisions support the approach taken by the FtTJ and she was entitled to look at the new evidence and consider whether this evidence was such for her to reach a different conclusion from that of the earlier decision.

72. In summary, I am satisfied that the judge properly applied the principles in Devaseelan when considering the present appeal. The judge expressly directed herself to the earlier decisions of the FtTJ and as upheld on appeal and that this was her "starting point". The judge was entitled to consider the new factual evidence since the decision made in 2017 and that the judge was entitled on the evidence to reach the conclusion that there was a different financial scenario with different evidence that related to the financial eligibility requirements. Thus the circumstances were materially different to the earlier appeal. Consequently I am satisfied that there was no misdirection law as asserted in behalf of the respondent.

73. I now turn to the 2nd ground. As Mr O'Ryan pointed out in his oral submissions, the way the ground is framed is of some importance. The written grounds state that the FtTJ erred in her conclusion that the appellant would be faced with significant obstacles on return to Pakistan, based on his claim to be involved in a land dispute. "In doing so he ignores the instructions of the appellant in withdrawing the application for asylum which is clear that he not only wishes to withdraw the claim but also that he had no fears on return". Thus the respondent's grounds assert that the FtTJ "ignored" the appellant's withdrawal document in her assessment of the evidence. That is patently incorrect. There are a number of paragraphs in the decision which expressly refer to the appellant and that there was reference to him having "submitted" a claim for asylum on 2 October 2018 which was then withdrawn. At paragraph [14] the judge cited that material including the declaration and at [21] the judge referred to

the respondent's case as to the withdrawal form and the evidence given by the appellant. At [45] the judge set out the respondent's submission on this issue and again referred to the issue of the withdrawal. The judge's consideration and analysis of the evidence on this issue was set out in detail at paragraphs [45]-[59]. Thus the assertion that the judge "ignored" the withdrawal of the appellant's claim is not made out.

74. The thrust of the submission made on behalf of the respondent is that the "insurmountable obstacle" relied upon by the appellant amounted to a "protection claim" and therefore should have been dealt with as such. Thus it is submitted that the judge by considering this as part of the article 8 assessment deprived the Secretary of State of examining what in reality amounted to a protection claim including the documents that the appellant relied upon.

75. Since the grounds were submitted, this issue has been considered by the Upper Tribunal in the decision of in JA (human rights claim, serious harm) Nigeria [2021] UKUT 97 (IAC).

76. The headnote to that decision sets out as follows:

> "*(l) Where a human rights claim is made, in circumstances where the Secretary of State considers the nature of what is being alleged is such that the claim could also constitute a protection claim, it is appropriate for her to draw this to the attention of the person concerned, pointing out they may wish to make a protection claim. Indeed, so much would appear to be required, in the light of the Secretary of State's international obligations regarding refugees and those in need of humanitarian protection.*
>
> *(2) There is no obligation on such a person to make a protection claim. The person concerned may decide to raise an alleged risk of serious harm, potentially falling within Article 3 of the ECHR, solely for the purpose of making an application for leave to remain in the United Kingdom that is centred on the private fife aspects of Article 8, whether by reference to paragraph 276ADE(l) (vi) or outside the immigration rules. If so, the "serious harm" element of the claim falls to be considered in that context,',*
>
> *(3) This is not to say, however, that the failure of a person to make a protection claim, when the possibility of doing so is drawn to their attention by the Secretary of State, will never be relevant to the assessment by her and, on appeal, by the First-tier Tribunal of the "serious harm" element of a purely human rights appeal. Depending on the circumstances, the assessment may well be informed by a person's refusal to subject themselves to the procedures that are inherent in the consideration of a claim to refugee or humanitarian protection status. Such a person may have to accept that the Secretary of State and the Tribunal are entitled to approach this element of the claim with some scepticism, particularly if it is advanced only late in the day. That is so, whether or not the element constitutes a "new matter" for the purposes of section 85(5) of the Nationality, Immigration and Asylum Act 2002.*

> *(4) On appeal against the refusal of a human rights claim, a person who has not made a protection claim will not be able to rely on the grounds set out in section 84(1) of the 2002 Act, but only on the ground specified in section 84(2).*

77. Applying that decision, it was therefore open to the appellant to raise a risk of serious harm for the purposes of making an application for leave to remain in the UK. Therefore the judge did not err in law by considering whether the circumstances in Pakistan gave rise to any risk of harm to the appellant and his wife.

78. Mr Diwnycz relies upon the 3rd part of the headnote recited above and submits that the appellant's failure to continue his protection claim having made one was relevant to the assessment and that the judge did not properly consider that aspect in her decision.

79. I have given careful consideration to that submission in the context of the FtTJ's assessment of the evidence that was before her. The decision in JA (as cited) states that an assessment of this type may well be informed by a previous refusal to subject themselves to the procedures that are inherent in the consideration of a claim and that such a person "may have to accept that the Secretary of State and the tribunal are entitled to approach this element of the claim with some scepticism, particularly if advanced only late in the day." However as the decision also states, that "depends on the circumstances".

80. It could not be said that the factual claim was advanced late in the day as it had been evidenced to the respondent in October 2018 and well before the decision letter of 29 July 2019 was issued. Thus it was not a new factual claim or assertion made by the appellant.

81. When applied to the facts of this current appeal the judge was plainly aware of the litigation background and what she described as the "complicated history" which was set out at [45]-[48]. From the documents that were before the judge, it appeared that the appellant made an application for leave to remain on family and private life grounds which was rejected on 13 July 2018 which then led to his detention on 15 August. It appears that whilst in detention he made a further human rights claim dated 1 October 2018 which is set out in the appellant's bundle at page 1. Under the heading "insurmountable obstacles and exceptional circumstances" the appellant made a reference to the circumstances in Pakistan and why he was in fear of them. The appellant had not made an asylum claim as noted there but had referred to issues of protection in the context of "insurmountable obstacles". The FtTJ referred to this at paragraph [45] and the email exchanges at page 77 showing the appellant's solicitor's reply to an email from the respondent. It was said that the appellant had made no asylum claim but had made a claim for leave to remain based on family and private life. It was against this background that the appellant "withdrew" what was described as an

asylum claim on 18 February although it was said that he had not made any such claim.

82. The explanation provided before the judge was that the application made in October 2018 had been submitted whilst in detention and as such was not a valid application. This was evidenced by the rejection of the application by the respondent set out at page 70. The appellant therefore made a 2nd application based on the same grounds dated 21 November 2018 which was then accepted. The appellant's claim was that that he had withdrawn the asylum claim, if one had been made, because he had already made a claim for leave to remain and that he had been advised that 2 applications could not be made together, and one would have to be withdrawn.

83. The FtTJ heard the evidence of the appellant and considered the submissions of the parties on this issue and did so in light of the documentary evidence which included the emails, the applications and the decision letter. Having done so, the FtTJ concluded in favour of the appellant at [45] and that she was satisfied that the "appellant simply followed the advice of the solicitor who'd advised him accordingly. I do not attach any significant weight to the fact that he withdrew his asylum claim." At [46] the FtTJ questioned why he had not made a protection claim when he had 1st arrived but nonetheless accepted the submission that the purpose of coming to the UK was to settle with his wife, he had made the appropriate application to enter the UK for that purpose and as such any application for asylum at that stage was unnecessary.

84. Therefore the FtTJ gave reasons based on the evidence as to why she accepted the appellant's evidence concerning the withdrawal of the claim if one had been made. In the circumstances it was open to the judge to give little weight to that document in the context in which it was made.

85. I am bound to say that the terms of the withdrawal referred to the appellant withdrawing the application because he had "no well-founded fear of persecution" and that he would "not face serious harm on return". He therefore appeared to be stating that he did not have a fear of return or being subject to serious harm in Pakistan which was inconsistent with the basis of the material set out in the letters dated 1 October 2018 and 21 November 2018. However, the judge was plainly aware of the terms of that withdrawal but reached the conclusion on the evidence that the appellant's explanation was plausible, credible and supported by the documentary evidence and the appellant was following the advice of his representatives (at [45]).

86. It is now well established that it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreement about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of

hearing oral evidence. The assessment of such a claim is always a highly fact sensitive task. The FtT judge was required to consider the evidence as a whole and she plainly did so, giving adequate reasons for her decision. Consequently it has not been demonstrated that judge was in error by considering the circumstances on return to Pakistan and issues of harm in the context of the human rights claim, applying the decision in JA.

87. Dealing with a last ground of challenge, the grounds challenge the FtTJ's finding at [50] on the basis that it was unfair of the judge to hold the lack of verification of the documents against the respondent given that the appellant had withdrawn the claim for protection.

88. At paragraph [50] the FtTJ stated as follows:

> "50. The Respondent has not challenged this evidence, nor have they sought to challenge the authenticity of the documents. The only query raised in this regard was why the Appellant's mother had failed to tell the Appellant about the issue in 2018 after the documentation was produced in 2011. The Appellant explained that his mother had not mentioned that the police had been to the family home looking for him in connection with these documents as she is elderly, and it had not been something that had come up immediately. Given that the documents were produced after the Appellant was in the UK, it may not have been something that was a priority in the mind of the Appellant's mother. It is right to say that the Appellant has not produced any evidence about his mother's health. In any event, the Appellant's mother is currently living alone in Pakistan with his sister living some half an hour away. Given that the Appellant's mother is living independently, the Appellant's mother's health is unlikely to be so poor that this has impacted upon her memory about something of this nature however for the reasons outlined above, it may not have been a priority point for discussion".

89. As the FtTJ observed, the respondent had been in possession of the document since October 2018 and before the decision was reached in July 2019. As the appellant set out his claim in the factual account of the documentation, the respondent was aware of the nature of the claim and had copies of the relevant documents. I can see no error in the judge's decision at [50]. I further note that there was nothing to prevent the appellant from relying on those documents. If the respondent did not wish to make enquiries about those documents or file relevant background evidence that was a matter for the respondent.

90. The grounds also failed to take into account the preceding paragraphs to paragraph [50]. At [49] the judge referred to counsel's submission that the documents had been provided in 2018 and they were not documents that had just been provided. Furthermore, there was documentary evidence in support of their provenance as reliable documentation in the form of the witness statement from Mr Singh. The judge considered that evidence at [49] and at [50]. Mr Singh had provided a witness statement setting out the enquiries made of a Pakistani lawyer who had visited the police station Pakistan where

the documentation had been obtained. The judge set out at paragraph [50] the respondent did not challenge the evidence at the hearing and Mr Singh was not the subject of cross-examination. Furthermore, the respondent had not sought to challenge the authenticity of the documentation. The judge undertook an assessment of those documents, properly taking into account the evidence of Mr Singh as to the documents provenance. The judge also considered the documents in the context of the contents of those documents at [53] and considered their reliability in the context of the background country material of the respondent's CPIN (at [54]0 despite recording that the respondent did not seek to challenge this or addresses the background material in detail during submissions.

91. Consequently the conclusion reached at paragraph [55] that the FIR and proclamation were documents that she considered were reliable was a finding that the judge was entitled to make on the evidence and supported by her assessment of the evidence in its totality.

92. The last issue on the grounds is that the judge erred in law by basing her conclusions as to the appellant's account on "conjecture and supposition". That was not explained further in any submissions made by Mr Diwnycz and the only paragraphs of the FtTJ's decision that are referred to are [50] and [53]. I have dealt with paragraph [50] above. Paragraph [53] is where the judge assessed the country background material in the respondent's own CPIN. I can see no speculation or conjecture in those paragraphs but that the judge properly assessed the supporting evidence when reaching an assessment as to the documents reliability and whether the judge could place weight and reliance upon them. There is no merit in that ground.

93. It has not been demonstrated by the respondent that on the particular factual circumstances of this appellant's case and on the evidence before the FtTJ that the decision was either inadequately reasoned or that the FtTJ failed to apply the correct legal principles.

94. For these reasons I consider that the grounds of appeal do not disclose any errors of law requiring the judge's decision to be set aside. The judge clearly had regard to all the evidence and was entitled to make the positive findings that she did. Consequently, the FtTJ was entitled to conclude that the appellant had shown that there were insurmountable obstacles to family life in Pakistan and that as such his removal would breach his human rights under Article 8 of the ECHR. The FtTJ carried out a full assessment reaching conclusions on that evidence which were reasonably open to her to make.

95. I now deal with a final point raised by Mr O'Ryan in his rule 24 response and also his oral submissions. It seems to me that it is a complete answer to the respondent's grounds. Notwithstanding the challenge to the FtTJ's assessment of whether the appellant would be

at risk of harm in Pakistan, the grounds do not to seek to challenge the alternative findings made by the FtTJ at paragraphs [60]-[61] and at [64]. In those paragraphs the FtTJ refers to the application of GEN 3.2 and whether there are "exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of article 8 of the ECHR, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose article 8 rights it is evidence from that information would be affected by a decision to refuse the application."

96. In assessing whether there were "unjustifiably harsh consequences" the FtTJ found that the consequences of refusing the appeal would be to require the appellant to return to Pakistan to make an application for entry clearance to re-join his spouse in circumstances in which the application was bound to succeed. This is because the only reason leave to remain was refused is because he could not meet the EX1 "insurmountable obstacles" and the sole reason why he was required to meet this test and EX1 is because he could not meet the eligibility immigration requirement. I pause to observe that the respondent did not refuse the application on the basis that the judge could not meet the financial requirements in the decision letter (although it appears to have been the subject of argument before the FTT) and this was expressly set out and analysed by the judge at paragraphs [40 – 42] who in fact made a firm finding, which is been unchallenged in these proceedings that the appellant did meet the financial eligibility requirements.

97. The judge took into account that on an application entry clearance the appellant would not have to demonstrate EX1 or the eligibility immigration requirement and therefore there were no sensible reasons for requiring the appellant to return to Pakistan when he was found to have met the requirements for entry clearance that he had already been found to have met in the course of an application for leave to remain and that was refused for reasons related exclusively to an in country application.

98. Whilst the judge referred to the "minded to allow document" which had been prepared following the Case Management review hearing by Judge Kelly, the FtTJ reached her own independent view on the evidence that was before her as evidenced at paragraph [61] where the judge undertook her own analysis of the evidence in relation to the appellant's history of applications and that but for the error when completing this form in 2016 the appellant would have been granted leave to remain at that stage. The judge set out that the facts taken together rendered the refusal of leave to remain as resulting in "unjustifiably harsh consequences" and that in her judgement she could see no useful purpose for the appellant returning to Pakistan when the application to enter would succeed.

99. Therefore the judge reached an alternative conclusion at paragraphs [60]-[61] and at [64] that even if they were no insurmountable obstacles when considering GEN 3.2 and the issue of "unjustifiably harsh consequences" she would have allowed the appeal for the reasons given at paragraph [60]-[61]. The grounds do not challenge that alternative finding and therefore it must follow that even if the judge was in error as the respondent asserts for the reasons set out in ground 2 relating to the issue of risk of harm, any error in this regard would not be material to the outcome.

100. For those reasons, the decision of the FtTJ did not involve the making of an error on a point of law, the appeal of the Secretary of State is dismissed and the decision of the FtTJ to allow the appeal shall stand.

Notice of Decision.

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision of the FtT to allow the appeal shall stand. The Secretary of State's appeal is dismissed.

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

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or their family members. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Upper Tribunal Judge Reeds

Dated 23/9/2021

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.