IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005360

First-tier Tribunal Nos: HU/53161/2021
IA/09660/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 21 June 2023

Before

THE HON. MRS JUSTICE THORNTON DBE
UPPER TRIBUNAL JUDGE RIMINGTON

Between

ANTONY RAJAN
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Wilcox, Counsel, instructed by Duncan Ellis Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

Heard at Field House on 16th May 2023

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Jolliffe who, on 30th August 2022, dismissed the appellant's appeal on human rights grounds following the refusal by the Secretary of State dated 4th February 2022 of his application for leave to remain under Appendix FM of the Immigration Rules on the basis of family life with his wife.

2. The appellant entered the United Kingdom on 27th January 2010 with a Tier 4 Student visa valid and his leave was extended in stages until 26th November 2013. On 22nd August 2014 the appellant was served as an overstayer with an IS151A and applied on 16th December 2014 for further leave on Article 8 grounds which was refused by the respondent on 22nd January 2015. That refusal, which

included an assertion that the appellant had engaged in deception in relation to an ETS English language TOIEC test, was subject to an appeal to the First-tier Tribunal heard by a First-tier Tribunal Judge (Judge Colvin) on 18th December 2015 and dismissed.

3. Judge Colvin found in favour of the appellant on the issue of deception in the ETS language test in April 2012 finding that the respondent had not discharged the burden of proof, but the judge found against the appellant on the issue of whether the appellant's claimed relationship with his wife was genuine. Notwithstanding his second finding the judge found there would be insurmountable obstacles to family life continuing in India if the relationship had been genuine.

4. On 16th August 2016 the appellant applied for further leave as a spouse and this application was refused in a decision of 4th September 2017. Further submissions were made, and these were refused with no right of appeal on 12th January 2018. On 25th September 2020 the appellant applied for leave to remain under the five year spouse route. That application was refused by the decision underlying this appeal.

5. The grounds for permission to appeal set out:

6. Ground 1 - improper application of **Devaseelan v The Secretary of State for the Home Department** [2002] UTIAC and the **Ladd v Marshall** principles in relation to the deception allegation.

7. In **Chomanga (binding effect of unappealed decisions) Zimbabwe [2011] UKUT 312 (IAC)** the Tribunal emphasised that in the absence of fraud or one of the exceptions in [35] of **TB (Jamaica) v Secretary of State for the Home Department [2008]** it was not open to the Home Office to seek to make a new decision by reference to evidence which was available at the time of the Tribunal's determination which it failed to put in evidence before the Tribunal. **Mubu and others (immigration appeals – res judicata) [2012] UKUT 00398 (IAC)** rejected the argument that there was any estoppel or application of the principle of res judicata but found **Devaseelan [2002] UKIAT 00702** applied and it was not open to the Secretary of State to relitigate the same issue by reference to evidence which it could have put before the previous Tribunal had it acted with reasonable diligence.

8. The grounds cited **R (Al-Siri) v Secretary of State v the Home Department [2021] EWCA Civ 113** which held at [66] to [68] that "The starting point is that an unappealed decision is final and binding and must be accepted and implemented by the Home Secretary, unless there is a good basis for impugning that decision".

9. In the light of the above it is a matter of some question of whether the criteria laid down in **Devaseelan**, or rather those laid down in **Ladd v Marshall** were applicable when the Tribunal considered departing from its earlier findings.

10. The judge had failed properly to explain or justify why he had departed from the earlier findings of Judge Colvin. To simply state that the evidential situation had moved on since Judge Colvin found in favour of the appellant was insufficient to meet the **Ladd v Marshall** test nor to justify departure from those earlier findings under the principles of **Devaseelan**.

11. In particular, no consideration was given by the judge to whether the evidence postdating Judge Colvin's decision could with reasonable diligence have been obtained by the respondent at that point. Given the numerous criticisms of the evidence relied upon by the respondent and its failure to put forward more compelling evidence in a number of cases prior to **DK and RK** it was strongly arguable that such evidence with due diligence could have been so obtained.

12. Ground 2 – failure to justify departing from earlier findings in relation to insurmountable obstacles.

13. In the earlier decision Judge Colvin found there would be insurmountable obstacles to family life continuing in India. The appellant had lived in the UK for over twenty years, had two sons in the UK and had a job here and it would be extremely difficult for his wife to relocate to India.

14. At [50] to [52] the judge departed from those earlier findings, there was no proper explanation as to why he departed.

15. Ground 3 – finding that there was no genuine relationship was insufficiently reasoned.

16. At [30] to [33] the judge reasoned that the evidence before him in respect of the relationship was not substantially different from that before Judge Colvin but failed entirely to consider the significance the appellant and his wife had now been in the same house for an additional six and a half years since the earlier determination. The finding that the appellant and his wife were not in a genuine relationship failed to take account of material considerations.

17. Ground 4 – no proper consideration of Article 8 outside the Rules.

18. The judge made no separate or adequate assessment of the appellant's case under Article 8 outside the Rules. The impact of his removal clearly engaged the rights not just of the appellant but also of the spouse and by extension at least one of her children. It was a material error of law for the judge not to engage in a proper assessment as to whether a refusal of the appellant's appeal would lead to unjustifiably consequences.

19. Permission was initially refused by the First-tier Tribunal who recorded that Judge Jolliffe had carried out a detailed and thorough rehearsal of the evidence and submissions and had made a careful analysis of the evidence and submissions within the framework of applicable law resulting in a well-reasoned and sustainable finding.

20. Permission to appeal was granted by Upper Tribunal Judge Jackson who reasoned that the first ground of appeal was arguable in relation to the finding of deception and it was at least arguable that the judge failed to consider whether the evidence now relied on by the respondent could or should have been available to the earlier Tribunal in 2016 (in fact the hearing was in 2015) and therefore what weight should be applied to it. She added:

> *"Although not expressly referred to in the grounds, it is also arguable that the Tribunal has not expressly followed the three part assessment required in deception, simply concluding that it would be extremely unlikely that the Appellant's test result was a false positive and the denial is therefore rejected".*

21. Judge Jackson, when granting permission found the two grounds of appeal in relation to family life were much weaker; there were cogent reasons for finding the appellant was not in a genuine relationship and without finding in the appellant's favour on that ground, whether or not there are insurmountable obstacles would be irrelevant. Nevertheless, it was arguable that the Tribunal had not identified any change of circumstances or evidence since the previous finding on insurmountable obstacles, which may be relevant.

22. The final ground of appeal on Article 8 was also found to be arguable; the only ground of appeal before the First-tier Tribunal was of human rights and therefore there should be an assessment and a finding one way or another, even if only that there was nothing separate to be considered outside of the Immigration Rules in Appendix FM.

23. A rule 24 response was filed citing **Secretary of State for the Home Department v Patel [2022] EWCA Civ** 36 such that the judge could not avoid the obligation to address the merits of the case on the evidence subsequently available and the judge had properly applied **Devaseelan**. The judge had also properly applied **DK and RK (ETS: SSHD evidence, proof) [**2022] UKUT 00112 and the reasons for departing from Judge Colvin's decision were detailed and sustainable on the evidence before him. In relation to the further grounds the judge again applied **Devaseelan,** and it was open to him to find there was no relationship on the basis of the evidence and documentation. In relation to Article 8 the judge had clearly applied **Agyarko** [2017] UKSC 11.

24. Mr Wilcox at the hearing before us emphasised that the judge did not properly apply **Devaseelan** and in particular did not consider whether the evidence before him was not previously before Judge Colvin and if not, whether it could have been obtained with reasonable diligence. The failure to consider that was an error of law. He submitted there were two lines of authority. The first line of authority focusing on **Devaseelan** which has received an endorsement from the Court of Appeal in **Secretary of State for the Home Department v BK (Afghanistan) [2019] EWCA Civ 1358** and the second line of authority which focuses more explicitly on the application of the stricter requirements laid down in **Ladd v Marshall [1954] EWCA Civ 1**. In **Chomanga (binding effect of unappealed decisions) Zimbabwe [2011] UKUT 312 (IAC)** the Tribunal emphasised it is not open to the Home Office to seek to make a new decision by reference to evidence which was available at the time of the Tribunal's determination but which it failed to put in evidence before the Tribunal. More recently that approach was reaffirmed in **R (Al-Siri) v Secretary of State for the Home Department [2021] EWCA Civ 113** where the Court of Appeal framed its discussion in the context of **Ladd v Marshall** the principles of res judicata, the issue of estoppel and the importance of finality and litigation.

25. He accepted that the decisions were consistent in requiring judges, asked to reconsider previously determined issues on the basis of new evidence, to scrutinise why that evidence was not adduced at an earlier hearing. In his skeleton argument Mr Wilcox again noted **Mubu and others (immigration appeals – res judicata) [2012] UKUT 00398 (IAC)** and whilst rejecting the argument that there was any estoppel or application of the principle of res judicata the Tribunal also accepted that it was not open to the Home Office to seek to relitigate the same issue by reference to evidence which could have been put before the previous Tribunal had it acted with reasonable diligence.

26. Mr Wilcox accepted that as recognised at [35] of **TB (Jamaica)** that a change in the law subsequent to a prior determination would normally satisfy the first reasonable diligence limb of **Ladd v Marshall** but he submitted it did not follow that every subsequent change in the law was sufficient to satisfy the **Ladd v Marshall** test. **DK and RK** fell into a special subset of cases which although ostensibly altered , the reason why a change of law had taken place was because new facts had been found pursuant to evidence which had been brought by the Secretary of State; there was no established principle why it could not be asked whether the Secretary of State could have brought that evidence with reasonable diligence at an earlier stage. That still should be the case. That is the question the judge should have asked himself.

27. Our attention was drawn to the comments of McCloskey J in **SM and Qadir v Secretary of State for the Home Department (ETS - Evidence - Burden of Proof)** [2016] UKUT 229 (IAC) that despite the generic evidence of fraud consideration of whether within that context individual allegation of fraud could be sustained was required. The evidence in that case was remarked upon as being very limited.

28. Secondly, Mr Wilcox submitted that the question of reasonable diligence would have to be calibrated according to the circumstances of the parties, one is a government department and one an individual. McCloskey J had specifically criticised the Secretary of State for the failure to produce evidence before the hearing. There should be a finality of litigation particularly when the allegations were of fraud. This was a specialist tribunal, and the relevant question should have been asked. Mr Wilcox also submitted that the judge had failed to properly consider the principle of **Devaseelan** in relation to insurmountable obstacles and whether what had changed was material.

29. Finally, Mr Wilcox submitted that the consideration of the legal burden of deception by the judge was threadbare and it was established that it was somewhat of a high burden to rebut and required full consideration.

30. Mr Lindsay submitted that the approach contended for by the appellant was artificial and unworkable and would have to ignore the authority of **DK and RK**. **Ladd v Marshall** related to the question of fresh admissible evidence. The appellant was legally represented in the First-tier Tribunal and there was no submission as to the admission of the fresh evidence. That was fatal to the appellant's case today and a point dealt with in **Sultana** at [52] was on all fours with the present case. This should have been raised by the appellant before Judge Jolliffe and it could not be said that he erred in failing to look at a submission which was not made.

31. As per **TB (Jamaica)** there had been a material change of law and the judge was entitled to consider and remake the decision he did. Paragraph [35] of **TB (Jamaica)** confirms that different considerations applied where there was a change of law and there was a change in this case. It was not accepted that **DK and RK** was a statement only of precedent fact but even if it were, it still addressed evidence that could not have reasonably been obtained by reasonable diligence in 2016. It was difficult to draw clear lines between fact and law. It was undesirable and administratively unworkable for the Secretary of State to establish that some oral evidence which was given in **DK and RK** could not have been before Judge Colvin. That was not consistent with the overall authorities, or the overall objective and it was sufficient that the law had changed materially. There were aspects of **DK and RK** in terms of the underlying evidence which

postdated Judge Colvin's decision and it was not realistic that all the evidence could have been placed before Judge Colvin in December 2015. **SM and Qadir** and the criticisms of the Secretary of State's evidence was promulgated after the Colvin decision was made and it is clear that the McCloskey J comments could not have prompted the Secretary of State to get more evidence. There was an evolving picture of evidence in the TOEIC cases. Judge Jolliffe relied squarely on Professor French's evidence at [39] and [42] and that postdated the earlier decision and squarely met the **Ladd v Marshall** criteria even in stringent form. There are a number of significant Court of Appeal decisions upholding **Devaseelan**. They confirmed it was not a straight jacket (but reflected the flexibility that needed to be taken in the interests of justice and fairness) and nothing here indicated that the Secretary of State or First-tier Tribunal were not entitled to proceed as they did. **DK** is a statement of the law and evidence some six years later.

32. As per the headnote of **DK and RK** the legal burden was set out and the boomerang approach disapproved.

33. Mr Wilcox submitted that the instruction to Professor French was not made in a timely manner. The burden of proof was on the Secretary of State to show that it could not have been obtained with reasonable diligence.

Analysis

34. The key planks to Mr Wilcox's submissions were that there was a tension in the jurisprudence between the **Devaseelan** and **Ladd and Marshall** principles[1], the judge failed to apply the principles properly and further that the judge should nevertheless as a specialist tribunal considered the issue of his own motion whether the Secretary of State had acted with due diligence in line with the principles in **Ladd v Marshall** in relation to the submission of the evidence including the report of Dr French by the Secretary of State in **SM Qadir**.

35. We find no inconsistency in the **Devaseelan** principles and **Ladd and Marshall** principles and we defer to the Court of Appeal decision in **Sultana [2021] EWCA Civ 1876** where Davis LJ at [51] and [52] considered that "*the Devaseelan test, namely that there must be 'some very good reason' for not adducing the relevant evidence at the first appeal, essentially mirrors the Ladd v Marshall test*". However, he opined that where the Secretary of State departed from that principle there should be a challenge to the decision on public law grounds, as for example by raising abuse of process.. That was not the case in **Sultana** and not the case here either, as Mr Lindsay submitted. In our view the first principle of **Ladd and Marshall** that '*it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial'* and the **Devaseelan** guidelines [4] –[7] are far from mutually exclusive and effectively complementary.

36. Secondly, it is evident to us that the judge properly applied the principles of **Devaseelan**. He made clear reference to Judge Colvin's decision as being the starting point [24] and [34] for his determination and referenced **Devaseelan** in his decision. We do not consider that this scenario before Judge Joliffe was comparable with the concern identified in **TB (Jamaica**) that the Secretary of State is ignoring a final ruling of the First-tier Tribunal or that there needed to be

[1] ...

a calibration in this instance of the relevant standing of the parties. This applicant made a fresh application which needed to be decided.

37. Moreover, the judge's decision was consistent with **Ladd and Marshall** principles because, as held in **TB (Jamaica)**, a change in the law subsequent to a prior determination satisfies the "first diligence" limb in **Ladd v Marshall**.

38. As set out in **Al-Siri [2021] EWCA Civ 113** at [44] citing from **TB (Jamaica)** as follows:

> *'Of course, different considerations may apply where there is relevant fresh evidence that was not available at the date of the hearing, or a change in the law, and the principle has no application where there is a change in circumstances or there are new events after the date of the decision: see Auld LJ in Boafo at [28]. But this is not such a case'.*

39. The judge in this instance clearly cited and relied on **DK and RK (ETS: SSHD evidence, proof) India [2022] UKUT 112 (IAC)**. The argument that **DK and RK** was not binding as a category of factual precedent case in establishing that the 'generic' evidence relied upon by the Secretary of State in the 'fraud factory' cases is sufficient to satisfy the evidential burden, was rejected by the Court of Appeal in **SSHD v Akter** [2022] EWCA Civ 741 at [29]. There it was held that "the judgment in **DK and RK** (2) includes a comprehensive account of the evidence which the UT heard and its analysis of the same and upon which it based its decision".

40. Not only did **RK and DK** address the range of evidence including oral evidence given in relation to the APPG Report and decided on its relevance to deciding TOEIC cases but also separately considered the law, not least in terms of legal and evidential burdens. At [47] **DK and RK** held:

> *"There is no sense in which procedurally a case passes backwards and forwards between the parties, giving either of them new chances or even tactical obligations to meet the evidence so far adduced by their opponent: on the contrary, each side has one opportunity only to produce all the evidence it considers relevant to the case. Further, the burden of proof does not shift from one side to the other during the course of a trial. The burden of proof is fixed by law according to the issue under examination".*

41. The shifting of the evidential burden was found to be more akin to the process of reasoning and as held in the headnote at (3) "The burdens of proof do not switch between parties but are those assigned by law". Thus we cannot accept the categorisation that **DK and RK** merely falls into a "subset" of decisions which although may have precedential authority cannot satisfy the first limb of **Ladd v Marshall** because the change of law recognised was dependent on new facts alone. A careful reading of **DK and RK** demonstrates that that clearly is not the case. Not least **Muhandiramge** is properly explained under the heading of legal and evidential burdens. At [127]-[129] **DK and RK** , after a comprehensive analysis of the evidence, specifically revised the legal approach to be taken to the Secretary of State's evidence from that in **SM and Qadir** (which it was said had explored the evidence in a less detailed way) such that 'mere assertions of ignorance or honesty by those whose results are identified as obtained by proxy are very unlikely to prevent the Secretary of State from showing that , on the balance of probabilities, the story shown by the documents is the true one'. On this basis alone we consider that it was open to Judge Jolliffe to be satisfied that

the first limb of **Ladd v Marshall**, if required, was satisfied and he was entitled to reconsider the matter of deception.

42. In terms of fresh evidence, **DK and RK** sets out how the landscape in terms of evidence had changed since 2015, some seven years earlier when the Secretary of State took her first faltering steps in collating evidence to present to the Tribunal. **Akter** acknowledged the changing landscape in these cases and referenced at [29] the forensic analysis undertaken in **DK and RK**. Not only did the panel in **DK and RK** address the fraud factories that had been set up to produce fraudulent tests but also the process adopted by ETS, and the ability of appellants to obtain their own voice recordings. All of that evidence was subsequent to the decision of First-tier Tribunal Judge Colvin.

43. Judge Jolliffe was fully aware of the principles of **Devaseelan** and set out the key findings of the judgment of Judge Colvin at [9] and noted that the case law before Judge Colvin was **R (Gazi) v SSHD [ETS: judicial review) [2015]**. The parties, as recorded, agreed that Judge Colvin's decision was subject to the principles of **Devaseelan** [13]. At [22] the judge identified that the "Upper Tribunal gave a comprehensive and detailed analysis of the evidential requirements for ETS cases in *DK and RK*" and that **DK and RK** considered the evidence inter alia of Professor French and the low rate of false positives. Not least, as can be seen at [12], Judge Jolliffe specifically raised **DK and RK** and **Akter** with the representatives, and as the judge recorded at [35] "the parties accepted that *DK and RK* represented the current law as approved by the Court of Appeal". There was no submission at this point before the First-tier Tribunal that **DK and RK** was considered to be a subset for the purposes of **Ladd v Marshall** and did not fulfil the first limb thereof or that the judge was prevented from considering the matter in line with **Devaseelan**. On that basis alone we conclude that the judge was entitled to consider the matter afresh and in line with the principles of both **Ladd v Marshall** and **Devaseelan** which are not inconsistent.

44. Nor was there any challenge on the basis that the judge should have considered whether the report of Professor French could have been "with due diligence" before Judge Colvin. We note that Judge Colvin heard the appeal on 18th December 2015 and promulgated his decision on 15th January 2016. The report of Professor French was commissioned on 16th February 2016 but dated 20th April 2016 and thus clearly postdates the decision. As we have noted there was no submission recorded before the First-tier Tribunal that the Secretary of State could have previously obtained the French report and failed to act with due diligence. Indeed, there was apparently no submission on this basis or representation as to the admission of fresh evidence before the First-tier Tribunal despite the appellant being legally represented. We consider this to be fatal to the challenge to the Upper Tribunal on this basis.

45. Essentially it cannot be asserted that the judge erred in law in failing to address submissions not put to him whether a specialist tribunal or not. To expect the Secretary of State to establish the process and exact timing of compiling instructions for the commissioning the report of Professor French is administratively unworkable and not a point taken hitherto. If that was a point that was to be taken by the appellant, it should have been put squarely in the pleadings. Indeed, in **Abbas [2017] EWHC 78 (Admin)** at [12] Mr Justice Davis, as he then was, considered the evidence of Professor French in response to the evidence of Dr Harrison and considered that it "allows real weight to be given to the result of the ETS review". Again there was no challenge on the basis that Mr

Justice Davis should have of his own motion delved into the timing of the Secretary of State's evidence gathering process notwithstanding **SM and Qadir**.

46. Mr Wilcox encouraged us to take note of the criticisms of McCloskey J of the Secretary of State's evidence garnering. **SM and Qadir** was not heard or promulgated until after the decision of Judge Colvin dated 16th January 2016. As pointed out by Judge Joliffe the law relied on by Judge Colvin was that of **Gazi** dated 22nd May 2015 and well before **SM and Qadir** and **Gazi** was a judicial review. The hearing dates for **SM Qadir** were 5th and 8th February 2016 and 3rd and 4th and 7th March 2016 (albeit we note it was signed with a February date). It is clear that the French report was commissioned for the **SM Qadir** case as it refers to the skeleton arguments for '**Majumder and Qadir'** as documents provided. Whilst a report was commissioned prior to the decision being promulgated on 31st March 2016 it was not ready by the time the hearing had been closed. The comments of McCloskey J therefore could not have prompted the Secretary of State to obtain more evidence as was suggested by Mr Wilcox and it is difficult to criticise the timing of the Secretary of State obtaining evidence on this basis.

47. Notwithstanding these observations considerable evidence (including oral evidence) has been submitted aside from and subsequent to the report of Dr French, and considered by **DK and RK**. The judge at [39] noted that the French report was new, which it was but we repeat he also relied on **DK and RK**. In this instance the findings of Judge Colvin were limited to the generic evidence of the Secretary of State and did not extend to the particular evidence given by the appellant in relation to matters which could be said to be 'stand-alone' from the generic evidence at the time. There can be no complaint about Judge Joliffe's approach.

48. We cannot accept that such appeals should be 'frozen' and fixed now against the evidential position of 2015/16, (albeit with the requisite caveats) because this would run counter to the guidance for immigration tribunals given in **Secretary of State v Patel [2022] EWCA Civ 36** at [31] as follows:

> *"The essential position is that the second FTT judge cannot be subject to any principles of estoppel in relation to an earlier finding. Rather, the judge must conscientiously decide the case in front of them applying principles of fairness. Those principles include the potential unfairness of requiring a party to re-litigate a point on which they have previously succeeded. These propositions were drawn from Devaseelan, Djebbar v SSHD [2004] EWCA Civ 804 and BK (Afghanistan)".*

49. As recognised at [33] of **Ahsan [2017] EWCA Civ 2009**:

> *"Ms Giovannetti was concerned to emphasise the extent to which the forensic landscape had changed since the Secretary of State's initial, and frankly stumbling, steps in this litigation. The observations of the UT in SM and Qadir should not be regarded as the last word. Where the impugned test was taken at an established fraud factory such as Elizabeth College, and also where the voice-file does not record the applicant's voice (or no attempt has been made to obtain it), the case that he or she cheated will be hard to resist".*

50. In relation to ground 2 and the analysis of a "three part assessment required in deception" and raised by Upper Tribunal Judge Jackson, although not expressly

referred to in the grounds, we conclude that the judge properly directed himself in the light of the evidence given on the legal and evidential burdens in **DK and RK**. It should be remarked that Judge Colvin did not get as far as making any findings of fact specific to the Appellant. The Secretary of State's evidence on deception before FTTJ Colvin is set out at [24], [25], [27], and [29] and is strikingly sparse compared with the evidence base addressed in **DK and RK** (March 2022) and now said as per **Akter** [29] to be the evidence base on which Tribunals should proceed in their assessment.

51. There was no error of law in the judge's approach to the question of deception. He looked at the generic evidence, the appellant's explanation and considered whether the respondent had discharged the overall legal burden. The judge held at [22] that the Tribunal gave a comprehensive and detailed analysis of the evidential requirements for ETS cases in **DK and RK**. There is no doubt that the judge was aware of the evidence given to Judge Colvin by the appellant and that he had put in a full bundle to the First-tier Tribunal including statements. Judge Jolliffe reminded himself of Judge Colvin's findings, identified the current law and rehearsed the appellant's evidence at [36]. He noted at [37] that Mr Lingajothy submitted, speculatively in our view, that "there could have been issues about the storage facilities used which might have corrupted the recording, and so the Tribunal could not be sure that he had used deception". At [37] to [40] the judge considered the appellant's evidence which amounted to a 'denial' with some 'additional corroborative detail'. The judge identified, in particular, Professor French's report at [42], and, it is clear that on consideration of all the evidence the judge found the respondent had discharged the legal burden.

52. In relation to ground 3 the judge explained from [43] onwards his departure from the previous decision in relation to insurmountable obstacles within the meaning of the Immigration Rules and as per **Agyarko**. It was submitted it would be 'hard' to return to India and recorded that she had taken her son for treatment in India in 2022. The judge also identified that the high point of the claimed wife's case was that she would lose her job at the Royal Mail but pointed that she was a capable, intelligent woman, had many years of productive working capacity and travels there [India] from time to time. The judge took into account her family life and noted that she had adult sons and could continue a relationship with them by visits.

53. However, bearing in mind that both Judge Colvin and Judge Jolliffe found that there was no genuine relationship between the appellant and his wife, we find that the issue of insurmountable obstacles is not relevant. Indeed, we make that finding independent of Judge Jackson's own observation to that same end. There were cogent reasons for finding that the appellant was not in a genuine relationship and that that finding was adequately reasoned. As the judge noted from [24] onwards that Judge Colvin had found the oral evidence inconsistent and there was a lack of documentary evidence. Judge Joliffe stated "Not much had changed in respect of the evidence provided. The photos and the bills were of limited evidential value and were surprisingly brief for a couple who claimed to have been living together for 10 years". The judge at [31] noted that the appellant lived in the same house, but that the documents relied on were recent mostly dating from 2021 to 2022 and he found:

> *"It is surprising that the documents are so few and so recent. The Tribunal would expect a much more substantial bundle of documents to have been produced to show cohabitation over the period claimed. The photographs relied on showed the appellant and Mrs Thomas together in various*

contexts, e.g. in a garden and in the street, but they did not add materially to the evidence about the genuineness of the relationship".

54. At [32] the judge added that no one other than the appellant and Mrs Thomas came to give evidence in support of the genuineness of the relationship. As the judge noted Mrs Thomas' children lived with her and the appellant and would have been well placed to testify on this issue. The judge enquired as to the explanation for their absence and found it unsatisfactory and uncorroborated. Neither was there anyone from the church to give evidence as to the genuineness of the relationship.

55. The judge clearly reviewed the matters overall and found the reasoning given was entirely adequate and without any material law.

56. In relation to ground 4, it is quite clear therefore that the appellant had not fulfilled the Immigration Rules and the judge at [50] noted that between 2010 and 2014 the appellant had been in the UK with precarious status within the meaning of Section 117B(5) of the Nationality, Immigration and Asylum Act 2002 and **Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58**. Thereafter he was present in the country unlawfully. As the judge noted, Section 117B(4) and (5) directed that little weight should be attached to a private life or a relationship entered into in those circumstances. The judge also noted at the outset that the starting point for his decision was that of Judge Colvin. The appellant is an Indian citizen said to be married to a sponsor who is also an Indian national. Judge Colvin found that the appellant had family in Kerala and did not consider under Article 8 that there were any matters or issues in this case which had not been adequately covered within the context of the Immigration Rules. It is evident that Judge Jolliffe recorded that the appellant had been served as an overstayer in 2014, had no genuine and subsisting relationship with the sponsor and had family in Kerala. The children of the said wife did not attend the hearing in order to assert their claimed relationship with the sponsor and the judge noted the absence of their input. In the absence of any further factors put forward by the appellant, the correct self direction in relation to **Agyarko** and the fact that no unjustifiably harsh circumstances on the appellant's removal were put forward, and having found that the appellant could not succeed under the Immigration Rules and having applied the relevant factors under the Nationality, Immigration and Asylum Act 2002, there is no material error of law in the judge's approach to Article 8 when dismissing the appeal.

57. We therefore find no material error of law in the decision and the decision of the First-tier Tribunal shall stand.

Helen Rimington

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12th June 2023