IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001454

First-tier Tribunal Nos:
PA/53625/2023
LP/00361/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 9th of July 2024

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE COTTON

Between

The Secretary of State for the Home Department

Appellant

and

RJ (Iraq)
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms S McKenzie, Senior Presenting Officer
For the Respondent: Mr A Rehman of Counsel instructed by Reiss Solicitors Limited

Heard at Field House on 25 June 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Respondent is granted anonymity, because the claims have, in part, related to a claimed fear of persecution. No-one shall publish or reveal any information, including the name or address of the Respondent, likely to lead members of the public to identify the Respondent. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. These written reasons reflect the full oral decision which we have given to the parties at the end of the hearing. To avoid confusion, we refer to the parties as they were before the First-tier Tribunal Judge, namely as the Claimant and the Secretary of State.

2. The Secretary of State challenges the decision of First-tier Tribunal Judge Hallen, promulgated on 6th March 2024. In that decision, the Judge had allowed the Claimant's appeal. At §24 of the decision, the Judge noted that both parties had accepted at the outset of the hearing, that if the Judge found that the Claimant was an undocumented Iraqi of Kurdish ethnicity, it would not be feasible for him to be returned to Iraq and the Judge should allow his appeal. The Judge did find the Claimant to be so undocumented, so he allowed the Claimant's appeal.

The Grounds of Appeal and the Hearing Before Us

3. The Secretary of State refers to 'two aspects' of a single ground. For simplicity, we refer to them as grounds (1) and (2). We do no more than summarise their gist.

4. Ground (1) is that the Judge correctly directed himself on the law, in this case relating to previous Tribunal decisions, but misapplied it. He had given no principled reasons for why he had not followed an unappealed finding by an earlier Judge, Judge Baker, in a decision of September 2009, in which Judge Baker recorded that the Claimant accepted that he had an Iraqi identity document. The passage of time between 2009 and 2024 did not explain why the Claimant no longer had his ID card. The Claimant had adduced no new evidence as a basis from which to depart from Judge Baker's decision.

5. Ground (2) is that the Judge's decision did not adequately explain why he had accepted the Claimant's credibility, when Judge Baker had not.

The Secretary of State's Challenge

6. Both parties cited to us relevant case law on the effect of earlier decisions, especially, Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* [2002] UKIAT 00702, particularly §§37 to 42; SSHD v Patel [2022] EWCA Civ 36, particularly §§33 and 35; R (MW) v SSHD (Fast track appeal: Devaseelan guidelines) [2019] UKUT 00411 (IAC), particularly headnote (2); and SSHD v BK (Afghanistan) [2019] EWCA Civ 1358, particularly §§53 to 59. We do not recite those passages. We explain the propositions in the cases only where necessary to reach our decision, but we have considered the cases in full.

7. The Secretary of State accepts that the Devaseelan guidelines are not a "straitjacket" (see MW). Nevertheless, the principles in them remain true, particularly at §37 that a first Adjudicator's determination stands as an assessment of the claim the Appellant was then making, at the time of that determination. It is not binding on the second Adjudicator; but, on the other hand, the second Adjudicator is not hearing an appeal against it. As an assessment of the matters that were before the first Adjudicator it should simply

be regarded as unquestioned. It may be built upon, and, as a result, the outcome of the hearing before the second Adjudicator may be quite different from what might have been expected from a reading of the first determination only. But it is not the second Adjudicator's role to consider arguments intended to undermine the first Adjudicator's determination.

8. In this case, the facts were not materially different and Judge Hallen should have regarded Judge Baker's finding as unquestioned and not to entertain arguments or evidence for why Judge Baker's finding was wrong. In principle, issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.

9. The Secretary of State says that Judge Hallen had gone behind the original decision of Judge Baker and had sought to undermine his judgment in circumstances where Devaseelan had not been applied. An obvious example was when Judge Hallen referred at §16 to Judge Baker only mentioning the issue of the ID card once.

10. Alternatively, Judge Hallen's reasons for explaining why he believed the Claimant to be credible when Judge Baker had not were insufficient. It was not enough to recite that that the Claimant's evidence had held up under strenuous cross-examination.

The Claimant's Case

11. On behalf of the Claimant, Mr Rehman referred us to Yalcin v SSHD [2024] EWCA Civ 74 as recent authority for the proposition that judicial caution and restraint was required when considering whether to set aside a decision of a specialist fact finding tribunal (see §50). Where a relevant point may not have been expressly mentioned, we should be slow to infer that it had not been taken into account.

12. It was correct that Judge Baker's decision stood as an assessment made at the time of his decision, but new evidence and facts occurring after that decision should be taken into account, as Judge Hallen reminded himself at §13 of his decision. As per §35 of Patel, it could be appropriate to depart from an earlier finding, where there was a very good reason to do so. The fundamental aim of the Tribunal process was to achieve justice in the case before the Tribunal and that required considering the entirety of the evidence on the merits. As confirmed in MW, Judges were permitted to depart from earlier decisions on a principled and properly reasoned basis. BK was authority for the proposition that facts happening since the first Adjudicator's determination could always be taken into account and evidence of other facts may not suffer from the same concerns about credibility. The question always was ultimately what was fair.

13. In relation to this case, Judge Baker had referred very briefly at §29 to the Claimant accepting that he had an Iraqi ID. Judge Baker did not say whether this was by way of oral evidence, a witness statement, or submissions and the finding was not a material reason for why the Claimant lost his appeal in 2009.

14. The Claimant responded to two questions as follows. First, on whether Judge Hallen had attempted to undermine Judge Baker's decision, he had not. He had explained on a principled basis that he needed to consider the Claimant's evidence that he did not have an Iraqi ID, either at the time of Judge Baker's

decision in 2009, or before him in 2024. Judge Hallen could not avoid the obligation to address the merits of the case on the evidence then available. Second, on the adequacy of reasons, Judge Hallen had analysed the context of Judge Baker's finding; the circumstances in which the Claimant had given evidence in 2009; whether the Claimant sought to challenge Judge Baker's decision; the documentation from the 2009 decision; and the Claimant's oral evidence in 2024, as tested in cross examination. The reasons at §§16 to 19 were sufficient.

Our Discussion and Conclusions

15. We do not recite again the various principles to which we have been referred, which both parties accept and are not disputed. Judge Hallen unarguably considered the principles of Devaseelan at §13 of his decision:

> "13. The case of Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702 sets out guidelines to be followed when there has been a previous decision by the Tribunal on a protection or human rights claim. The first decision stands as the assessment of the claim made at the time of the decision. As such it should always be the starting point. New evidence, and facts occurring after the earlier decision, should always be taken into account. If before the second judge the appellant relies on facts which are not materially different from those put to the first judge, the second judge should regard those issues as settled by the first judge's decision and make findings in line with that decision. That said, in SSHD v Patel [2022] EWCA Civ 36 the Court of Appeal discussed the Devaseelan principles and highlighted that what fairness requires depends on the particular facts of the case The findings in an earlier decision will be an important starting point, but the second judge cannot avoid the obligation to address the merits of the case on the evidence available. The second judge should consider whether there are very good reasons to depart from the earlier findings. Whether the evidence could have been adduced at the previous hearing may be relevant to that issue. Equally, a very good reason may be that the new evidence is so cogent and compelling as to justify a different finding."

Applying those principles, we do not accept that Judge Hallen's reasons at §§16 to 19 were an attempt to undermine or relitigate Judge Baker's findings, rather they had been taken as a starting point. Judge Hallen was entitled to consider the circumstances in which Judge Baker had found that the Claimant did have an Iraqi ID. This was potentially relevant when considering whether to depart from that finding in light of the Claimant's new, oral evidence. Judge Hallen was entitled to consider that he did not have the original documentation in the 2009 decision, to consider whether the finding was based on a witness statement, oral evidence, or other appeal documentation. Judge Hallen was entitled to consider all of that in the context of the Claimant's oral evidence, in the round.

16. At §16 of his decision, Judge Hallen considered the Claimant's oral evidence that he had never had an ID card, and had never told the Secretary of State or Judge Baker that he had. Judge Hallen was unarguably conscious that the Claimant had not appealed Judge Baker's decision, but Judge Hallen was hearing new evidence

not just about 2009, but about 2024. Judge Hallen recorded in detail the Claimant's cross-examination on the issue at §17, which we do not repeat, which at §18 Judge Hallen said was not "impugned by strenuous cross-examination." It is clear that Judge Hallen regarded the Claimant has a consistent and honest witness about the circumstances of not having an Iraqi ID. This went beyond a mere conclusion to that effect, but included an analysis of why. The Judge made clear at §19 of his reasons that it was not possible to come to any conclusions as to how Judge Baker made the comment that the Claimant was in possession of an Iraqi ID at the time of the hearing in 2009, but whether or not he had such documentation at that time, the Claimant did not have an ID by the time of the hearing of Judge Hallen. This was new evidence which shone a fresh light on Judge Baker's earlier findings, and Judge Hallen did no more than to depart from those earlier findings on a principled basis, by considering all of the evidence to achieve a fair decision.

17. In conclusion, Judge Hallen did not misapply the law. He did not attempt to undermine Judge Baker's original decision. Rather, he considered fresh evidence, which was tested in cross-examination. The alternative would have risked not considering all relevant evidence in reaching a fair decision, by refusing to countenance or assess evidence that the Claimant had never had an ID, and the circumstances of the original finding to the contrary. On the authorities we have considered, Judge Hallen was unarguably entitled to consider all of the evidence on the facts of this case, in a nuanced decision. Finally, we pause to observe that there was no perversity challenge before us.

Notice of Decision

18. The decision of Judge Hallen did not contain an error of law and stands. The Secretary of State's appeal is dismissed.

J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8th July 2024