Neutral Citation Number: [2019] EWCA Civ 1358

Case No: C5/2016/2728

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Upper Tribunal (Immigration and Asylum Chamber)
The Hon Lord Burns (sitting as an Upper Tribunal Judge) and
Upper Tribunal Judge Bruce
Appeal No IA/20209/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2019

Before :

LORD JUSTICE FLOYD
LORD JUSTICE BAKER
and
LADY JUSTICE ROSE DBE

- -

Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and –	
BK (AFGHANISTAN)	**Respondent**

Zane Malik (instructed by **Government Legal Department**) for the Appellant
Stephen Knafler QC and Patrick Lewis (instructed by **Duncan Lewis Solicitors** for the Respondent)

Hearing date: 3 July 2019

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Approved Judgment

Lady Justice Rose:

1. The Secretary of State for the Home Department brings this appeal against the decision of the Upper Tribunal (Immigration and Asylum Chamber) (The Hon Lord Burns, sitting as an Upper Tribunal Judge, and UTJ Bruce) dated 8 April 2016. Permission to appeal was granted by Arden LJ on 25 April 2017. The appeal was then stayed pending the hand down of the Supreme Court's judgment in *KO (Nigeria) v SSHD* [2018] UKSC 53, [2018] WLR 5273.

The dismissal of BK's asylum application

2. The Appellant (BK) is a national of Afghanistan who was born on 1 January 1977. He arrived in the United Kingdom in 2002 and sought asylum. He failed to attend an interview and his claim was rejected on the grounds of non-compliance. He lodged an appeal with the Adjudicator (the predecessor to the First-tier Tribunal) and attended the hearing in October 2004 as a litigant in person. The Adjudicator, Mrs P Hands, found first that BK had had a good excuse for not attending the interview. She then described BK's oral evidence of his early life and of how he had been conscripted into the Taliban, working as a bodyguard to one or two commanders in 1995 or 1996. In response to the Adjudicator's question about why he was frightened to return to Afghanistan, she records he said he was aware that "a lot of the people he had to be cruel to when he was with the Taliban" are now in power and "they will be seeking revenge". She recorded him saying "He would personally beat people when he was instructed to do so. These people will remember him and be looking out for him to seek their revenge".

3. The Adjudicator then summarised the SSHD's case that BK's claim was based on having worked for the Taliban and that because of this he now fears those who are in power in Kabul: "He was ordered to go and kill specific people by his commander". Later she recorded:

> "21 He explained that he could not remember the names of any of the people who ordered him about. He would be taken by car to a house and shown the people he was to kidnap or kill. He was never given the names of these people.
>
> 22 Finally, he explained that he was petrified because now he thinks of all the inhuman things he did then it is little wonder that people would want to exact their revenge."

4. The Adjudicator set out the relevant country background material. This included that rank and file members of the Taliban should stay away from the villages of their origin but that a significant number of people who had been forced to be loyal to the Taliban would not face any problem and were being integrated into Afghan society.

5. The Adjudicator then set out her findings of fact. She said:

> "40. The Appellant's own story is one of being the persecutor rather than the persecuted. He followed the instructions of his commander and harassed, arrested, detained, tortured and killed

> people. He returned to his home and did not suffer any adverse reaction from his fellow villagers."

6. She concluded that there was no likelihood that BK would suffer persecution at the hands of the state or by any non-state agents should he return to Afghanistan. He was unable to say "who the important people were that he captured or tortured on behalf of his commander". She therefore dismissed his claim for asylum.

7. I shall refer to Adjudicator Hands' decision as the '2004 Decision'. BK did not challenge that decision and in January 2007 he was removed from the United Kingdom to Afghanistan.

8. Once back in Afghanistan he applied for entry clearance as the spouse of a person present and settled here, namely his British wife, CH whom he had married in 2007. That application was successful and he re-entered the United Kingdom on 2 August 2007. BK then made an application to the SSHD for indefinite leave to remain. It is the answers that BK gave in the application form for that leave that form part of the dispute between the parties to this appeal. The application form asked the following questions ('the terrorist activity questions') to each of which BK answered "No":

> "8.3 In times of either peace or war have you or any of your dependents who are applying with you ever been involved, or suspected of involvement, in War Crimes, crimes against humanity or genocide?
>
> 8.4 Have you or any dependents who are applying with you ever been involved in, supported or encouraged terrorist activities in any country?
>
> 8.5 Have you or any dependents who are applying with you ever been a member of, or given support to, an organisation which has been concerned in terrorism?
>
> 8.6 Have you or any dependents who are applying with you ever, by any means or medium, expressed views that justify or glorify terrorist violence or that may encourage others to terrorist acts or other serious criminal acts?
>
> 8.7 Have you or any dependents who are applying with you ever engaged in any other activities which might indicate that you may not be considered to be persons of good character?"

9. On 22 September 2009 BK was granted indefinite leave to remain.

10. BK subsequently made an application for British citizenship. The application form included the terrorist activity questions and BK again answered 'no' to each of those questions. His application for citizenship was refused by letter dated 20 December 2011. The grounds for refusing citizenship were that the evidence he had given in his asylum appeal was that he had served with the Taliban and been responsible for war crimes namely murder, torture, wilfully causing great suffering and serious injury to

body or health. In addition the refusal letter said he had committed crimes against humanity. The Secretary of State was not satisfied therefore that BK was a person of "good character" for the purposes of the British Nationality Act 1981. The SSHD stated that BK's assertion that he had carried out these crimes on the orders of a superior officer did not amount to a defence of his actions. Despite that letter, the SSHD took no action at that stage to curtail or cancel BK's leave to remain in the United Kingdom.

11. After BK and CH had started their relationship, CH fell pregnant with twins but unfortunately she had a miscarriage at 18 weeks. She and BK later had a son, born in August 2007 to whom I shall refer as C. BK and CH were divorced in 2011. In 2012 BK went back to Afghanistan on a visit and was married there to an Afghani woman on 2 November 2012. He then returned to the United Kingdom and sponsored an application made by his new wife for entry clearance. In September 2013 he went back to Afghanistan for the birth of his daughter and on 24 September 2013 he flew back to Heathrow. On arrival he was questioned by an Immigration Officer and his indefinite leave to remain was suspended pursuant to Schedule 2 of the Immigration Act 1971. The Officer granted him temporary admission pending further investigation.

The cancellation of BK's indefinite leave to remain

12. As a result of the investigation triggered when BK entered the country on 24 September 2013, the SSHD cancelled BK's indefinite leave to remain and formally refused him leave to enter the United Kingdom. The letter notifying him of this decision was dated 17 April 2014 ('the IDL Letter'). The IDL Letter quoted from the 2004 Decision of Adjudicator Hands and concluded that as BK had represented himself throughout the appeal hearing, the Adjudicator had reached her findings based on the evidence presented by him at the appeal. It stated that BK had employed deception or had failed to disclose material facts on three occasions; first, in his application for indefinite leave to remain in July 2009, secondly in his application for British citizenship and thirdly in an interview on 20 March 2014 during the course of the SSHD's investigation. The deception was said to arise from the contrast between the evidence recorded by Adjudicator Hands at the hearing of BK's asylum appeal in October 2004 and his denials in the answers he gave to the terrorist activity questions. The IDL Letter set out the legal definition of war crimes and crimes against humanity and said that the Secretary of State was satisfied that the activities that BK had described to Adjudicator Hands met those criteria. The letter says:

> "30. It is believed the reasons for answering no to the questions posed … were not born out of a genuine lack of understanding of the application form but relates to a blatant attempt on your part to deceive the Home Office by knowingly failing to disclose material facts, namely; that you had harassed, arrested, detained, tortured and killed people as part of your role whilst a member of the Taliban."

13. She cancelled his indefinite leave to remain pursuant to Schedule 2(8) of the Immigration Act 1971. The SSHD went on to reject BK's claims under the immigration rules based on his right to family life and private life. The letter

concluded that the interests of the state outweighed any family/private life that BK may have accrued in the United Kingdom.

14. BK appealed against that decision to the First-tier Tribunal. The FTT (Judge Denson) dismissed the appeal. Judge Denson's decision was set aside by UTJ Bruce on the grounds that the he had misstated the proper burden of proof. The UT adjourned the matter for the decision to be remade at a later date.

The proceedings before the Upper Tribunal

15. A rehearing of BK's appeal against the cancellation of his indefinite leave to remain took place on 2 March 2016, leading to the judgment which is currently under appeal before us. The rehearing, although conducted before the Upper Tribunal, was in effect a rehearing of the appeal that Judge Denson had heard. The UT heard evidence from BK's former wife CH about the closeness of BK's relationship with their son, C. C has serious health problems after suffering a stroke when he was two years old. CH's mother, Mrs H, gave evidence attesting to the closeness of the bond between BK and his son C saying that C "dotes on his dad" and that BK is "100% great dad".

16. In his oral evidence, BK did not deny the truth of what he recalled having said in evidence to Adjudicator Hands. He said that the only reason he joined the Taliban was because they threatened those who refused to join with violence and death. He denied however having told Adjudicator Hands that he killed or tortured people. His role with the Taliban had been forcibly to conscript men and boys to join his unit. He admitted that he and other Taliban members would kick, hit, punch and pull men who refused to come. He also admitted that he had witnessed prisoners being tortured but denied that he himself had ever killed or tortured anyone or that he had ever said that he had. When he attended the hearing before Adjudicator Hands in 2004 his English had been very poor and he had not been able to follow how his evidence was being translated and conveyed to the Adjudicator. He denied that he had said that he had killed people at night; he had meant to say that those were the kind of things the commander of the unit had done. He stood by the truth of his answers to the terrorist activity questions. He did not consider himself to be a terrorist or a war criminal or a person of bad character and he had never supported terrorism.

17. In a thorough and careful judgment, the UT first considered the 2004 Decision dismissing BK's asylum appeal. Since no appeal was lodged against that decision, they were bound to treat it as an authoritative judgment of matters as they stood at that date. The UT had before them not only the written 2004 Decision but also the note taken by the Presenting Officer in the Upper Tribunal when BK was giving evidence ('the PO Notes'). This had been made available after BK had made a data subject access request to have those notes disclosed.

18. Having considered the terms of the 2004 Decision, the PO Notes and BK's evidence before them, the UT held as follows. In the course of his asylum appeal in 2004, BK had made admissions that he took part in the forcible recruitment of others as a member of the Taliban when he hit, threatened, kicked and punched people. Although Adjudicator Hands had recorded BK's evidence as being that he followed the instructions of his commander and harassed, arrested, detained, tortured and killed people, that was not borne out by the PO Notes. Nowhere in those notes was it

recorded that BK said that he tortured or killed anyone. The passage in the PO Notes that was particularly relevant read as follows:

> "Names of those in power?
>
> I don't know exact names – with N/Alliance in Kabul
>
> How did you know them if working for Taliban?
>
> At that time no ones asked Q's. Commander used to order 5 of us to go to a persons hse + bring them back by force + beat them up. He used to persecute people, we were under his orders.
>
> People you beat up – in power now?
>
> Yes, I'm frightened from them. …
>
> If you go back to Afg tomorrow you're scared Commanders in N/Alliance will kill you?
>
> I don't have good memories in Afg, because from childhood everyone came to tell us what to do + we had to do it.
>
> That why you don't want to go back?
>
> Yes, that 1 reason + the fact that we did a lot of terrible things eg when we were with Commander Rascul we did a lot of harm to people, we did harm to Hazara people.
>
> We – do you mean you?
>
> Under order of Commanders
>
> You committed acts?
>
> Yes, ordered at night [to kill] people.
>
> Anything else to tell me?
>
> I want to get on with education here. I am fond of English language and once I learn I want to start proper education."

19. I have put the words in that last answer "to kill" in brackets because the UT found that the script was illegible at this point but the SSHD maintains that the words read "to kill" or "torture". The UT held that even if the PO Notes did record that BK said that he had been ordered to kill people, there was "a marked distinction between being ordered to do something and actually doing it": [50]. They pointed out that there was no indication that consideration was given at the asylum hearing to excluding BK from the Refugee Convention on the basis of Article 1F as one would have expected to happen if such admissions had been made by BK.

20. They bore in mind that BK had not been represented at the hearing in 2004 and there had been no one there to re-examine him. They noted also that BK's asylum claim had been bound to fail because the country guidance indicated there was no objective risk to him in Afghanistan at the time. The precise detail of what he had or had not done when a member of the Taliban had not been determinative of his application.

21. Having found that the finding in the 2004 Decision that BK had tortured and killed people was not something they were prepared to rely on, they went on to consider BK's evidence before them. They accepted his evidence that he had not deliberately inflicted pain on anyone in detention although he admitted that he assaulted people in the course of press-ganging them to join the militia. They found further that BK took part in these actions because he was afraid for himself and his family: [49]. They held however that they could not be satisfied that BK had killed or tortured anyone: [50].

22. The Upper Tribunal held that the ultimate question for their evaluation was whether BK had sought to deceive when he answered "no" to the terrorist activity questions in the application forms for indefinite leave and citizenship and during the course of his interview in the current investigation: [53]. It was for the SSHD to show that the answers given were false and were given with dishonest intent. The Upper Tribunal noted that in his various applications BK had made full disclosure of the fact that he had previously claimed asylum and he was well aware that the facts of the asylum claim were known to the SSHD. That knowledge had not stopped the SSHD from granting him indefinite leave to remain in 2009. It was only in 2011 when his application for naturalisation was refused that the matter of his character was raised. No steps had been taken following the refusal of citizenship to revoke his indefinite leave to remain and in 2012 he had visited Afghanistan and re-entered the United Kingdom without difficulty. The UT said that during the nine years between the refusal of his asylum claim in 2004 and the start of the investigation in September 2013 there had been five opportunities for the SSHD to take some action on the basis of the matters on which she now relied. That was not to say that there was some waiver or estoppel but that chronology was, the UT said, "helpful in giving some context to [BK's] evidence about his state of mind when he answered the questions in the way he did": [56]. In addition, BK was not legally represented at any stage and his English although intelligible was far from fluent. He might not therefore have been "fully cognizant of the importance of the questions that he was answering, or the nuances therein".

23. Given their findings that BK did not kill or torture anyone and that the actions that he had undertaken were performed under duress, the UT considered that even if those activities could fall within the definition of war crime or crime against humanity, BK would have a legal defence in that the harm he feared was greater than the harm inflicted. They were therefore satisfied that BK genuinely believed and still believes himself not guilty of these crimes. For similar reasons they accepted BK's evidence that he did not ideologically support the Taliban, that in his own mind he had never supported or encouraged terrorist activity, supported or been a member of an organisation concerned in terrorism or expressed views that justified or glorified terrorist violence. Finally the UT accepted that BK considered himself to be a person of good character and when he completed the forms it did not occur to him that the SSHD thought otherwise. His assertion of good character was supported not only by his former wife and her mother but by written statements of 16 other witnesses who

referred to him as honest, loyal, compassionate, hard-working, trustworthy and "a good guy with a big heart".

24. In conclusion the UT held that considering all the evidence in the round, they were not satisfied that the SSHD had demonstrated that BK used deception at any point in his application forms for indefinite leave to remain or British citizenship or in the course of his investigation in this matter. They found that the burden of proof had not been discharged: [60].

25. Although it was strictly unnecessary to do so the UT went on to consider BK's alternative human rights claim based on article 8 ECHR. The UT concluded that there were manifestly good reasons to consider the application of article 8 outside the Rules. They found the evidence of the witnesses as to the closeness of the relationship between BK and his son to be "compelling and wholly credible": [67]. There would be an interference with BK's family life if he were required to leave the United Kingdom because C will not leave the UK where he lives with his mother and younger brother from CH's subsequent relationship. The UT concluded that it would be wholly contrary to C's best interests for his father to be required to leave the United Kingdom.

26. The UT therefore set aside the determination of the FTT and remade the decision by allowing it on all grounds. They also granted an anonymity order in view of C's young age.

The grounds of appeal

27. The grounds of appeal put forward by the SSHD (as modified to some extent in the skeleton argument) are that the UT erred in law in the following ways:

    i) **Ground 1**: The UT went behind the specific finding of fact by the Adjudicator in 2004 that BK had, as a member of the Taliban, "followed the instructions of his commander and harassed, arrested, detained, tortured and killed people". Under the *Devaseelan* principles (discussed below) the Tribunal was not permitted to go behind that finding of fact.

    ii) **Ground 2**: The UT's conclusion that BK had not tortured or killed people was perverse.

    iii) **Ground 3**: If it is right that the UT was not permitted to go behind the Adjudicator's findings in 2004, then their findings that BK's denial of those activities was true was not a finding open to them and was thus also perverse.

    iv) **Ground 4**: The Tribunal erred in its approach to the question of deception.

    v) **Ground 5**: The Tribunal's analysis under article 8 was fundamentally flawed by its earlier finding that BK did not torture or kill anyone.

28. During the course of the hearing of the appeal, Mr Malik appearing for the SSHD said that the SSHD was not pursuing Ground 5 and so conceded that BK did have an article 8 right to remain in the United Kingdom. The effect of that was that if we allowed the appeal on Grounds 1 to 4, BK's indefinite leave to remain would be cancelled and his article 8 right would have to be reconsidered by the SSHD with a

view to granting a more limited but appropriate period of leave to reflect that right. Conversely he accepted, of course, that if we dismissed the appeal on Grounds 1 to 4, the entitlement to indefinite leave to remain would revive and the article 8 right would be superfluous. It is unfortunate that Ground 5 was persisted in until, and indeed during, the hearing of this appeal given that the ruling in *KO (Nigeria)* handed down on 24 October 2018 rendered this ground of appeal unsustainable.

The law

29. Schedule 2 to the Immigration Act 1971 provides a power on entry to revoke a grant of indefinite leave to remain or enter. According to paragraph 2A of the Schedule, where a person arrives with continuing leave granted to him previously, an immigration officer may examine him for the purpose of establishing, amongst other things, whether that leave was obtained as a result of false information given by him or of his failure to disclose material facts. Paragraph 2A(7) provides that an immigration officer examining a person may by notice suspend his leave to enter until the examination is completed and may on the completion of the examination cancel his leave to enter.

30. It is accepted by the SSHD that the burden of proof in establishing the falsity of information provided lies on the SSHD and that the standard of proof is the ordinary civil standard but can only be discharged with the production of cogent evidence. It is also accepted that "false" for the purposes of paragraph 2A means dishonest as opposed to merely inaccurate: see *AA (Nigeria) v Secretary of State for the Home Department* [2010] EWCA Civ 773 [2011] 1 WLR 564 at [76].

31. Key to the disposal of this appeal is the UT's approach to the findings of fact made in the 2004 Decision and the UT's decision in this case to make findings apparently inconsistent with what Adjudicator Hands had found. The SSHD relies primarily on the guidelines set out in *Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 702, [2003] Imm AR 1 ('*Devaseelan*'). In *Devaseelan* the applicant's application for asylum had been refused and an appeal was dismissed by the adjudicator. Following the coming into force of the Human Rights Act 1998, the applicant made an application for leave to remain in the United Kingdom on the basis that he feared his human rights would be violated if returned to Sri Lanka. An adjudicator, relying to some extent on the evidence in the asylum appeal, dismissed his second appeal. The tribunal noted that the possibility of second appeals arose because in the majority of cases the SSHD does not attempt promptly to enforce adverse decisions by adjudicators or tribunals. A proposed removal will only occur after a passage of time. The proper approach of the second tribunal should reflect the fact that the first adjudicator's determination stands as an assessment of the claim that 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. It is not the second adjudicator's role to consider arguments intended to undermine the first adjudicator's determination but the second adjudicator must be careful to recognise that the issue before him is not the issue that was before the first adjudicator:

> "38. … In particular, time has passed; and the situation at the time of the second adjudicator's determination may be shown to be different from that which obtained previously."

32. The Tribunal in *Devaseelan* then gave guidance that can be summarised as follows:

> (1) The first adjudicator's determination should always be the starting-point. It is the authoritative assessment of the appellant's status at the time it was made. In principle issues such as whether the appellant was properly represented, or whether he gave evidence, are irrelevant to this.
>
> (2) Facts happening since the first adjudicator's determination can always be taken into account by the second adjudicator.
>
> (3) Facts happening before the first adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second adjudicator.
>
> (4) Facts personal to the appellant that were not brought to the attention of the first adjudicator, although they were relevant to the issues before him, should be treated by the second adjudicator with the greatest circumspection.
>
> (5) Evidence of other facts, for example country evidence, may not suffer from the same concerns as to credibility, but should be treated with caution.
>
> (6) If before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, the second adjudicator should regard the issues as settled by the first adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated.
>
> (7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the appellant's failure to adduce relevant evidence before the first adjudicator should not be, as it were, held against him. Such reasons will be rare.
>
> (8) The foregoing does not cover every possibility. By covering the major categories into which second appeals fall, the guidance is intended to indicate the principles for dealing with such appeals. It will be for the second adjudicator to decide which of them is or are appropriate in any given case.

33. In the case before them, the Tribunal in *Devaseelan* held that there was no reason at all for the second adjudicator not to follow the first adjudicator's decision and to make his own findings in line with it as he had done.

34. The guidance was referred to with approval by the Court of Appeal in *Djebbar v SSHD* [2004] EWCA Civ 804, [2004] Imm AR 497 on the basis that it had not created any difficulty for or inconsistency among special adjudicators. Judge LJ, giving the judgment of the Court, said that the specialist Tribunal was entitled to provide guidance to the entire body of specialist adjudicators about how they should deal with the fact of an earlier unsuccessful application when deciding a later one. The extent of the relevance of the earlier decision and the proper approach to it should be addressed as a matter of principle. He went on:

> "29. … Such guidance was essential to ensure consistency of approach among special adjudicators. The guidelines remedied

> an immediate and pressing difficulty, with direct application to, but not exclusively concerned with, the many cases in which, after unsuccessfully exhausting all the possible legal channels, asylum seekers remained in the United Kingdom and put forward a case on human rights grounds after October 2000."

35. He then said this about the application of 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 LJ said:

> "40. … 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."

37. The importance of not allowing the guidance to place unacceptable restrictions on the second adjudicator's ability to determine the appeal in front of him has been emphasised in subsequent cases. In *Mubu and others* [2012] UKUT 00398 (IAC) a tribunal judge, Judge Tipping, had made a finding that copy birth certificates provided by the Mubu family were genuine and showed that Mr Mubu was the grandson of a British citizen, Mr Ernest Alletson. When Mr Mubu later applied for indefinite leave to remain for himself and his family, the SSHD rejected the application on the grounds that the certificates were not authentic. The FTT allowed the appeal on the grounds that Judge Tipping's conclusion on the issue of the relationship between Mr Mubu and Ernest Alletson was determinative of the issue. The Upper Tribunal held that that was an error of law. They confirmed that the principle of res judicata was not applicable in immigration appeals. After setting out the *Devaseelan* guidance, the Tribunal concluded that there was no logical basis for holding that the guidance applied differently depending on whether the previous decision was in favour of or against the SSHD. However they held that the FTT judge had erred because Judge Tipping's decision had not been determinative of the issue before him; according to the *Devaseelan* guidance it should have been treated as the starting point. They went on to remake the decision. They examined in detail what had happened before Judge Tipping, the further evidence adduced by the SSHD before them, whether that evidence pre-dated the previous tribunal hearing and why that evidence had not been available previously. The Tribunal concluded:

> "66. We are well aware that, in the field of public law, finality of litigation is subject always to the discretion of the Court if wider interests of justice so require. We bear in mind, however, that the nature of the issue now in dispute between the parties was the same issue that was determinative of the appeal before

> Judge Tipping. We also bear in mind the failure of the Secretary of State to produce all of the relevant evidence to Judge Tipping that ought to have been, or could have been with reasonable diligence, made available to him. In the light of these considerations we conclude that the determination of Judge Tipping should be treated as settling the issue of the relationship between the first claimant and Mr Ernest Alletson".

38. The ability of a tribunal to depart, after careful examination, from a previous conclusion on the facts does not always operate in favour of the appellant. For example in *Ocampo v SSHD* [2006] EWCA Civ 1276, [2007] Imm AR 1 the Court of Appeal upheld a decision by the tribunal rejecting the asylum claim of the claimant. This was despite the fact that before a different tribunal, his daughter had been granted asylum on the basis of her father's flight from Colombia. The further evidence which the tribunal hearing the father's appeal had considered would not have met the *Ladd v Marshall* criteria because it could have been put before the adjudicator in the daughter's appeal. The Court held however that it was right that the tribunal as a matter of common sense and fairness took the evidence into account. Auld LJ (with whom Rix and Hooper LJJ agreed) stressed at paragraph 26 that the daughter's status as a refugee was not affected by any finding in reliance on new and cogent evidence that the father had lied in supporting her successful appeal against refusal of asylum. The flexibility for the tribunal to take a fresh decision allowed proper regard to be given to the public interest giving effect to a consistent and fair immigration policy – the matter should be judged, Auld LJ said, "as one of fairness and maintenance of proper immigration control".

39. There has been some discussion in the cases about the juridical basis for the *Devaseelan* guidelines. The authorities are clear that the guidelines are not based on any application of the principle of res judicata or issue estoppel. The Court of Appeal in *Djebbar* referred to the need for consistency of approach. The Court of Appeal in *AA (Somalia) v SSHD* [2007] EWCA Civ 1040 also referred to consistency as a principle of public law and the well-established principle of administrative law that persons should be treated uniformly unless there is some valid reason to treat them differently.

Grounds 1, 2 and 3

40. Mr Malik made his submissions on Grounds 1, 2 and 3 together. He argued that there was a material misdirection when the UT stated that they were entitled to depart from the findings in the 2004 Decision only in certain circumstances for example when new evidence had emerged: see [48]. That was a misdirection because, Mr Malik argues, the *Devaseelan* guidelines make clear that the new evidence must normally be either evidence which post-dates the earlier determination or evidence of facts which were not material to the earlier determination. There is no recognition of this in the Upper Tribunal's judgment. There was no new evidence fitting into either of those categories. The new evidence consisted of the PO Notes and the evidence given by BK which the Tribunal found was credible. There was nothing new in either of those items. The SSHD also argues that the approach of the UT runs contrary to the exhortation in *Devaseelan* that the second adjudicator's role is not to consider arguments intended to undermine the first adjudicator's decision. The SSHD

characterises BK's submission as arguing that the first adjudicator had made an error in her findings of fact as to the extent of his activities with the Taliban. This is, the SSHD contends, a "straightforward collateral attack on the earlier decision".

41. In addressing Ground 2, the SSHD describes the UT's decision as perverse because it is clear from the PO Notes that BK was admitting to doing "a lot of terrible things" albeit under the orders of his commander. The distinction drawn in the decision between being ordered to do something and actually doing it was not tenable in the context because the exchange recorded in the PO Notes was aimed at eliciting the extent of BK's personal involvement. Further, the significance attached to the absence of any discussion of whether BK should be excluded from the protection of the Refugee Convention was misplaced. There could be many reasons why the point was not raised including that the Presenting Officer was confident that she could win the case on the basis of the country evidence and the lack of likely repercussions for BK if he was returned to Afghanistan.

Grounds 1 – 3: discussion

42. I start from the proposition that the primary task of the Upper Tribunal at the hearing in March 2016 was to determine BK's appeal from the SSHD's decision to cancel his indefinite leave to remain and to reject his alternative article 8 claim. On the first issue, the main point for the UT to decide was, according to Schedule 2, para 2A, whether BK had answered the terrorist activity questions falsely, both in the sense that his denials were untrue as a matter of fact and secondly in the sense that he made those denials dishonestly. They could not therefore avoid making a finding as to whether BK had committed war crimes or been a member of, or given support to, an organisation concerned in terrorism. The case presented by the SSHD did not rest on the basis that kicking, punching and beating people when press ganging them to join the Taliban militia (that is to say, the conduct that BK admitted) was itself sufficient to render his denials factually untrue and dishonest so as to justify the cancellation of his indefinite leave. That was the SSHD's fallback position but his primary position was that BK's denials were untrue because he had in fact killed and/or tortured people.

43. The question then arose for the UT as to how they should go about making findings as to whether BK had in fact killed or tortured people as a necessary step on the way to determining BK's appeal. That in turn raised the question of the appropriate response to Adjudicator Hand's earlier findings of fact. Mr Malik did not go so far as to say that a tribunal in such circumstances should refuse even to consider whether material put forward by an appellant could cast doubt on the correctness of earlier factual findings. He accepted that as a matter of practice, the tribunal must address its mind to the reasons put forward by the party which is seeking to depart from the previous findings as to why that finding is unreliable so that it should in effect be carried forward into the determination of the appeal now before it. That must be right given what the Upper Tribunal said in *Mubu* about the earlier decision being a starting point, rather than determinative of the issue.

44. 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. A tribunal must be alive to the unfairness to the opposing party of having to relitigate a point on which they have previously succeeded particularly where the point was not then challenged on appeal.

45. Mr Malik complains that the only new items available to the Upper Tribunal were the PO Notes and the oral evidence of BK which they found to be truthful. That is not the full picture. I agree with Mr Knafler that the content of the PO Notes coupled with BK's strenuous and credible insistence that he had never told Adjudicator Hands that he had killed or tortured anyone raised a number of serious question marks over the validity of the earlier finding.

46. The first question mark was that looking at the PO Notes and the 2004 Decision more closely, it was not at all clear where the finding in paragraph 40 that BK had tortured and killed anyone had come from. There is no reference to BK admitting to torturing anyone (unless that term is used as a shorthand for kicking and hitting) either in the PO Notes or in Adjudicator Hands' almost verbatim record of that cross-examination in paragraphs 8 to 12 of the 2004 Decision. Mr Malik could only speculate where this had come from - perhaps a comment made in submissions by BK outside the witness box in opening or closing his case. As to the supposed finding that BK had killed people himself, it is true that BK said he had witnessed people being killed if they did not agree to join the militia and that he himself had orders to kill people who refuse to join. But he did not at any point say that someone whom he had been instructed to press-gang had in fact refused to join and had therefore been killed by him.

47. A second question mark, in my judgment, was that the tribunal was also entitled to consider the context in which the issue of the egregiousness of BK's conduct arose in the asylum appeal before Adjudicator Hands. Procedurally, the hearing before the Adjudicator was unusual because there had been no asylum interview at which BK's complicity in torture and murder could be explored. Because the grounds for refusing asylum had been BK's non-attendance at his asylum interview, the Reasons for Refusal letter had not set out the SSHD's conclusions on the severity of BK's conduct. There was no witness statement from BK before the Adjudicator setting out in his own words what he said he had done that made him so fearful of revenge attacks if he returned to Afghanistan. The SSHD did not, according to the 2004 Decision, appear to be putting the case to the Adjudicator on the basis that BK had killed or tortured anyone. She records only that the SSHD claimed that BK had been ordered to do so. It therefore appears that there was nothing before the Adjudicator at the start of the hearing in which either BK admitted to killing or torturing people or in which the SSHD asserted unequivocally that it was his case that BK had killed or tortured someone or produced evidence from any source to show that he had done so.

48. I recognise that the parties' positions before the Adjudicator were reversed in the sense that the SSHD's case that there was no real fear of persecution on return would be bolstered by a conclusion that BK had not in fact personally done anything very terrible. By contrast BK's interest at that point was to bolster the plausibility of a fear of revenge by exaggerating the severity of his conduct. As the Upper Tribunal pointed out, he could risk proving too much if the severity of his conduct deprived him of the protection of the Refugee Convention pursuant to Article 1F(a). There is no evidence whether BK or the Presenting Officer appreciated that fine line.

49. BK's denial that he was guilty of anything more heinous than beating and press-ganging people does not, therefore, undermine the actual decision taken by Adjudicator Hands, since his claim to asylum is weaker, the less serious his conduct was. Mr Malik submitted that had BK succeeded in his appeal for refugee status on the basis that he was at risk in Afghanistan by reason of the extent of his activities, it would have been an abuse of process to allow him to now run a case based upon a much lesser extent of his activities for the purposes of obtaining a different benefit. There is no principled basis why a different approach should apply simply because he did not in fact succeed in obtaining that first benefit (refugee status). I agree with that, but in that circumstance BK would in effect be arguing that his asylum claim had been wrongly granted. Here, his case before the Upper Tribunal did not undermine the decision that he was not entitled to asylum.

50. In my judgment those procedural features of the 2004 Decision coupled with the difficulty of identifying the evidence on which the Adjudicator's finding was based, entitled the Upper Tribunal, once they had recognised that the 2004 Decision was the starting point, to depart from that starting point and make their own assessment of the evidence before them.

51. The position might well have been different if the Adjudicator's finding had been based on admissions made in the asylum interview, or in a witness statement or in the course of the hearing. It would also have been different if conflicting evidence had been placed before the Adjudicator and she had decided that she preferred the evidence demonstrating a greater severity of BK's involvement. As it was, this was an unusual case which was not covered by any of the paragraphs of the *Devaseelan* guidance. A conscientious tribunal would not have been acting fairly if they had decided that BK had tortured and killed people and hence had committed war crimes and was a person of bad character and hence that his answers to the terrorist activity questions were inaccurate, all on the strength of a few words in the PO Notes which were at best bordering on illegible.

52. Was the subsequent rejection by the Upper Tribunal of the SSHD's case in the appeal that the answers given to the terrorist activity questions were factually untrue and must have been given dishonestly perverse? That depends on whether the Tribunal was entitled to accept BK's evidence that he had not tortured and killed people as credible. The UT was clearly entitled so to find and this Court cannot interfere with that assessment of his evidence.

53. Mr Malik submitted that it would have been inaccurate - and must have been dishonest - to answer no to the terrorist activity questions even if his involvement in the Taliban militia was limited to the punching and kicking to which he did admit. The Upper Tribunal took the view that it was debatable whether that conduct would make the denials untrue. They noted that the definition of war crimes is broad and that BK might have had a defence of duress.

54. Mr Malik also submitted that no honest person would claim to be of good character if he had engaged in the conduct to which BK admitted even though that was several years before and in circumstances where people were constantly faced with appalling choices and terrifying dilemmas. That submission is in my view unrealistic. The Upper Tribunal had plenty of evidence before them as to BK's excellent character in more recent years. Many people - even those putting themselves forward for the

highest public office – are challenged to explain earlier misconduct including criminal conduct. They do so on the basis that that misconduct was committed at other times and in other places. Experience shows that people are "considered to be persons of good character" if their subsequent conduct demonstrates that the earlier faults were atypical and not indicative of some deep-seated malevolence. That was what the Upper Tribunal found here and in my judgment they were entitled to make that finding.

55. I would therefore dismiss Grounds 1, 2 and 3 of the appeal.

Ground 4: dishonesty

56. Given that I have found that the Upper Tribunal were entitled to conclude that BK's denials in answer to the terrorist activity questions were not factually inaccurate, I can address the question of whether he was dishonest in making those denials more briefly. The SSHD asserts that the terrorist activity questions are broadly phrased and that in the light of the 2004 Decision findings, the only possible truthful answer these questions was yes. Mr Malik referred us to *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2017] UKSC 67, [2018] AC 391, the well-known authority on the test for dishonesty in civil proceedings: see paragraph 74. Mr Malik accepted that the Tribunal's decision on BK's appeal predates the Supreme Court's ruling and that at the time of that decision, the two stage subjective belief and objective assessment was not so clear. Mr Malik referred us to the recent decision of this court in *Balajigari and others v SSHD* [2019] EWCA Civ 673. The judgment in that case disposed of four appeals arising from the practice of the SSHD of comparing the level of earnings figures given in the appellants' applications for leave to remain (where it was in their interests for their earnings to be high) with the earnings that they reported for tax purposes to HMRC (where it was in their interests for their earnings to be low). The SSHD had refused applications for indefinite leave to remain where such discrepancies were found. Underhill LJ giving the judgment of the Court said at paragraph 37 that the principles summarised by Lord Hughes JSP at para 74 of *Genting* applied in the immigration context. The Court in *Balajigari* said also that although it was not helpful to generalise about the height of the threshold, it was obvious that the rule is only concerned with conduct of a serious character. As a matter of principle, Underhill LJ said, dishonest conduct will not always and in every case reach a sufficient level of seriousness though in the earnings discrepancy cases it was hard to see how it would not do so.

57. Mr Malik argued that there was an error of law in that the UT seemed to treat their finding that BK genuinely did not believe that he was a war criminal, or that he had supported the Taliban or that he was a person of bad character as determinative of the question of dishonesty, without going on to consider whether what he had done was dishonest by applying the objective standards of ordinary decent people.

58. I do not accept that that is a fair reading of the UT's decision on this point. Having decided that BK had not tortured or killed people, they concluded that the conduct which he admitted, even if it amounted to a war crime technically, was not conduct which made his answers false. They emphasised in paragraph 56 that even though BK's application for citizenship had been rejected because he was not of good character in 2011, BK knew that the facts of the 2004 Decision were known to the SSHD when BK was granted leave to remain and when he re-entered the UK without

difficulty on an earlier occasion. The UT also referred to the fact that BK had joined the Taliban because he was afraid of death or torture of himself and family members. Further, there were 16 people in addition to his former wife and mother in law who attested to his good character. I do not see that there was any error of law in the UT's finding that he had not used deception in his answers to the terrorist activity questions.

59. I therefore reject Ground 4 of the appeal and would dismiss the appeal and confirm the UT's decision to allow the appeal against the cancellation of the BK's indefinite leave to remain.

Baker LJ

60. I agree.

Floyd LJ

61. I also agree.