



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2023-004709**  
**First-tier Tribunal No:**  
**PA/54513/2022**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 24 April 2024**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BAGRAL**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**A.S.A.**  
**(ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Ms J Isherwood, Senior Presenting Officer  
For the Respondent: Mr T lay, instructed by BHT Sussex

**Heard at Field House on 29 February 2024**

**DECISION AND REASONS**

1. Anonymity was ordered by the First-tier Tribunal and that order continues in force.
2. The Secretary of State appeals with the permission of Deputy Upper Tribunal Judge Thomas KC against the decision of First-tier Tribunal Judge M L Brewer ("the judge"). By her decision of 19 September 2023, the judge allowed ASA's appeal against the respondent's refusal of his claim for international protection. The appeal was allowed on Refugee Convention and Articles 3 and 8 ECHR grounds.
3. To avoid confusion, I shall refer to the parties as they were before the First-tier Tribunal: ASA as the appellant and the Secretary of State as the respondent.

**Background**

4. The appellant is a national of Jordan. He first entered the United Kingdom on or around 8 January 2009 and claimed asylum on 9 April 2009. The appellant's claim was refused by the respondent and his appeal against that decision was dismissed by the First-tier Tribunal on 6 October 2010 ("the first appeal"). In the first appeal it was not accepted, amongst other things, that the appellant had been sentenced to 8 years imprisonment for unlicensed trading in Jordan, and, that he would be subject to state persecution.
5. Subsequently, the appellant made a fresh claim arguing that he risked ill-treatment if detained in Jordan, which was assessed by the respondent in 2011. At [11] the judge cited a minute recorded by the respondent in which it was stated "...It is my opinion that there is a reasonable degree of likelihood that the appellant may be subjected to treatment which will breach his Article 3 rights...".
6. On 30 May 2012 the appellant gave evidence for the prosecution in a terrorist criminal case against a defendant who was subsequently convicted of terrorism offences, following which the appellant was then removed to Jordan on 22 August 2012. On arrival he was detained by the authorities for 5 weeks and tortured concerning the evidence he gave in the criminal case and was released subject to reporting conditions. In October 2013 he was sentenced to 8 years imprisonment. In November 2013 the appellant left Jordan on a fake passport and travelled to the UK and claimed asylum, which the respondent refused without a right of appeal in April 2018. A subsequent fresh claim made by the appellant in 2019 was refused in September 2022, and it was this decision that was the subject of appeal before the judge.

### **The Appeal to the First-tier Tribunal**

7. The appellant's appeal was heard by the judge, sitting at Taylor House, on 31 August 2023. The appellant was represented by Mr Lay, as he is before me. The respondent was also represented by counsel, Mr Khan.
8. The judge received documentary evidence that included two reports from a country expert. The respondent did not challenge the expert evidence. The judge heard oral evidence from the appellant. The judge set out a summary of the appellant's claim and evidence at [8]-[19] and her analysis of the evidence begins at [20]. The judge first considered the decision in the first appeal under the sub-heading "Devaseelan" ([2003] Imm AR 1) and summarised the findings made at [21]-[23]. She noted that very little of the appellant's account of events prior to 2009 had been accepted as credible save for "...his role as an agent and the financial losses he and those he was investing on behalf of, incurred because of the Jordanian Government crackdown on unlicensed trading".
9. The judge by reference to the principles in Djebbar v SSHD [2004] EWCA Civ 804 then considered that she could re-visit findings made in the first appeal in circumstances where evidence was not available to the appellant at the time "*de novo*". The judge set out the expert and documentary evidence before her that was not available in the first appeal and made reference *inter alia* to the expert evidence, criminal court documentation and correspondence from the appellant's Jordanian lawyer. The judge reminded herself that the expert evidence was unchallenged by the respondent and she thus considered that it was necessary to re-evaluate the appellant's credibility "...viz the entirety of his account *de novo*".

10. From [24]-[39], the judge reached her own conclusions in relation to the appellant's credibility in respect of each strand of his claim to be at risk of which there was three. In doing so, she placed significant weight on the expert reports and considered the appellant's account in the context of the documentary evidence, and evaluated the evidence within the context of the respondent's case as advanced in the refusal letter and in submissions before her.
11. At [26]-[28] the judge dealt with the appellant's claim, first, that he faced criminal sentences in Jordan for illegal trading. The judge explained why, on the basis of the expert evidence and the correspondence from the appellant's Jordanian lawyer, why she concluded the appellant faced five charges and had been sentenced in respect of four of them, and why the appellant was not at risk of persecution on return in consequence for the reasons given by the expert.
12. Next, the judge at [29]-[30], dealt with the appellant's claim of ill-treatment following his arrest in Jordan on 17 October 2008 and considered that this was separate and distinct to the appellant's first claim. Again the judge drew heavily upon the expert evidence and concluded in light of that, and the appellant's unchallenged evidence which was internally and externally consistent, that his account was credible. The judge accepted the unchallenged evidence of the expert which explained within the context of the criminal charges the appellant faced, how he was able to leave Jordan using his own passport in 2009.
13. Last, at [31]-[39] the judge considered the appellant's claim of events following his removal to Jordan in 2012, when he claimed to have been detained and tortured by the Jordanian authorities concerning his role as a prosecution witness. There was no dispute before the judge that the appellant gave evidence for the prosecution in a case concerning national security. The judge accepted the appellant's claim that he was detained, questioned and tortured by the Jordanian authorities following his return and then released with reporting conditions because his evidence was consistent, detailed and plausible, and she was assisted in this regard by the unchallenged analysis of the expert. In consequence of the appellant absconding from reporting conditions and his subsequent departure from Jordan on a fake passport (a criminal offence in Jordan), the judge considered that this was sufficient to establish that his return to Jordan would re-ignite suspicions about terrorist connections leading to detention and ill-treatment. The latter conclusion was again based on the expert evidence.
14. The appeal was therefore allowed on Refugee Convention and Article 3 ECHR grounds.
15. At [41]-[43], the judge found that the appellant satisfied the Private Life Immigration Rules because there would be very significant obstacles to his re-integration to Jordan. That conclusion was premised on the conclusions she had reached earlier, and further caused her to allow the appeal on Article 8 ECHR grounds.

### **The Appeal to the Upper Tribunal**

16. The Secretary of State sought permission to appeal on two grounds. Ground one asserts that the judge made a material misdirection in law. Ground two is a reasons challenge. First-tier Tribunal Judge Cox gave those grounds short shrift and refused permission on 18 October 2023. The Secretary of State on renewing

the application to this Tribunal highlighted that Judge Cox had not fully considered the Secretary of State's ground that the judge misdirected herself in law, and maintained that the judge misapplied Devaseelan. Deputy Upper Tribunal Judge Thomas KC limited his grant of permission to ground one only in the following terms:

"3. It is however arguable that the directions she gave herself in a section of the decision under sub-heading "Devaseelan" [21-23] were inadequate and that adopting the wholly "de novo" approach amounted to a material error of law."

### **The Hearing before the Upper Tribunal**

17. At the outset, I invited Ms Isherwood to address whether, the pleaded error, if accepted was material in view of the judge's finding that the appellant faced a risk of detention and ill-treatment on return following the events in 2012, which was separate to the claim considered in the first appeal.
18. Ms Isherwood made brief submissions. She submitted that the judge erred in failing to consider the adverse credibility findings made in the first appeal. She submitted that all subsequent events flowed from that initial assessment. Ms Isherwood acknowledged the judge made reference to the findings in the first appeal, but nonetheless the judge failed to apply them in her assessment of the evidence.
19. Mr Lay submitted that there was no legal error in the judge's decision. He submitted the judge's consideration of the Devaseelan principles was correct. The court in Djebbar reinforced the principles and did not preclude a second judge from revisiting the findings of the first judge. Paras [21]-[23] and [30] was illustrative of the approach the judge adopted. The expert's opinion was that the claim was credible so the findings in the first appeal needed to be revisited. When the judge referred to "de novo" her actual meaning was that she was considering the matter afresh by revisiting the findings considering the additional evidence before her. The previous findings were contained to events before 2009, whereas the judge also made findings flowing from events after the appellant was deported to Jordan in 2012. The respondent had made concessions before the judge regarding the expert evidence and the appellant gave compelling evidence. Mr Lay submitted in the alternative that the error was not material.
20. Ms Isherwood made no reply.
21. I announced my decision at the hearing that I was satisfied the judge did not materially err in law for the reasons which I now turn to give.

### **Analysis**

22. The restraint which must be exercised on appeal has been discussed and reinforced in many cases. The approach I adopt to the judge's findings of fact reflects what was said by Lewison LJ at [2] of Volpi v Volpi [2022] EWCA Civ 464; [2022] 4 WLR 48:
  - i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
  - ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial

judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.

23. The grant of permission to appeal is limited in this case to ground one, which Ms Isherwood briefly amplified. Essentially, ground one as originally pleaded in the grounds of application to the First-tier Tribunal, and on renewed application to this Tribunal, assert that the judge's approach to the application of the guidance in Devaseelan was in error because she failed to treat the findings in the first appeal as her starting point; she failed to recognise that the evidence produced in the instant appeal could have been adduced in the first appeal and, by considering the appeal on a *de novo* basis allowed the appellant to relitigate his case.
24. Before I consider the substance of this ground, it is necessary to consider the proper approach to findings of fact made in a previous appeal. Such findings are not *res judicata* and a party is not estopped from seeking to persuade a second tribunal to take a different view. The findings represent a starting point, not a straitjacket, and the later authorities have emphasised that the strength of the Devaseelan guidelines lies in their flexibility and the fact that they do not impose any unacceptable restrictions on the second judge's ability to make the findings which he/she conscientiously believes to be right (see: SSHD v BK (Afghanistan) [2019] EWCA Civ 1358 and Djebbar v SSHD [2004] EWCA Civ 804).
25. Judge Brewer was evidently aware of the guidance in Devaseelan and the principles identified in subsequent case-law, since she cited Djebbar at [22] of her decision, and began her evaluation of the evidence by addressing the findings in the first appeal. To say, as the grounds do, that the judge failed to consider the extant findings made in the first appeal is not a valid criticism. At [21] the judge first reminded herself that "very little of the appellant's account..." was accepted as credible and she set out the facts that had been accepted and indeed those that had not. In doing so, the judge was plainly treating the findings in the first appeal as her "starting point" even though she did not express herself explicitly in those terms.

26. The demarcation of the appellant's claims are clear and related to events, first, prior to the appellant's arrival in the UK in 2009 and, second, to events that occurred after he was returned to Jordan in 2012. The findings in the first appeal related to events that occurred hitherto 2009, namely, whether the appellant faced criminal sentencing in Jordan for illegal trading and/or whether he had been arrested on 17 October 2008 and ill-treated by the Jordanian authorities for attending an anti-government demonstration. These claims were distinct from the appellant's further claim that he was arrested by the authorities and tortured after he was returned to Jordan in 2012. This latter claim evidently could not have been advanced in the first appeal.
27. The judge was invited to consider the entirety of the appellant's claims in light of the expert evidence, a printout from Jordan's Security Directorate and correspondence from the appellant's Jordanian lawyer. The documentary evidence was in part, as the judge noted, consistent with the expert evidence and it is this evidence which the judge particularly drew upon to support her conclusions.
28. The grounds refer to guideline (4) and (6) of Devaseelan. In summary guideline (4) applies to *"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..."*. Guideline (6) applies to *"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"*.
29. Taking the grounds as pleaded, in my judgment, guideline (4) does not address the situation before the judge. In respect of the events prior to 2009 considered in the first appeal, the appellant was not relying on facts personal to his claim that were not brought to the attention of the judge hearing that appeal. Perhaps more apt is guideline (5) which concerns *"[E]vidence of other facts, for example country evidence, may not suffer from the same concerns as to credibility, but should be treated with caution"*. In this case the evidence the appellant sought to rely on was in principle the expert evidence. As the judge noted throughout her decision the expert evidence was unchallenged by the respondent, who himself sought to rely on that very same evidence to support his case that the appellant was not at risk of facing criminal sentencing on return to Jordan. In those circumstances, the judge was not required to adopt a cautionary approach to the expert evidence.
30. What the judge was required to do was to address her mind to the reasons put forward by the appellant as to why she should depart from the findings in the first appeal. That reason in my judgement is made plain at [23] when the judge referred to the unchallenged expert evidence. Whilst the judge could have expressed herself in clearer terms and perhaps the use of the adverb *"de novo"* was misplaced, I remind myself that I should not subject the judge's decision to a textual analysis and that context is important. Given the position of the parties before the judge, a position which is neither acknowledged in the grounds or in submissions, I agree with Mr Lay that the judge's actual meaning was that she was considering the matter afresh by revisiting the findings in the first appeal in light of the unchallenged expert evidence. In that context, I do not agree that in adopting that approach the judge was simply permitting the appellant to relitigate his previous claim.

31. It seems to me, that the respondent's grounds are close to bordering on suggesting that the judge could not have re-visited the appellant's initial claim despite being seized of unchallenged expert evidence that supported the appellant's account of events. That, in my view, goes against the principle that the guidelines ought to be applied flexibly. The judge conducted a detailed analysis on the basis of all of the evidence before her. She explained why she did not treat the appellant's previous claim as being settled by the first appeal. In my judgement the judge did not err and was entitled to revisit those findings for the reasons that she gave.
32. In the alternative, should I be wrong in that conclusion, and the judge's application of the Devaseelan guidelines was inadequate, I do not accept the error is material. As to the events that were the subject of the first appeal, the judge did not allow the appeal on that basis and expressly found at [28] that the appellant was not at risk of facing a criminal sentence on return to Jordan for past illegal trading. Whilst I acknowledge that the judge referred to the appellant's history of treatment in breach of Article 3 by the authorities as one of many factors supportive of her conclusion that the appellant was able to leave Jordan for a second time on a false passport at [37], the judge clearly identified at [38] the factors that caused her to allow the appeal:
- "Secondly, I find to the lower standard of proof that this appellant would be questioned on return by the Jordanian authorities in the light of his absconding from reporting conditions. I place significant weight on the expert analysis that his failure to report to intelligence services could re-ignite suspicions about terrorist connections sufficient to warrant questioning and further ill-treatment. Under such questioning the appellant cannot be expected to lie and I am satisfied that he will disclose leaving Jordan on a false passport with the assistance of an airport official which is a criminal offence. It is the cumulative impact of these factors which would place this appellant at risk on return of further persecution by the Jordanian authorities."
33. These findings – both evaluative and of primary fact – were properly open to the judge for the reasons that she gave. The judge's decision illustrates by sufficient reasoning the approach she adopted and why. The judge's assessment of the appellant's credibility was made in light of the respondent's position regarding the expert evidence and upon scrutiny of the appellant's evidence. I find the judge was entitled to allow the appeal for the reasons she gave on events that followed the appellant's return to Jordan in 2012, after he gave evidence in the UK that led to the conviction of a defendant in a national security case.
34. Having considered the judge's decision holistically, it is likely that she would have reached the same conclusion even if she had not revisited the findings in the first appeal. Applying the approach in Volpi v Volpi, the judge's findings are not plainly wrong, and the Upper Tribunal has no proper basis on which to interfere with those findings.
35. For all of these reasons, therefore, I conclude that the decision of the First-tier Tribunal does not contain a material error of law.

### **Notice of Decision**

The Secretary of State's appeal is dismissed. The decision of the First-tier Tribunal to allow the appeal shall stand.

R.Bagral

Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber

11 April 2024