Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09278/2019 (V)

THE IMMIGRATION ACTS

Heard at Filed House (via Skype)	**Decision & Reasons Promulgated**
On 17 September 2020	**On 23 September 2020**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

ER (ALBANIA)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Lams, instructed by Wimbledon Solicitors (Balham)
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is an Albanian national who was born on 28 October 2001. He appeals, with permission granted by Upper Tribunal Judge Gill, against First-tier Tribunal Judge Andonian's decision to dismiss his appeal on international protection and human rights grounds. The decision of the FtT was sent to the

parties on 13 November 2019, and followed a hearing which had taken place on 28 October 2019.

Background

2. The appellant entered the country on 20 July 2016, aged 14. He claimed asylum, stating that he was at risk on account of a blood feud between his family and the [S] family. The feud was said to have originated when the appellant's uncle, a police officer, found a member of the [S] family stealing timber from a forest. A shot was fired, the thief was injured, and matters had then followed the course prescribed by the Kanun of Lek Dukagjini. The appellant had been sent out of the country before he reached the age of 15, his family having been told by a village elder that the [S] family would seek to target him at that age.

3. Asylum was refused but discretionary leave was granted as a result of the appellant's status as an Unaccompanied Asylum-Seeking Child. He appealed against the former decision, and his appeal came before First-tier Tribunal Judge Gibbs on 23 February 2017. On 20 March 2017, Judge Gibbs issued a decision in which she dismissed the appeal on all grounds. She accepted that the appellant's account was 'broadly credible' and that 'there were tensions … between the [S] family and the appellant's family'. She did not accept, however, that the 'tensions' could be classified as a blood feud, or that the appellant had been entirely truthful about his contact with his family or his uncle's whereabouts. The appellant did not secure permission to appeal against Judge Gibbs' decision.

4. The appellant made further submissions in support of his asylum claim on 25 April 2019, prompted by the forthcoming expiry of his Discretionary Leave. The fear of the [S] family was re-asserted. The application was again refused on 25 August 2019. I do not propose to set out the contents of the letter of refusal, which spans 17 pages of single-spaced type. It suffices to note that the respondent placed significant weight on Judge Gibbs' conclusions and considered that the appellant could turn to the authorities in Albania for protection, or that he could relocate internally.

The Appeal to the First-tier Tribunal

5. The appellant gave evidence before Judge Andonian ("the judge"). Submissions were made by both representatives. Mr Lams, who represented the appellant then as he does now, developed the submissions he had made in a skeleton argument which had been settled the day before the hearing. The Presenting Officer (Ms Ahmed) relied on the refusal letter and made oral submissions on the matters summarised above. The judge reserved his decision.

6. The judge's decision is comparatively lengthy and somewhat unconventionally structured. At [2], he noted that he had 'highlighted certain paragraphs which deal with the appellant's credibility as regards his contact with his family in Albania'. Those paragraphs – which are partly or entirely emboldened – appear throughout the decision. The first such paragraph appears under the sub-heading 'The appellant's evidence', on the second page of the decision, and contains observations by the judge that the appellant had given incredible and contradictory evidence. The judge then returned to the narrative before making similar observations at [10], [11] and [16]-[19] and [38]-[40]. The structure of the decision is rendered all the more unusual by the manner in which the judge sets out his conclusions, at [31]-[34], before mentioning the burden of proof and then returning, at [36], to express further conclusions about the appellant's credibility and the other grounds upon which he had concluded that the appeal should be dismissed. As I understand his ultimate conclusions, he decided that the appellant's family had been involved in a dispute with the [S] family but that the appellant had otherwise mounted a 'fictitious claim for asylum in the UK with a view to remain in this country': [31]. The judge concluded in the alternative that the appellant could obtain a sufficiency of protection from the Albanian police and that he could relocate within Albania so as to obviate any risk to him in his home area: [37]-[41].

The Appeal to the Upper Tribunal

7. Four grounds of appeal were advanced on the papers before Upper Tribunal Judge Gill. She granted permission on the first, second and fourth and refused permission on the third. Mr Lams accordingly made no submissions orally or in writing on the third ground of appeal. The grounds of appeal may be summarised as follows:

   (i) The judge erred in his application of Devaseelan [2003] Imm AR 1, because he departed impermissibly from Judge Gibbs' conclusion that the appellant's account was 'broadly credible'.

   (ii) The judge failed to take material evidence into account when he concluded (as had Judge Gibbs) that the appellant was too young to be targeted by a blood feud and that killing was a prerequisite for such a feud.

   (iii) (…)

   (iv) The judge failed to consider the appellant's evidence that the [S] family held sway over the Albanian police force in coming to the conclusion that there was a sufficiency of protection or an internal relocation alternative.

8. The papers were placed in front of me on 31 March 2020. I reached the provisional view, at that stage, that the appeal might properly be determined on the papers. I sought submissions from the parties on that course and on the merits of the appeal. I received written submissions from Mr Lams and Mr Diwnycz. The respondent opposed the appeal and was content for it to be determined on the papers. The appellant sought an oral hearing. Having considered the competing submissions, I directed that the appeal should be listed remotely. It was as a result of that direction that the appeal came before me on 17 September 2020, when Mr Lams represented the appellant and Mr Diwnycz represented the respondent.

9. Mr Lams submitted, as he had in writing, that the judge had erred in his application of Devaseelan. Although he had mentioned that decision, and was clearly aware of the principles settled by it, he had erred in his consideration of Judge Gibbs' decision. In finding that the appellant was 'broadly credible', Judge Gibbs must be taken to have accepted various matters which Judge Andonian had found unproven. Judge Gibbs must have accepted, for example, the appellant's assertion that Mr [S] had said that he would kill the appellant's uncle and that the appellant's father had attempted to kill Mr [S]. She must also have accepted the appellant's evidence that Mr [S] had issued threats against the appellant's family, after which they had lived in 'semi-confinement'. Equally, she must have accepted that threats were made against the appellant as he approached his fifteenth birthday, as a result of which he was sent from Albania by his family. The judge had erred in failing to take these positive findings as his starting point.

10. In relation to grounds two and four, Mr Lams noted that he had provided the judge with a skeleton argument and that there was no mention of the document in the decision. Had the judge turned his mind to the arguments contained in that skeleton (as developed orally), he might not have concluded that it was inherently unlikely that threats would have been issued against the appellant before he attained his majority. The country guidance in EH (blood feuds) Albania CG [2012] UKUT 348 (IAC) and the respondent's Country Policy and Information Note spoke with one voice in suggesting that boys were potentially at risk from an extant blood feud from the age of 15. Equally, the judge had failed to turn his mind to another point made in the skeleton, which was that Judge Gibbs was wrong to conclude that a killing was a prerequisite for a blood feud; EH (Albania) stated that a blood feud began with either a killing or an offence committed by one family against another. As to ground four, the judge had failed to engage with the submission made orally and in writing, which was that the appellant's ability to relocate or to access sufficient protection from the Albanian state was compromised

by the assertion that the [S] family had senior connections within the Albanian police.

11. In response, Mr Diwnycz submitted that the judge had clearly taken into account and made reference to Judge Gibbs' decision. He accepted that the decision was unconventionally structured but submitted that it was nevertheless sustainable. I asked Mr Diwnycz whether he could locate any reference in the judge's decision to either the skeleton argument or to any of the arguments advanced therein. He could not. I asked whether the judge's assessment of credibility could stand when it seemed to be the case, as asserted in ground two, that he had reached his finding that the appellant's account was 'fictitious' without reference to those arguments. Although he did not withdraw his opposition to the appeal, Mr Diwnycz did not seek to make any further submissions.

12. Mr Lams did not seek to respond.

Discussion

13. I have come to the clear conclusion that the judge erred in law as contended in grounds two and four. As will be apparent from the record of the submissions above, the respondent was unable to advance any real defence against these grounds of appeal. That is not a criticism of Mr Diwnynz; it is a reflection of the merit of those grounds.

14. The reasons I find for the appellant in respect of ground two are as follows.

15. Judge Gibbs had, as noted above, found that the appellant's account was 'broadly credible'. She was plainly concerned, in considering whether there was an 'active blood feud' as defined in EH (Albania), by what she perceived to be inaction on the part of the [S] family since the incident between the two men had occurred in 2011-2012. It was in that connection that she noted at [17] that the appellant had been able to attend school. Judge Gibbs had also found, at [20], of her decision that there could be no blood feud, as defined, because there had been no killing. She considered an initial killing to be a prerequisite to a blood feud, citing a Home Office CIG in support of her conclusion.

16. Conscious of the fact that these conclusions would form the starting point for the next judge's assessment, Mr Lams had taken the trouble to address these two points 'head on' at [5]-[7] of his skeleton argument before the judge. He submitted that it was permissible for boys to be targeted from the age of fifteen and that a blood feud could begin with an offence; a killing was not required. Oddly, there is no reference to the skeleton argument in the judge's decision. Nor is there any reference to these two arguments, or to the background material cited by Mr Lams in support of his argument. At [14], the judge

misunderstood the first of those submissions, when he stated that boys did not become targets until they reached the age of majority (which he seemingly took to be eighteen) and, at [26], he failed to consider the background material relied upon by Mr Lams to show that an offence could suffice to generate revenge killings. These concerns were plainly material to the judge's overall conclusion that the claim was nothing more than an embellishment of a simmering dispute between two families.

17. As to ground four, the judge's error may also be simply described, in that he failed again to consider arguments and evidence which were identified in the skeleton argument before him. Mr Lams had submitted, at [7]-[10] of his admirably concise skeleton argument, that the appellant could not receive a sufficiency of protection in Albania and that there was no realistic internal relocation alternative. Amongst the reasons for those submissions were the claim made by the appellant that the appellant's family had been threatened even after moving to Tirana and that 'the [S] family have connections with the Albanian authorities'. The latter submission was a reference to the appellant's claim in interview that his uncle had been dismissed from the Albanian police force at the request of the [S] family, who were said to be particularly well-connected.

18. In considering whether this particular appellant could relocate or could turn to the Albanian police, however, the judge failed to take this evidence into account. His consideration of sufficiency of protection, at [38]-[40] in particular, is at the most general level and fails to consider the question posed by Auld LJ at [55] (6) of Bagdanvicius [2004] 1 WLR 1207: whether, notwithstanding a systemic sufficiency of protection, the authorities would be unlikely to provide the additional protection required by the applicant due to his particular circumstances.

19. The errors disclosed by ground two go to the judge's assessment of the appellant's credibility and to the risk which might or might not exist in Albania. The errors disclosed by ground four go to the judge's assessment of sufficiency of protection and internal relocation. Since I have accepted that those grounds disclose errors of law in the decision of the judge, I conclude that the decision cannot stand in its entirety. In fairness to Mr Diwnycz, he did not attempt to respond to grounds two and four and he did not attempt to submit that there were aspects of the decision which might properly be preserved in the event that these grounds were made out. In the circumstances, I conclude that the decision of the FtT involved the making of errors on points of law and that the decision must be set aside.

20. Both advocates submitted that the proper course, given that the next hearing would have to be *de novo*, was for the appeal to be remitted to the FtT. Having regard to the Senior President's

Practice Statement, and given the scope of the hearing now required, I agree.

21. I have reached these conclusions without expressing a view on ground one. Since it is unnecessary for the resolution of the appeal, I can state my conclusions on that ground quite shortly.

22. It is quite clear that Judge Andonian was aware of the conclusions reached by Judge Gibbs and that he was also aware of the approach required by Devaseelan. The findings reached by Judge Gibbs were mentioned at [3] and [22], amongst other places, and there is express reference to Devaseelan at [4]. As I listened to Mr Lams make his submissions before me, it became progressively clearer that the difficulty in this case was not in the judge's application of Devaseelan, it is in the precise 'starting point' provided by Judge Gibbs' decision.

23. Judge Gibbs certainly accepted that the appellant's account was 'broadly credible' and she certainly expressed some concerns about the extent and nature of the risk to the appellant. What Mr Lams sought to submit was that, in finding the appellant 'broadly credible', Judge Gibbs 'must have' been taken to accept various other matters, although there was no express finding on those matters within her decision. He submitted that she must have accepted that the appellant's family had been threatened by the [S] family and that a particular threat had been communicated about the appellant as he approached his fifteenth birthday.

24. With respect to Mr Lams, however, I consider that this is to read too much into the judge's finding that the appellant's account is broadly credible. It is imperative to recall the flexibility of the Devaseelan guidelines; they do not represent a straitjacket for a subsequent judicial finder of fact: R (on the application of MW) v SSHD [2019] UKUT 411 (IAC). It is also imperative to recall the difficulty of drawing a bright line around what a finding of fact actually is: AB (Iraq) [2020] UKUT 268 (IAC). Where there are, in truth, simply no findings on certain relevant matters, it is for the second judge to reach their own conclusions on the matters in issue. They must treat the first judge's decision as a starting point but there will be cases – and this appears to be one – in which proper resolution of the appeal is unlikely to be achieved by attempting to define what must and must not have been accepted by the first judge in the absence of express findings on those matters.

Notice of Decision

The decision of the FtT involved the making of errors on points of law and it is set aside. The appeal is remitted to the FtT for rehearing *de novo* by a judge other than Judge Andonian.

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 September 2020