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

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 December 2021	**On 24 February 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

ER (ALBANIA)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B. Lams, Counsel instructed by Wimbledon Solicitors
For the Respondent: Mr A. McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge C. H. Bennett, promulgated on 8 April 2021, dismissing an appeal by the appellant, a citizen of Albania born on 14 October 2001, against a decision of the respondent dated 25 August 2019 refusing his fresh claim for asylum.

Procedural and factual background

2. These proceedings have a lengthy history and have been before a number of different judges already. Where necessary, I have quoted the other judges' decisions in these proceedings as though they describe the key individuals using

the same terminology that I have adopted: I refer to *the appellant*, his *uncle*, and *S*[1].

3. The appellant arrived in the United Kingdom as an unaccompanied asylum-seeking child on 20 July 2016, aged 14. He claimed asylum on the basis that he was at risk of being persecuted as the member of a family targeted in a *Kanun* law blood feud. The Secretary of State refused the claim on 11 January 2017, but granted the appellant discretionary leave to remain until he was 17. He appealed against the refusal of the protection claim to the First-tier Tribunal, and the appeal was heard by Judge Gibbs. In a decision promulgated on 20 March 2017, Judge Gibbs found the appellant to have provided a "broadly credible account of events in Albania" (see [16] of her decision) but dismissed the appeal for reasons to which I shall return. Judge Gibbs' decision has not been set aside.

4. As the expiry of his discretionary leave neared, the appellant made a further application to the respondent, on 25 April 2019. He renewed his claim to be at risk of being persecuted, on account of the same blood feud. The Secretary of State refused the application in a decision dated 25 August 2019. The appellant appealed, and the appeal was heard, and dismissed, by Judge Andonian in a decision promulgated on 13 November 2019. Judge Andonian's decision was later set aside by Upper Tribunal Judge Blundell who, in a decision dated 21 September 2020, remitted the appeal to the First-tier Tribunal to be heard *de novo* by a different judge. It was in those circumstances that the appeal was heard by Judge Bennett, on 19 March 2021.

5. I gratefully adopt Judge Blundell's concise factual summary of the appellant's claim, from paragraph 2 of his decision dated 21 September 2020:

> "The feud was said to have originated in 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."

6. Judge Gibbs' operative reasoning when dismissing the appellant's appeal in 2017 was as follows:

> "15. In assessing the credibility of the appellant's claim I have taken into account the fact that when the events occurred in Albania he was a minor. I also remind myself of the asylum policy guidance that 'the benefit of the doubt will need to be applied more generously when dealing with a child particularly where a child is unable to provide detail on a particular element of the claim.'
>
> 16. Taking into account the appellant's age I am satisfied that he has provided a broadly credible account of events in Albania. I accept that his uncle was a police officer who tried to arrest a man called S. I accept that there were tensions because of this between the S family in the appellant's family. I am not however persuaded that this can be classified as a blood feud for the reasons I will set out below."

[1] Judge Bennett referred to the appellant as "Mr R", his uncle as "Mr AR", and the interlocutor from the S clan as "Mr SR". Upper Tribunal Judge Blundell used the full name of the S clan.

7. At paragraph 17, Judge Gibbs said that the encounter between the appellant's uncle and S took place in 2011-12, and observed that there was no serious injury or death. There was no evidence of an attack on the appellant's family in the years that followed. The appellant's father did not go into self-confinement and did not describe any significant alteration to their usual family life. The appellant was able to finish school, and it was not until 2016 that his parents told him to stay indoors. Having summarised the applicable country guidance, *EH (blood feuds) Albania CG* [2012] UKUT 00348 (IAC), at [19] the judge said that she placed significant weight on the absence of death or serious injury, and the largely unhindered ability the appellant's family enjoyed to continue their daily lives. She rejected arguments advanced by the appellant's then counsel, Ms Poynor, that death or serious injury were not prerequisites for the existence of a blood feud and concluded at [21] that she was not satisfied that a blood feud was in existence, or that the appellant would be at real risk of serious harm on return to his local area in Albania, or any other area.

8. Judge Gibbs rejected the appellant's claim to have lost contact with his family at [22] and [23] and reached a positive finding at [24] that the appellant had family in Albania with whom he would be able to establish contact. He would not return as an unaccompanied minor.

9. Judge Gibbs' decision has not been set aside.

10. The appellant's 25 April 2019 further submissions largely restated his primary claim (see paragraph 21 of the respondent's decision dated 25 August 2019) and maintained that he had not had any further contact with his family. Before Judge Bennett, however, the appellant claimed to have resurrected contact with his sister, on two occasions, who informed him that the S family had continued their threats towards his family. According to his witness statement dated 17 October 2019, his parents had moved to Tirana, but had continued to receive threats from the S family, as they had connections to the authorities. The Secretary of State considered that the further submissions did not merit a departure from the findings reached by Judge Gibbs.

Judge Bennett's decision

11. Since Judge Bennett's decision is 58 pages long, I can do no more than attempt to summarise its contents, to the extent necessary to engage with the appellant's grounds of appeal.

12. Having outlined the appellant's claim, the Secretary of State's two decisions, and the decision of Judge Gibbs, Judge Bennett addressed what he considered to be the import of *EH (blood feuds) Albania CG* [2012] UKUT 00348 (IAC), the relevant country guidance, at [31] and [32]. The evidence in the case pre-dated December 2010, when the appeal was heard, he said. The findings of this tribunal, in 2010, were that the number of blood feuds in Albania were "few and declining", and there was no basis to conclude that that decline had not continued.

13. At [33] to [38], the judge quoted extensive extracts from the respondent's *Country Policy and Information Note – Albania: blood feuds*, February 2020 ("the CPIN"). The extracts, he said, supported the view that the number of blood feuds had continued to decline. The judge considered that the extracts also demonstrated that police and official corruption in Albania did exist, but that only

those with strong ties to politics would be able to influence corrupt judicial decisions, and that bribery of judges rarely occurs in cases of blood feud: [37]. At [38], the judge stated:

> "I conclude that the *weight of evidence was in favour of the police efforts* [to address blood feuds] *being effective*"(emphasis original).

14. Referring to paragraph 2.5.8 of the CPIN, in which the Secretary of State concluded that effective protection is, in general, available for blood feuds in Albania, and correspondence from the British Embassy Tirana, which stated that blood feuds had continued to decline such that "[m]odern blood feud is very limited, and few cases can really be defined as such, many either being fraudulently invented cases, or simply cases of common criminality and revenge", the judge went on to say, at [38]:

> "I have no reason to doubt, and accept, that, even though doubts by some had been expressed, the weight of the evidence was as stated, and that it was to the effect that the police were effective and justified in the conclusions expressed in paragraph 2.5.8 and in the letters from the embassy in Tirana. I prefer the opinions and evidence of the 'multiple other sources', simply because it represents the weight of evidence."

15. Addressing the decision of Judge Gibbs, Judge Bennett said that, taken at its highest, Judge Gibbs could only have found that the appellant had given a credible account of what he had been told by others concerning the blood feud. He said at [41]:

> "I have a very considerable doubt as to whether [Judge Gibbs'] conclusion that the appellant had given a broadly credible account of events in Albania can properly be understood as any more than an acceptance that he had been informed of his uncle's attempts to arrest Mr S. Nevertheless, because Judge Gibbs specifically accepted that the appellant's uncle had been a police officer and that he attempted to arrest Mr S, I will proceed on the footing that *she had accepted those matters* and that that therefore is the 'starting point' for my determination. However, I go no further than that, so far as the conclusion that the appellant had given a broadly credible account of events in Albania is concerned, and, specifically, do not proceed on the footing that she accepted that the uncle had aimed his gun at or attempted to murder Mr S, either at the coffee shop or at all."

16. The judge then outlined the submissions advanced by Mr Lams which, in essence, contended that Judge Gibbs had erred concerning death or serious injury being a pre-requisite for a blood feud, and that she had misapplied *EH*. Judge Bennett said at [43] that, pursuant to *Devaseelan* at [37], it was not his role to consider arguments intended to undermine the earlier decision. However, he said that he addressed those arguments in any event, at [44] to [46], finding that, properly understood, the operative guidance in *EH*, read in light of the Refugee Convention and the European Convention on Human Rights, meant that the "crucial question" was whether:

> "…the individual asylum claimant will be murdered, persecuted or will suffer serious harm if returned (in an Albanian case) to Albania."

The judge found support in reaching this conclusion by examining the operative country guidance in *TB (Blood Feuds – relevant risk factors*) Albania CG [2004] UKIAT 158, the predecessor country guidance to *EH*, which was withdrawn by *EH* (see *EH* at [74]).

17. Towards the end of paragraph 45, in the fourth unnumbered indentation of text to the end, the judge said that although Judge Gibbs did not address the potential for a significant insult to trigger a blood feud, "I do not accept that she was so lacking in understanding of her function as a judge of this Tribunal and/or of the requirements of the 1951 Refugee Convention… that she did not have in mind and consider whether [the appellant's uncle' having shot at and wounded [S] *might itself have give rise, in him and/or members of his family, to a desire for revenge, and therefore to a risk to* [the appellant] *at least…*" (emphasis original).

18. At [47], the judge said that, since the material before him was "in broad terms" the same as that before Judge Gibbs, pursuant to the *Devaseelan* guidelines, he was "required" to make findings in line with those contained in Judge Gibbs' determination. He found that there was no reasonable likelihood that the appellant would be persecuted, subjected to serious harm, or otherwise unlawfully killed.

19. At [49], the judge then listed a series of reasons why he found the appellant to lack credibility in any event, having taken into account that the appellant was 15 when he arrived, and when interviewed by the Secretary of State as part of his asylum claim. The appellant's accounts had been inconsistent with each other, were internally inconsistent, and lacked plausibility. The appellant's claim that the police in Albania could not offer sufficient protection to him was inconsistent with the judge's own analysis of the background materials at [37] and [38], which found that there *was* a sufficiency of protection. The appellant's willingness to claim that the police were *not* able to offer a sufficiency of protection to those at risk from blood feuds was factor that further undermined his credibility. See [49(j)].

20. At [51], the judge said that, because he had not found the appellant to be "an entirely reliable, credible or truthful witness", and in light of the credibility findings against the appellant at paragraphs 49 and 50, he did not find him to be credible in relation to the remaining limbs of his case. The judge proceeded to make a series of specific findings rejecting detailed aspects of the appellant's case.

21. The judge then addressed further weaknesses in the appellant's case at [53], finding at sub-paragraph (f) that, on the basis of the findings he set out at paragraphs 33 and 34, concerning the CPIN's departure from the findings in *EH* that the police would be *unable* to offer sufficiency of protection (see above), the appellant would enjoy a sufficiency of protection in any event. The family of S were not of the profile or influence to place the appellant beyond the protection of the authorities. The judge gave further detailed reasons to support that finding at [56], adding at footnote 19, "I am not satisfied that there is *anywhere* in Albania *now, in 2021,* in which 'Kanun' law predominates"(emphasis original).

22. In conclusion, the judge found that the appellant had not demonstrated that he had a well-founded fear of being persecuted, or subject to serious harm for the purposes of humanitarian protection or Article 3 ECHR. The appellant had not advanced an Article 8 argument in the alternative. The judge dismissed the appeal.

Grounds of appeal

23. There are seven grounds of appeal, which I have sought to summarise as follows:

    a. Ground 1: the judge failed to apply the *Devaseelan* guidelines in relation to Judge Gibb's findings that the appellant was broadly credible, and in so doing failed adequately to direct himself concerning the impact of the appellant's age as a minor at the time of all relevant events in Albania;

    b. Ground 2: the judge ignored the fact that the appellant was a minor when interviewed by the Secretary of State, and when he made his statement dated 31 August 2016. The judge's analysis "largely turns on the nuances of the degree of restrictions to the father's movements articulated by a child in the asylum interview…" The judge also wrongly followed Judge Gibbs' finding that there was no self-confinement. There had been partial self-confinement, which, in any event, was not a prerequisite to the existence of a blood feud;

    c. Ground 3: the judge's credibility analysis at [49(j)] was irrational. It was irrational to conclude that the appellant lacked credibility because the appellant's view of the ability of the police to offer sufficient protection differed from the judge's own view of the background materials concerning that issue;

    d. Ground 4: it was irrational for the judge to reject the matters listed at [51] simply on account of having rejected other aspects of the appellant's credibility, without engaging in a specific analysis of those matters;

    e. Ground 5: the departed from *EH* without considering or applying the established test for departing from extant country guidance in *SG (Iraq) v Secretary of State for the Home Department* [2012] EWCA Civ 940 at [47];

    f. Ground 6: at [39] the judge failed to follow the *Devaseelan* guidelines concerning Judge Gibbs' express finding that the appellant's uncle had aimed or shot at S in a coffee shop, and adopted a perverse approach to the interpretation of her findings of fact;

    g. Ground 7: the judge erred by concluding at [46(e)] that the appellant's ability to attend school was a factor pointing against the existence of a blood feud, in contrast to the country guidance given in *EH* at [5].

24. Permission to appeal was granted by First-tier Tribunal Judge O'Garro on all grounds.

25. The respondent submitted a rule 24 notice dated 19 July 2021 resisting the appeal, but it was granted without sight of the grounds of appeal, and with the benefit only of the brief grant of permission to appeal.

The law

26. The grounds of appeal primarily seek to target the findings of fact reached by a first instance judge, who had the benefit of considering the "whole sea of evidence" in the case, to adopt the terminology of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114]. Given appeals only lie to this tribunal on the basis of errors of law, rather than disagreements of fact, it is necessary to recall the circumstances in which an error of fact may amount to an error of law. They were notably summarised in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982, at [9]:

> "i) Making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");
>
> ii) Failing to give reasons or any adequate reasons for findings on material matters;
>
> iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
>
> iv) Giving weight to immaterial matters;
>
> v) Making a material misdirection of law on any material matter;
>
> vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
>
> vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

Discussion

27. By way of a preliminary observation, it is necessary first to address the overall complexity, detail, and length of the judge's decision, in order to place the subsequent analysis in context. The complexity arose not only due to its overall length, but also due to the length of the individual paragraphs, and the complexity of the sub-paragraphs in setting out the individual strands of the judge's reasoning. Some paragraphs spanned several pages due to the number of sub-paragraphs; see, for example, paragraph 49, which starts on page 37 and ends on page 43.

28. In *Budhathoki (reasons for decisions)* [2014] UKUT 00341 (IAC), Mr Justice Haddon-Cave, as he then was, said:

> "…it is generally unnecessary, unhelpful and unhealthy for First-tier Tribunal judgments to seek to rehearse every detail or issue raised in the case. This leads to judgments becoming overly long and confused. Further, it is not a proportionate approach to deciding cases." (Paragraph 14)

29. While this tribunal will necessarily adopt a deferential approach to findings of fact reached by first instance judges, in cases such as this where the decision is of a length and complexity that strays beyond that merited by the issues in the case, the appellate restraint which normally characterises the analysis of findings of fact reached below is harder to apply. Regrettably in light of the fact that this is an appeal which has already been remitted to the First-tier Tribunal, it will be necessary to do so on a further occasion, for the reasons set out below.

30. Against that background, I will first address ground 3, concerning the judge's analysis of the appellant's credibility in light of his knowledge and understanding of police corruption.

31. There was a degree of common ground at the hearing before me that the judge's analysis at [49(j)] was at least, to adopt Mr McVeety's terminology, "clumsy".

32. In [49(j)], the judge held against the appellant his assertion that he would not enjoy sufficiency of protection in Albania because his, the appellant's, view of police corruption contrasted with that reached by the judge on the issue. The judge had reviewed a number of the background materials himself, at [33] to [38], and concluded that the appellant would enjoy a sufficiency of protection. The appellant's case had been that he would *not* enjoy a sufficiency of protection. The appellant's expression of that view led the judge to make an adverse credibility finding against him, in these terms, at [49(j)]:

> "The making of such an assertion, when he had no evidential basis to vouch [for] that assertion, is a matter which casts doubt on his honesty and truthfulness."

Mr Lams submitted that it was not rationally open to the judge to impugn the appellant's credibility on that basis.

33. The reason Mr McVeety sought to categorise the above analysis as merely "clumsy", and not irrational, was because it was the appellant's case that he was closely related to two police officers, namely his father and uncle. The implication of this submission is that the appellant, when he was a child in Albania, must have been well placed to have formed an accurate view of the capacity, reliability and integrity of the police. He must have known that police officers in the country, and certainly in his home area, would have been able to offer him the protection necessary to deprive him of a well-founded fear of being persecuted. Accordingly, in Mr McVeety's submission, the appellant's credibility was harmed when he maintained to the Secretary of State, and the judge, that he would *not* enjoy a sufficiency of protection in Albania.

34. I agree with Mr Lams that this aspect of the judge's reasoning was irrational and perverse. The judge was only in a position to conclude that the authorities in Albania offered a sufficiency of protection to prospective blood feud victims as a result of the extensive analysis of the background materials he conducted at [33] to [38]. That analysis involved balancing competing sources, some of which supported his conclusion, others which were diametrically opposed to it. The judge noted multiple reports of corruption in the police and judicial authorities, including those documented in the United States State Dept. Human Rights Practices Report for 2016 (the year the appellant left Albania as a child). The judge said that he preferred the background materials contained in the 2020

CPIN, which painted the police in a more generous light, than other materials, including those set out in an earlier version of the CPIN. In *EH* itself, this tribunal held that whether the authorities would be able to offer a sufficiency of protection required case-specific analysis: see [70 and [74(e)].

35. The judge penalised the appellant for forming (as a child) and holding (as a young adult) views that accorded with the respected and weighty reports, which the judge simply chose not to "prefer" to the other reports. That was irrational. At its highest, the judge's analysis was capable of going to whether the appellant had a "well founded", i.e., objective, fear of being persecuted. It was not capable of demonstrating that the appellant's personal credibility was harmed, simply on account of him holding widespread (and well-supported) views that the police in Albania would not extend a sufficiency of protection to him.

36. This was not, for example, a situation in which the appellant had sought to rely upon a wild, unsupported and implausible conspiracy theory concerning the absence of sufficient protection in Albania. Had he done so, then the judge may have been on stronger ground. By contrast, the appellant manifested a widely-held and supported view that the police in Albania are unable to offer a sufficiency of protection. That they may be unable to do so is supported by *EH* at [70], which requires a fact-sensitive assessment in all cases. By concluding as he did against the appellant in this way, I consider that the judge reached a finding that no reasonable judge could have reached.

37. It is nothing to the point, as submitted by Mr McVeety, that the appellant's father and uncle were police officers. Merely having two police relatives cannot impute to an individual, still less a child, knowledge of the overall sufficiency of protection provided by the law enforcement authorities in Albania, especially given the spectrum of views concerning whether such protection would be sufficient. This aspect of the judge's reasoning was not simply "clumsy", but irrational. Ground 3 is therefore established.

38. Grounds 1 and 2 concerning the judge's failure to take account of the appellant's age at the relevant times when departing from Judge Gibb's findings largely overlap. At [37] of *Devaseelan*, the Immigration and Asylum Tribunal said:

> "As an assessment of the matters that were before the first Adjudicator [the earlier judge's decision] 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."

39. While stating that it was not his function to undermine Judge Gibbs' determination in relation to matters adverse to the appellant in that decision (see, for example, [43]), the judge felt no such constraints in relation to Judge Gibbs' positive credibility findings. Rather than regard Judge Gibbs' primary findings of fact as "unquestioned" (*Devaseelan* at [37]), the judge felt able to say, at [41], that were he determining the matter for himself, "I would have had very substantial doubt as to whether any reliance could be placed on the [appellant's] evidence of what he can only have been told by others as to what happened." Despite Judge Gibbs making positive findings that she accepted the appellant's uncle to be a police officer, who tried to arrest S, and that that led to tensions between the appellant's family and the S family, Judge Bennett read

those findings down, and treated them as though Judge Gibbs had qualified her findings in a way she simply had not sought to do so. Judge Bennett said that he had "considerable doubt" as to whether Judge Gibbs' findings "can properly be understood as any more than an acceptance that he had been informed of [his uncle's] attempts to arrest [S]". Then, despite stating that he would, in any event, proceed on the "footing" that Judge Gibbs had accepted those matters, and that they therefore formed the "starting point" for his own analysis, the judge then stated that he specifically did *not* accept that the uncle had aimed his gun at S. Yet Judge Gibbs accepted that "an incident" took place (see [19]), and that the appellant had given a "broadly credible" account.

40. In my judgment, while the *Devaseelan* guidelines are not a straitjacket, and may legitimately allow for a quite different conclusion at the second appeal, the judge did not so much "build upon" Judge Gibbs' decision, so much as impermissibly dismantle and rebuild it. The judge took the positive credibility findings reached by Judge Gibbs and unnecessarily stated that he "would have had very substantial doubt" as to whether the appellant's account was credible were he deciding the matter for himself. It was not necessary or appropriate for the judge openly to undermine Judge Gibbs' primary findings of fact in that way, in light of the *Devaseelan* guidelines' requirement that her decision should have been "regarded as unquestioned". Doing so also unnecessarily contributed to the length and complexity of the decision.

41. Further, the judge subsequently impermissibly minimised Judge Gibbs' findings by stating that, taken at their highest, Judge Gibbs' findings that the appellant "has provided a broadly credible account of events in Albania" meant only that Judge Gibbs accepted that the appellant had given an accurate account of what others had told him. But that is a reality inherent to many findings of fact in protection appeals; it may well be that evidence which in other contexts would be regarded as "hearsay" lies at the heart of positive findings of fact reached by a judge, as was the case with Judge Gibbs' decision. Judge Bennett's exegesis of Judge Gibbs' decision impermissibly sought to deconstruct her earlier primary findings of fact, and in doing so considered "arguments intended to undermine the first Adjudicator's determination". It is not clear whether Judge Bennett was invited by the Secretary of State to consider arguments intended to undermine Judge Gibbs' decision, or whether he did so of his own motion. The Secretary of State's refusal letter dated 25 August 2019 took Judge Gibbs' findings of fact at face value and did not seek to deconstruct them in the manner later undertaken by Judge Bennett. See, for example, paragraph 20 of the refusal letter:

> "… Judge Gibbs accepted that your uncle was a police officer who tried to arrest a man called [S] and that there were tensions between the [S] family and your family."

The Secretary of State's position was that Judge Gibbs had accepted the above features of the appellant's account; not that she merely accepted that the appellant had been told by others that those things had happened.

42. I therefore find that the judge erred in his approach to Judge Gibbs' decision under the *Devaseelan* guidelines, for the reasons set out above. Nothing therefore turns on the judge's approach to the appellant's age at the relevant times, as his analysis was flawed in any event.

43. Mr Lams' submissions go further, however. He submitted that Judge Gibbs was wrong to reject the appellant's claim to be a victim of a blood feud. Under the country guidance in *EH*, and contrary to the conclusions of Judge Gibbs, a killing is not a prerequisite to the existence of a blood feud, he submitted. A feud may be triggered by a killing or by the giving of offence: see *EH* at [5(v)]. That the appellant was able to attend school is nothing to the point, submitted Mr Lams, as the country guidance in *EH* is that children under the age of 15 are usually not required to kill or be killed. That being so, it was open to the judge to revisit Judge Gibbs' application of the country guidance, and reach another conclusion.

44. Mr McVeety submitted that it was not open to the appellant to pick and choose those parts of Judge Gibbs' decision which were advantageous to him, while simultaneously criticising Judge Bennett for adopting the reasoning of other parts of her decision. It is, of course, trite law that the *Devaseelan* guidelines apply equally to both parties. As such, ordinarily it would not be appropriate to identify certain findings of fact as forming the "starting point", while isolating and disregarding others.

45. In my judgment, much turns on what amounts to a "finding of fact" in the earlier decision. Judge Blundell, when setting aside Judge Andonian's decision, made the following observation about the findings reached by Judge Gibbs, at [24]:

> "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 (oao MW) v Secretary of State for the Home Department (Fast track appeal: Devaseelan guidelines)* [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)."

46. The Presidential panel in *AB (Iraq)* highlighted a number of authorities in which a distinction was drawn between primary findings of fact, on the one hand, and an evaluation of those facts as found, on the other. See, for example, the judgment of Lord Glennie sitting in the Inner House of the Court of Session in *MS and YZ v Secretary of State for the Home Department* [2017] CSIH 41 at [42], and that of Lord Carnwath JSC in *HMRC v Pendragon* [2015] UKSC 37 at [49], quoting *Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929 and *Lawson v Serco* [2006] ICR 250 at [34].

47. I consider that the findings of Judge Gibbs concerning the credibility of the appellant, for example those at [16], fall firmly into the territory of being primary findings of fact. By contrast, her analysis of in light of the applicable country guidance, as she understood it to apply, were evaluative findings based upon, and distinct from, those earlier primary findings of fact. The task of any judge of the First-tier Tribunal upon hearing an appeal in which an earlier decision is relevant in the *Devaseelan* context is to arrive at a contemporary assessment of the appellant's case, taking proper account of earlier findings of fact as a starting point, but performing a fresh evaluative assessment of the implications of those earlier findings, taken with any subsequent findings of fact. The flexibility inherent to the *Devaseelan* guidelines is emphasised by the eighth principle, which states, with emphasis added:

> "We do not suggest that, in the foregoing, we have covered every possibility. By covering the major categories into which second appeals fall, we intend 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.**"

48. In *Djebbar v Secretary of State for the Home Department* [2004] EWCA Civ 804, Judge LJ, as he then was, said the following of the *Devaseelan* guidelines, at [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."

49. It follows that, while "primary" findings of fact (such as Judge Gibbs' credibility findings) should form the starting point for subsequent judicial findings of fact, the same is not true of evaluative findings reached in earlier decisions. Any other approach would be an abrogation of the responsibility of the second judge to consider the appeal on its merits, taking into account both the earlier primary findings of fact, and any later findings of fact.

50. Judge Bennett sought to engage with Mr Lams' submissions about the potential for the giving of offence to catalyse a blood feud at [46], and so appears to have accepted that, in principle, it would be permissible to revisit the overall question of risk on return in respect of evaluative findings reached by Judge Gibbs. However, despite acknowledging that Judge Gibbs' approach to this issue omitted any express consideration of the potential for offence to catalyse a blood feud, Judge Bennett said, at [46(a)] that "I have little doubt but that, as a matter of common sense, [Judge Gibbs] was of the opinion" that, had S engaged in the matters alleged by the appellant, they were not matters that would be reasonably likely to give rise to a blood feud. In doing so, Judge Bennett read into Judge Gibbs' decision reasons that quite simply it did not feature: Judge Gibbs did not expressly address the potential for blood feuds to be triggered by offence, rather than a prior death. There is force to Mr Lams' submission that she should have done, and that, accordingly, that issue required an evaluative finding that Judge Bennett was required to reach for himself, unconstrained by Judge Gibbs' earlier approach. Rather than determining the matter for himself, as he should have done, Judge Bennett imputed to Judge Gibbs reasoning that was absent from her decision.

51. The appellant succeeds on grounds 1 and 2.

52. The appellant also succeeds on grounds 6 and 7. In relation to ground 6, the judge's recharacterization of Judge Gibbs' findings concerning what the appellant claimed to have taken place in a coffee shop subsequent to the original forest-based incident failed to ascribe to Judge Gibbs' findings the significance they merited, pursuant to *Devaseelan*.

53. Turning briefly to ground 7, Mr Lams also submitted to Judge Bennett that children aged under 15 would not be subject to the Kanun law blood feud, as a means to explain the relatively restriction-free existence maintained by the appellant in the time before his departure from Albania, before he turned 15. At [46(e)], the judge responded to this submission in the following terms:

> "Whilst the 'strict' rules of the Kanun blood feud might exempt children under the age of 15 from murder or serious harm, it could not properly be assumed that [S] or other members of his family would adhere to those 'strict' rules."

It is not clear on what basis the judge was able to reach the above conclusion. It is speculation and amounts to a finding with no evidential foundation, which is therefore perverse, and contrary to the country guidance in *EH*.

54. In light of the above analysis, it is not necessary for me to engage in further detailed discussion of the remaining grounds of appeal. The following brief analysis will be sufficient.

55. In relation to ground 4, at [51] the judge anchored his operative credibility analysis in relation to a number of findings of fact to his earlier, negative credibility assessment of the appellant conducted pursuant to the flawed analysis outlined above. There is considerable force to Mr Lams' submission that the judge failed to conduct a holistic credibility assessment, in the round. Simply because an individual has been found to lack credibility in relation to some aspects of his account it cannot be assumed that the remaining aspects also lack credibility: see, for example, *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49 at [32]. What is more, by basing this analysis on his earlier, flawed, credibility findings, the overall credibility findings reached by the judge rested on foundations made of sand. The judge reached flawed initial findings, which took into account irrelevant matters (concerning sufficiency of protection), and failed to take into account relevant matters (such as Judge Gibbs' primary findings of fact), and built his later operative analysis on those most unreliable groundings. Ground 4 is made out.

56. Under to ground 5, Mr Lams submitted that the judge departed from *EH*'s findings concerning the insufficiency of protection available to victims of blood feuds in Albania, without addressing or applying the established test for departing from country guidance. Pursuant to the judgment of Stanley Burnton LJ in *SG (Iraq)* at [47]:

> "…tribunal judges are required to take Country Guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so."

57. Mr Lams' submission relies on the following country guidance concerning internal relocation, at [74(c)] of *EH*:

> "The Albanian state has taken steps to improve state protection, but in areas where Kanun law predominates (particularly in northern Albania) those steps do not yet provide sufficiency of protection from Kanun-related blood-taking if an active feud exists and affects the individual claimant. Internal relocation to an area of Albania less dependent on the Kanun may provide sufficient protection, depending on the reach, influence, and commitment to prosecution of the feud by the aggressor clan."

58. Mr McVeety submitted that the judge didn't depart from *EH*; he adopted an approach that was consistent with it. The judge noted that, in 2010, the number of blood feuds was declining, and that that trajectory had continued, such that

the judge was entitled to conclude that in 2021 there were very few remaining blood feuds.

59. I agree that the judge failed to take into account the test for departing from country guidance. While he sought to demonstrate that the trajectory of blood feuds had continued to decline, his operative conclusion that there are now *no* areas in which Kanun law 'predominates', was a departure from the findings if *EH*. It was incumbent upon the judge to direct himself pursuant to the *SG (Iraq)* test. This is because the judge did not simply conclude that the trajectory of blood feuds had continued to decline based on the operative findings of *EH* itself. Rather, the judge based those findings on a range of broader materials, which enabled him to depart in material terms from the conclusions of *EH* that some blood feuds remain in existence. In addition, the materials upon which the judge based his analysis did not support he proposition that revenge killings would not take place, at all: the letter from the British Embassy quoted at [34] by the judge (at the bottom of page 27, in the penultimate unnumbered paragraph to the end) opined that many remaining 'blood feuds' would more appropriately be categorised as common criminality and revenge. Even if the materials cited by the judge supported the proposition that Kanun feuds had declined to negligible levels, they did not necessarily support the proposition that revenge would be sought by those willing to take matters into their own hands.

60. Drawing this analysis together, I find that the decision of Judge Bennett involved the making of an error of law such that it should be set aside, with no findings of fact preserved. In light of the extensive findings of fact that remain to be made, regrettably (in light of the two hearings that have already taken place before the First-tier Tribunal), remittal to the First-tier Tribunal is the appropriate course.

61. Anonymity: This is a protection claim which is yet to be determined. The risk is said to arise from an incident Judge Gibbs accepted took place. Bearing in mind the guidance recently given in the Upper Tribunal Immigration and Asylum Chamber *Guidance Note 2022 No. 2 Anonymity Orders and Hearings in Private* at [27] and [28], it is appropriate at this stage to maintain the anonymity direction already in force.

Notice of Decision

The decision of Judge Bennett involved the making of an error of law and is set aside with no findings of fact preserved.

The appeal is remitted to the First-tier Tribunal to be reheard by a judge other than Judge C Bennett.

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 their 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.

Signed Stephen H Smith Date 14 February 2022
Upper Tribunal Judge Stephen Smith