IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004179
First-tier Tribunal No:
RP/50078/2021
LR/00036/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 April 2023

Before

UPPER TRIBUNAL JUDGE SMITH

Between

A (ALBANIA)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Dr S Chelvan and Dr A Morgan, instructed by Duncan Lewis
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Heard at Field House on 23 March 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant and any member of his family are granted anonymity.
No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant and his family members. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge J G Raymond dated 18 July 2022 ("the Decision") dismissing the Appellant's appeal on all grounds against the Respondent's decision dated 24 August 2021 revoking the Appellant's refugee status and 23 August 2021 refusing the Appellant's protection and human rights claims in the context of a decision to deport the Appellant to Albania.

2. The Appellant is a national of Albania. He entered the UK as a child illegally with his mother in 2016. She claimed asylum with the Appellant as her dependent. Their claim was refused but allowed on appeal and they were granted refugee status in October 2015.

3. Since then, the Appellant has been convicted of a number of crimes. In the period 2016 to 2021, he had six convictions for thirteen offences, the last two carrying a sentence of over three years. It is as a result of his offending that the Respondent seeks to deport him to Algeria. Before she is able to do so, though, she must be in a position to revoke his refugee status.

4. The Respondent relies upon Article 1C (5) of the Refugee Convention ("Article 1C(5)"). She contends that there has been a change in circumstances in Albania meaning that the Appellant would no longer be at risk. The Respondent has also made a decision that section 72 Nationality, Immigration and Asylum Act 2002 ("Section 72") applies. Even if the Appellant could not be returned to Albania, if Section 72 applies, he is not entitled to the protection of the Refugee Convention and would need to fall back on an Article 3 protection claim. The Appellant has also claimed that his deportation would breach Articles 3 and 8 ECHR. He claims that he would remain at risk in Albania as he and his mother were found to have been victims of trafficking and he would remain at risk of re-trafficking. He also relies on Article 3 in relation to his mental health. That and his family life in the UK are also relied upon under Article 8 ECHR.

5. Judge Raymond correctly identified the relevant issues at [14] of the Decision. However, in an extremely lengthy decision running to 281 paragraphs over 81 closely typed pages, the Judge rejected the Appellant's case on all issues.

6. The Appellant appeals on three grounds as follows:

   Ground 1: The **Devaseelan** issue

   The Appellant accepts that the Devaseelan guidance has a part to play. The findings in the successful asylum appeal in 2015 form the starting point for the Judge on this occasion but this Judge is entitled to reach different findings if further evidence justifies a departure.

However, as the Appellant points out, this has to be in the context of a shifted burden of proof as the first issue is whether the Respondent is entitled to revoke refugee status, on which issue she bears the burden. The Appellant says that the Judge has wrongly placed the burden on him.

Ground 2: Article 2/3 real risk and expert evidence on mental health

In essence, the Appellant says that the Judge, when finding that the Appellant could obtain treatment for his mental health in Albania has ignored the expert evidence of Dr Bibi that the Appellant would be unlikely to access such treatment due to the impact of his "complex trauma". It is said this will also give rise to a causative link with the risk of the Appellant committing suicide.

Ground 3: Inadequate reasons for adverse credibility findings

The Appellant draws attention to several paragraphs where it is said that the Judge has made factually incorrect assessments of the evidence.

7. Permission to appeal was refused by First-tier Tribunal Judge Grant-Hutchison on 17 August 2022 in the following terms so far as relevant:

> "... 3. The Judge has not departed from the general principle established in Devaseelan and is entitled to consider the previous Judge's findings in light of the further evidence before him as at the date of hearing. The Judge has considered the evidence of Dr Bibi and has made appropriate findings which he was entitled to make. It was open for the Judge to consider what weight he felt it appropriate to place on all the evidence before him, including Dr Bibi's evidence. The Judge has given detailed reasons for his decision. The adverse credibility findings which are submitted as being factually incorrect are immaterial to the Judge's decision.
>
> 4. The grounds disclose no arguable error of law."

8. The Appellant appealed to this Tribunal on the same grounds. He also drew attention in the context of the first ground to a concession recorded as made by the Respondent that the Appellant at the time of the 2015 appeal was recognised as a refugee in his own right ("the Concession"). It is therefore submitted that Judge Raymond was not entitled to go behind the findings made by the previous Judge as the Concession had not been withdrawn. It is also additionally submitted that the hearing before Judge Raymond was procedurally unfair as he did not put the Appellant on notice that he was minded to disagree with the findings of the previous Judge.

9. Permission to appeal was granted by Upper Tribunal Judge Kebede on 19 October 2022 in the following terms:

> "… 2. There is arguable merit in the assertion in the grounds that there was procedural unfairness arising from the judge departing from the principles in Devaseelan and arguably going behind the findings of a previous Tribunal without providing the appellant with a proper opportunity to respond. The second and third grounds, seeking to challenge the judge's findings on the medical evidence and his adverse credibility findings, whilst perhaps of lesser arguable merit, may nevertheless be argued."

10. The Respondent filed a Rule 24 Reply dated 28 November 2022 opposing the Appellant's appeal. The Respondent submits that there has been no misdirection in the application of Devaseelan, and that the findings made in relation to the Appellant's mental health were open to the Judge on all the evidence.

11. Both parties have filed skeleton arguments for the hearing before me. The Respondent accepts in her skeleton argument that the factual errors identified by ground 3 are made out but argues that those make no material difference to the overall outcome. She also submits that, even if the error identified in ground 1 were made out, that would make no difference as, in spite of Judge Raymond's misgivings about the findings of the previous Judge, he left undisturbed the finding that the Appellant was a refugee. Accordingly, it is said that there is no procedural unfairness if the Judge failed to indicate that he intended to engage with the previous findings. The Respondent also submits that the Judge's findings in relation to the Appellant's mental health were open to him.

12. In addition to the parties' skeleton arguments, and the core documents relevant to the appeal, I had before me the bundles before the First-tier Tribunal, a bundle prepared for the hearing before me ([UTB/xx]) (which includes evidence relied upon by the Appellant in an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008) and an authorities bundle. For reasons which will become apparent below, I do not need to refer to documents other than those in the Upper Tribunal bundle.

13. The matter comes before me to consider whether the Decision contains an error of law as asserted and if I so find to decide whether to set aside the Decision and, if set aside, to either remit the appeal to the First-tier Tribunal or re-make the Decision in this Tribunal.

14. Having heard submissions from Dr Chelvan for the Appellant and Ms Cunha for the Respondent, I indicated that I found an error of law in the Decision based on the first ground as expanded upon in the renewal grounds and would explain my decision further in writing. For the reasons which follow, I do not need thereafter to deal with the second and third grounds. It is appropriate to set aside the Decision in its entirety, but I was persuaded that the Concession as recorded should be preserved. I rejected Dr Chelvan's submission that I ought to go on to re-make the decision on the basis that there

could be only one outcome on the evidence. I have explained below why I reached that conclusion.

DISCUSSION OF AND CONCLUSIONS ON THE GROUNDS OF APPEAL

Introduction

15. The length of a Tribunal decision is not a reason for finding an error of law. Brevity or lack of it does not mean that a decision contains errors. It perhaps goes without saying that the longer a decision the more risk that it will contain some errors be they of fact or law but that does not necessarily follow.

16. However, in this case, the prolixity of the reasoning coupled with a lack of structure and headings has led to difficulties identifying which of the issues correctly identified by the Judge at [14] of the Decision are being dealt with under which of the subsequent paragraphs. The Decision is very difficult to follow as it is unfocussed. The findings which are the important part of the Decision do not begin until paragraph [242] (although some of the findings are based on what is said earlier in the Decision). Much of what precedes those findings consists of lengthy citations from the evidence and case-law which could have been summarised in a few paragraphs. The parties can be taken to know what evidence was before the Judge and what happened at the hearing. The important part of any decision is the findings.

Ground 1: Devaseelan, the Concession and Procedural Unfairness

17. As I indicated at the outset of the hearing, the first ground is potentially determinative of the error of law hearing (and as I have concluded is in fact determinative). Before dealing with the point regarding the Devaseelan guidance, I turn to the point made in the renewal grounds that it was not open to Judge Raymond to go behind the Concession made by the Respondent. This is the starting point for the error which I have found to exist.

18. The Appellant relies on what is said at [239] of the Decision in the record of the Respondent's submissions before Judge Raymond which reads as follows:

> "The essential points made by Ms Davies for the respondent were reliance was placed [sic] upon the arguments set out in the decisions to deport and to cease refugee status. It was accepted in the light of G v G that the appellant is a refugee in own right, and this concession was made. (The review by the respondent had argued [§8] that the appellant was never recognised as a Refugee Convention refugee in his own right)…."

19. As I agreed with Dr Chelvan and Ms Cunha, if the Concession is read as the Appellant says it should be, that is a recording of an acceptance by the Respondent that the Appellant had a well-founded fear of persecution for a Convention reason in 2015. It is

not suggested that it was a concession by the Respondent that such a fear continued at the date of the hearing before Judge Raymond. Had that been the position, then the Respondent would have to concede the entire appeal (save perhaps for the Section 72 issue).

20. Ms Cunha disputed that the Concession could be read as the Appellant suggested. Leaving aside that, as Dr Chelvan pointed out, the Respondent had not taken issue with the Concession having been made as recorded in her Rule 24 Reply, I permitted Ms Cunha to explain her position.

21. Ms Cunha directed my attention to [121] of G v G [2021] UKSC 9. That reads as follows:

> "121. Accordingly, I consider that a child named as a dependant on the parent's asylum application and who has not made a separate request for international protection generally can and should be understood to be seeking such protection and therefore treated as an applicant. I would allow this aspect of the appeal."

22. That paragraph does not assist with the meaning of the Concession. It merely makes the point that a child in the Appellant's position in 2015 who was a dependent on his mother's case should be taken as having applied for refugee status. Paragraph [121] has to be read with [120] of the judgment as follows:

> "120. There is also an important practical aspect to this question. If an application for international protection made by a parent naming a child as a dependant is not regarded as including an application by the child unless the latter application has been made formally, a refusal of the parent's application would not prevent the parent from at that point making a further application for the child in his or her own right, which would then need to be considered and decided separately. In a case where there are 1980 Hague Convention proceedings pending this would have the potential to introduce an additional layer of delay. If there is a possibility that an asylum claim will be made in the name of the child, it is vital that it should be brought forward and decided at the first opportunity."

23. As [120] of G v G makes clear, there is a distinction between an asylum claim being made by a child who is a dependent on a parent's claim and one made in the child's "own right". It is that distinction which informs the interpretation of the Concession in this case.

24. That point is also best illustrated by reference to the Respondent's case here. The notification of intention to cease refugee status dated 14 November 2018 is at [UTB/52-57]. At [13] of the decision, the Respondent recites the basis on which she says that the previous appeal was allowed which turned on the position of the Appellant's mother. At [22] of the decision, the Respondent did not accept that

"the [Appellant] continue[s] to share the same profile as his mother", thereby firmly tying the Respondent's understanding of the position in the 2015 appeal to the Appellant's position as his mother's dependent.

25. The decision to revoke refugee status appears at [UTB/145-173] and relies on the same position. At [10] of that decision, the Respondent says that the Appellant was "granted asylum and leave to remain until 30 September 2020 in line with your mother" (my emphasis). The Respondent's position was expanded upon at [46] to [48] of the decision. The point is again made that the Appellant was granted status "in line with [his] mother". Reference is made to the case of Secretary of State for the Home Department v JS (Uganda) [2019] EWCA Civ 1670 and to how Article 1C (5) of the Refugee Convention is to be applied in such situations.

26. Finally, the Respondent was directed by the First-tier Tribunal to review her decision and did so on 2 March 2022 ([UTB/187-197]). That document is particularly pertinent to the interpretation of the Concession as recorded by Judge Raymond. The Respondent says this at [8] of the review decision:

> "The Respondent's position remains that the appellant was never recognised as a Refugee Convention refugee in his own right and the grounds for recognising him as a refugee because of a dependency upon his mother [and his mother's claim] have ceased to exist. See Secretary of State for the Home Department v JS (Uganda) [2019] EWCA Civ 1670"

27. Turning back then to the terms of the Concession, it is not possible to read that other than as a submission by the Respondent's Presenting Officer that the Appellant was recognised as a refugee in his own right as opposed to as the dependent on his mother's claim. That is why there is a juxtaposition noted by the Judge between the Concession as made and the Respondent's previously argued position.

28. As the Appellant points out, the Respondent has not addressed the Concession either in her Rule 24 Reply nor her skeleton argument. Although the Rule 24 Reply re-states that the Appellant's "original refugee status was based on his mother's claim", it is not submitted that Judge Raymond has mis-recorded the terms of the Concession nor that it was wrongly made. I have no evidence that this is the position.

29. Accordingly, I accept that the Concession as recorded at [239] of the Decision confirms the Respondent's acceptance that at the time of the previous appeal, the Appellant had a well-founded fear of persecution for a Convention reason.

30. I should add that I do not accept Dr Chelvan's submission that the Respondent's position must always have been that the Appellant

had been recognised as a refugee in his own right as otherwise paragraph 339A(v) of the Immigration Rules could not apply and the Respondent would not need to revoke the Appellant's status. Although I accept that JS (Uganda), as a family reunion case, is somewhat different from this case, the Court of Appeal made clear that, even in those circumstances, and where status has been granted very clearly in line with a parent, removal of status still requires the Respondent to apply revocation principles under Article 1C(5). The analysis of whether the risk remains may be slightly different, but paragraph 339A(v) continues to apply.

31. Although Dr Chelvan submitted that, once I had made the finding I did about the Concession, the Devaseelan issue has no relevance thereafter, I do not agree. In any event it is appropriate to say something about this part of the first ground.

32. First, I cannot accept as the Appellant suggests in his grounds that "Devaseelan was never envisaged to address positive determination findings of an earlier Tribunal". The guidance is as applicable to earlier positive findings as it is to earlier adverse findings. Take as an extreme example, a case where an individual has obtained a positive determination that he is the spouse of a British citizen, but it then transpires that the marriage certificate on which that finding was based was a forgery and the British citizen spouse was coerced into giving supportive evidence. It could not possibly be suggested that in those circumstances a Judge could not find that the individual was not and never had been a spouse. That is perhaps somewhat different from the asylum context as refugee status is declaratory in nature. Nonetheless, if evidence came to light indicating, perhaps, that a person recognised as a refugee did not have the nationality or identity which he claimed previously to have, a second Judge would undoubtedly be entitled to go behind the earlier positive finding.

33. That though is not this case. Judge Raymond's comments on the earlier findings are not based on additional evidence. They are in the main his analysis of the same evidence as was before the previous Judge. This was not an appeal against the earlier decision. The earlier findings were merely a starting point.

34. Second, I recognise that at several points in his analysis of the earlier decision Judge Raymond does say that he is not seeking to go behind the earlier Judge's findings (see for example [36] of the Decision). However, his critique of the earlier appeal decision does give that impression.

35. Moreover, based on the Concession, the Judge should not have been revisiting the earlier findings at all unless there were further evidence which undermined those findings. Even if there had not been a Concession, the Respondent had not taken issue with the Appellant having been recognised as a refugee in 2015. She did not appeal the earlier decision.

36. Third, the Judge's approach purportedly applying Devaseelan led to further errors in the Judge's overall approach. Although I accept that the Judge has properly identified the issues which arose in this appeal at [14] of the Decision and has properly directed himself as to burdens and standards of proof, he has addressed the issues in the wrong order.

37. The findings do not begin until [242] of the Decision. No issue was taken with what is said about Devaseelan at [242] of the Decision. However, instead of beginning with the revocation issue from which other issues flowed, the Judge began his findings with the Appellant's protection claim at [243] and applied Devaseelan as follows:

> "… I find by reference to *Devaseelan*, that in the present appeal, whilst not going behind the findings made by the Judge as regards the mother of the appellant, it is necessary to assess the claimed present risk posed for the appellant arising from the revocation, combined with the proposed deportation, both as regards his claimed refugee status in his own right, and any Article 3 risk said to flow from that, in the light of a much more extensive and fresh body of evidence than was before the previous Judge in 2015, and which takes the present appeal well beyond the limits of what the previous Judge had to consider, this being recognised within the *Devaseelan* principles themselves. I note also in this context that the obligation on the second tribunal conscientiously to decide the case before it for itself may entitle it to revisit factual findings made by the first tribunal even in the absence of new evidence, particularly where there are apparent shortcomings in the procedure and reasoning of the first tribunal (*BK (Afghanistan) [2019] EWCA Civ 1358*)."

38. BK (Afghanistan) does indeed make the point that new evidence is not essential to the redetermination of findings made previously. It also makes the point, undermining the Appellant's position, that it matters not whether the previous decision was favourable or adverse to the Secretary of State ([37]). However, the passage on which Judge Raymond apparently relies (at [44] of the judgment) also makes the point that "[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."

39. The erroneous approach of Judge Raymond is also evident from the Devaseelan guidance itself. At [31] of the judgment in BK (Afghanistan) prior to setting out the guidance, the Court of Appeal summarised the approach taken in Devaseelan as follows:

> "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…"

40. There is a fine line between taking earlier findings as a starting point and subjecting those findings to a critical analysis as if they were the subject of an appeal. In this case, the Judge overstepped that line.

41. The guidance in Devaseelan was summarised by the Court of Appeal at [32] of the judgment 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."
>
> [my emphasis]

42. Judge Raymond's error was in failing to appreciate the difference between looking at the findings of fact as they applied to the appeal as before him and considering whether those needed to be revisited in light of the effluxion of time and any new evidence as against treating the appeal before him as an appeal against those findings. As the Devaseelan guidance makes plain, if the facts (not the evidence) are as before the first Tribunal, then the findings in relation to the issues which depend on those facts should be regarded as settled, at least unless there is further evidence which undermines the findings. Judge Raymond should not have reopened the issue whether the Appellant ever was a refugee even if the Concession had not been made. He certainly should not have done so once he accepted the Concession.

43. Moreover, as Ms Cunha accepted and Judge Kebede noted when granting permission, there is a procedural unfairness if the parties are not aware that the Judge intends to revisit the findings in the earlier appeal.

44. The error of approach and the taking of the issues in the wrong order has also led the Judge into further errors as follows.

45. Having first dealt with why he did not accept the findings in the earlier appeal, at [257] of the Decision, the Judge concluded that "the risk that the appellant is supposed to run if he were returned to Albania falls away. Because he was not trafficked into Italy with his mother …where is claimed to have been subjected…". Although accepting that this was not an appeal against the decision granting the Appellant's mother refugee status, the Judge also there found that she had not been trafficked. That was not an issue before him.

46. It would have been open to the Respondent to maintain her position that the Appellant was not a refugee in his own right. That would be relevant to the risk which he might face on return. However, unless the previous findings that the Appellant and his mother were trafficked was undermined by evidence since the earlier appeal rather than by Judge Raymond making his own findings by way of a critique of the earlier appeal and unless that point was taken by the Respondent, the Judge's finding both reverses the burden of proof and is procedurally unfair.

47. At [265] of the Decision, the Judge reached the following conclusion:

> "Therefore, having found that the appellant has failed in re-asserting a well-founded fear of persecution in his own right, because the asylum narrative in his regard can be seen at the lower standard to be a complete fabrication. I also find that Secretary of State has established a change of circumstances which the objective evidence shows as having occurred in Albania, since 2015 when the appellant obtained refugee status resulting from his dependency upon the asylum claim of his mother, that is of such a significant and non-temporary nature, that his fear of

> persecution can no longer be regarded as well-founded, and because those circumstances as applicable to the appellant never existed in the first place."

48. The first part of that paragraph again discloses a reversal of the burden of proof. If the Judge had been determining whether the Appellant was at risk on return, absent an earlier grant of refugee status, then that would be an appropriate conclusion. However, the first issue for him to decide was whether the Respondent had discharged her burden of showing that the Appellant was no longer at risk. That might involve consideration whether the facts had changed. If the evidence permitted departure from the earlier findings and the assessment was a procedurally fair one, it might equally involve a reopening of the facts which led to the grant of status. However, the way in which the Judge approached the issue is both a wrong apportionment of the burden and is procedurally unfair for the reasons I have already rehearsed.

49. I also accept that the second part of that paragraph cannot stand in light of the first part of it and for the reasons I have given. The Judge did carry out an assessment of the background evidence in relation to Albania at [258] to [264] of the Decision. He did so with the opening words "presuming that [he] had accepted the asylum narrative of the appellant".

50. I do not accept Dr Chelvan's submission that the Judge applied the wrong test to his consideration whether there had been a change of circumstances. As I pointed out in discussion, the Appellant has not challenged the assessment at [258] to [264] of the Decision. Nor has he challenged the Judge's conclusion in relation to what "the objective evidence shows". I reject the submission that it is "Robinson obvious" that the Judge has there applied the wrong test. The Judge sets out what is clearly the correct test in relation to revocation at [13] of the Decision. Although the Judge at [265] says that the Respondent "has established a change of circumstances" without using the word "durable", he goes on to say that the change "is of such a significant and non-temporary nature" that the Appellant can no longer have a well-founded fear of persecution on return. Dr Chelvan made no application to amend his grounds. For the foregoing reasons, I would have refused that in any event. The Judge has not misdirected himself in that regard.

51. However, in light of the first part of that paragraph and the concluding words which incorporate the Judge's findings as to the Appellant's earlier asylum claim, I accept that all findings at [265] of the Decision must be set aside.

52. For the foregoing reasons, I accept there is an error disclosed by the first ground.

Grounds 2 and 3

53. The error of approach disclosed by the first ground impacts on the Judge's findings in their entirety. Although Dr Chelvan invited me to determine the second ground, there is no point in so doing. The Judge's approach to the medical evidence is predicated on his finding that the Appellant has never been the victim of trafficking which is said to impact on the trauma he is said to suffer. The (non) existence of that trauma in turn is said by the Judge to affect the views expressed by the experts as to the Appellant's ability to access medical treatment on return to Albania. The medical evidence therefore needs to be reassessed once findings have been made whether the Appellant can be returned to Albania at all and, if so, what situation he will face there.

54. The Respondent has accepted in her skeleton argument that the Judge has made some errors in his assessment of some of the evidence. However, since I have concluded that all findings must be set aside, those errors are now academic. The evidence will need to be reassessed by a different Judge.

NEXT STEPS

55. Dr Chelvan was intent on persuading me that, following MAH (Egypt) v Secretary of State for the Home Department [2023] EWCA Civ 216, I should decide the appeal for myself without a further hearing or remittal. His argument is that the Respondent has failed to discharge the burden of proof which rests upon her and that remittal would be a "breach of natural justice" because the Respondent "would have a second bite of the cherry to relitigate her case, where she has no grounds of appeal against the determination below".

56. Whilst I fully accept as the Court of Appeal did in MAH that, in an appropriate case, it is open to this Tribunal to re-determine an appeal without a full hearing to reconsider the issues, that is not this case. In MAH, the Court of Appeal re-made the decision under appeal in the appellant's favour because, as it put it at [99] of the Decision, the evidence taken as a whole "could reasonably lead only to one conclusion" which was that the appellant in that case had a well-founded fear of persecution on return to Egypt.

57. That is not this case. Although as I have concluded Judge Raymond adopted a wrong approach to the issues which he had to consider, he did not make a finding that the Respondent had not discharged her burden in relation to revocation. In fact, he reached the opposite conclusion. I have not preserved that conclusion for the reasons I have already given. In reaching his conclusion, Judge Raymond wrongly incorporated the erroneous approach in relation to the burden of proof on the Appellant. However, his conclusion in the Respondent's favour was reached following an assessment of the background evidence which might have withstood scrutiny if it had been reached without being tainted by the erroneous approach to the issues as a whole.

58. It cannot sensibly be argued that, simply because a Judge reaches a finding based on an erroneous legal approach, that finding must be replaced with the opposite conclusion at least not without a reassessment of the evidence. Put another way, this is not a case which permits of only one conclusion on the revocation issue. As I have said, the assessment of the background evidence at [258] to [264] of the Decision and the conclusion in that regard at [265] of the Decision was not challenged by the Appellant (at least not until Dr Chelvan's oral submissions).

59. This is not a case where remittal and re-determination is unfair to the Appellant. He was the losing party before Judge Raymond. If anything, it is he who is getting the benefit of "a second bite at the cherry".

60. This is a standard appeal where re-determination should take place following a reassessment of the evidence. That could either be done in this Tribunal or following remittal to the First-tier Tribunal. The Appellant in his skeleton argument seeks remittal. Ms Cunha agreed that this is an appeal which should be remitted. I have found there to be a procedural unfairness in the approach which Judge Raymond took. I have also set aside the Decision in relation to all issues (save as to the Concession which I come to below). There is a substantial amount of fact finding which will need to be carried out again in order to determine the appeal. It is therefore appropriate to remit the appeal.

61. I have however preserved the Concession recorded at [239] of the Decision (and set out at [18] above). I have explained at [18] to [29] above why I agree with the Appellant's understanding of the Concession which represented a change in the Respondent's case. Ms Cunha sought to persuade me that this was a wrong interpretation but I disagreed with her submission in that regard. She did not ask to withdraw the Concession although she did suggest that the Concession was either wrongly recorded or wrongly made.

62. It would of course be open to the Respondent to show by evidence that the Concession was not as it was recorded by Judge Raymond. She may have file notes in that regard. Many First-tier Tribunal hearings are now recorded, and it may be possible to check the recording if the Respondent considers that the Concession was not in accordance with the Presenting Officer's submission.

63. Dr Chelvan submitted that, if the Respondent were to seek to withdraw the Concession, he would argue that the Respondent was acting in bad faith. I make no observations in that regard. That would be a matter for the First-tier Tribunal to determine if that should arise. The First-tier Tribunal may consider giving a direction or listing a case management hearing to ensure that, if the Respondent is seeking to withdraw the Concession or argue that it

was wrongly recorded, that issue is determined prior to the main hearing and so that the Appellant knows the case he has to meet in advance of that hearing.

CONCLUSION

64. For the reasons set out above, I conclude that there is an error established by the Appellant's first ground. That is determinative of the error of law issue and means that the Decision must be set aside in its entirety. For that reason, I do not need to determine the second and third grounds. Although I set aside the Decision as a whole, I preserve the Concession made by the Respondent as recorded at [239] of the Decision and set out at [18] above. The First-tier Tribunal may wish to note my observations at [63] above in relation to the potential need to ensure, in advance of the next full hearing, that the Respondent is not seeking to withdraw the Concession or to argue that it was wrongly recorded by Judge Raymond.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge J G Raymond dated 18 July 2022 contains an error of law. I set aside the Decision and remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge J G Raymond or Judge C J Woolley (who heard the previous appeal). I preserve the Respondent's concession as recorded at [239] of the Decision and as set out at [18] above.

L K Smith

Upper Tribunal Judge Lesley Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

28 March 2023