



Neutral Citation Number: [2019] EWCA Civ 950

Case No: C5/2017/0845

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL (IMMIGRATION AND ASYLUM
CHAMBER)

Lord Matthews and Deputy Upper Tribunal Judge Monson
AA/00527/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2019

Before:

LORD JUSTICE BEAN
LADY JUSTICE ASPLIN DBE
and
LADY JUSTICE NICOLA DAVIES DBE

Between:

AL (ALBANIA)
- and -
THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Appellant

Respondent

Hugh Southey QC and Ayesha Christie (instructed by Duncan Lewis Solicitors) for the
Appellant
Sarabjit Singh QC (instructed by Government Legal Department) for the Respondent

Hearing date: 14 May 2019

Approved Judgment

Lady Justice Nicola Davies:

1. The appellant brings this appeal against a determination of the Upper Tribunal (“UT”) which dismissed an appeal brought by the appellant in respect of a determination of the First Tier Tribunal (“FTT”). The FTT had determined findings of fact which were inconsistent with findings made by another constitution of the FTT in 2013 determining the asylum claim of the appellant’s brother. The issues which arise on this appeal are:
 - i) Whether the UT unlawfully failed to recognise that the FTT erred in its approach to the appellant’s brother’s earlier successful appeal;
 - ii) Whether the UT unlawfully failed to recognise that the evidence served on the morning of the FTT hearing by the respondent was insufficient to displace the previous determination; and
 - iii) Whether the UT unlawfully erred in its approach to the appellant’s explanation for the evidence served late by the respondent.

Factual background

2. The appellant is a national of Albania. His elder brother, R, is also a national of Albania who arrived in the UK on 29 October 2012 and claimed asylum. Following a refusal of his claim by the respondent, R appealed to the FTT and in a determination in May 2013 Judge Devittie upheld his appeal. R’s case was that he had a well-founded fear of persecution if returned to Albania by reason of his membership of a particular social group, namely being a member of a family that had been targeted in a blood feud.
3. At the FTT hearing R provided a witness statement and gave oral evidence. The essence of his evidence was that he, together with his parents, his brother AL and his sister lived in a village near Tirana. R’s family are in a blood feud with the Lita family which has its genesis in a land dispute. The Lita family owned a piece of land adjacent to land owned by R’s paternal uncle, Ferit. In May 2011 Ramazan Lita intended to construct a house on a piece of land and began erecting the foundations. The area marked out for the construction encroached onto the land of Uncle Ferit. At the time Uncle Ferit was working in Greece but was informed by the family of Ramazan’s intentions. He returned to Albania and confronted Ramazan. Ramazan produced a map indicating land boundaries, showing that the area in which he was constructing his house was legally his land. Uncle Ferit was not satisfied with the authenticity of the map, accordingly a further map was obtained from the local authorities. In May 2012 the land registry produced the map. Uncle Ferit returned to the village. R’s father and Uncle Ferit went to the land where they met with Ramazan’s brother and father. An argument ensued as to the authenticity of the map, during which Uncle Ferit struck Ramazan’s father with a piece of wood which killed him. In his witness statement R said that his “uncle, fearful of being killed by Ramazan’s family in revenge, fled to Greece immediately”. A blood feud was declared by Ramazan’s family as a result of which members of R’s family were unable to leave the house. With assistance from his family R left Albania, he arrived in the UK having travelled through Italy.
4. Judge Devittie found R’s evidence was generally consistent. The judge was satisfied that there was a reasonable degree of likelihood that R would suffer persecution if returned to Albania. He found that R’s uncle killed the father of Ramazan over a land

dispute and as a consequence of that killing “his uncle has had to flee Albania and that his father, in accordance with custom, has not been able to leave his house for fear of a revenge killing taking place”. The judge accepted R’s evidence that his family are and remain the target of a blood feud resulting from the killing. He was satisfied that R had established his entitlement to international protection under the Refugee Convention and allowed the appeal.

5. The appellant is R’s younger brother. He left Albania in December 2014. The appellant arrived in the UK and claimed asylum on 24 December 2014 relying upon the same claim, namely that his family had been in a blood feud with the Lita family. The appellant’s case is that the killing took place when he was 14, he did not have to leave at that time because it is only those aged 16 and over who can be part of a blood feud. The appellant’s evidence was that when he reached the age of 16 he remained indoors until he was able to leave Albania. His father remained in Albania however he could not leave his house because he would be in danger if he left.
6. On 15 March 2016 the respondent refused the appellant’s asylum claim. In the detailed reasons for refusal the facts of the events which gave rise to the alleged land blood feud were set out. They were said to be a summary of the appellant’s statements and evidence, which included the appellant’s screening interview, the statement of evidence form, witness statement (“WS”) and asylum interview record (“AIR”). Reference to some of the documents was included in the determination as follows:

“... During the fight, your uncle killed Ramazan Lita’s father Ismal by striking him repeatedly with a piece of wood. Your uncle immediately fled to Greece to avoid being killed by the Lita family (WS para. 11-12, AIR q. 73-78). **Alternatively**, your uncle returned to the family home to collect his belongings and left Albania the next day (AIR q. 78-83). (Emphasis added by respondent)

On 05 December 2014 you left Albania with your uncle who hid you in his car (WS para. 21).”

7. The respondent did not accept that there existed a blood feud between the appellant’s family and the Lita family. A number of reasons were given which included inconsistent accounts as to who obtained a map of land ownership from the local registry, the fact that internal government checks with the authorities in Albania had confirmed that Ismail Lita was alive and residing with his spouse and two children in Paskuqan 2 Fushe, Tirana.
8. At [39] of the decision the following is stated:

“You assert that when your uncle realised he had killed Ismail Lita (Ramazan’s father) in May 2012, he fled to Greece immediately in fear of his own life (WS para. 12). This is considered to contradict your claim that your uncle returned home after the incident in order to collect his belongings, leaving Albania the next day (AIR q. 78-83). Furthermore, it is not considered to be credible that your uncle returned to the family home before leaving Albania, given his immediate fear of the

Lita family, particularly when by your brother's evidence at his appeal hearing, your 'uncle had a resident permit and was able to travel freely, meaning he could leave the country quickly'. ... More significantly, although you state that your uncle fled to Greece immediately; the authorities of Albania have confirmed that your uncle Ferit did not leave Albania for Greece until 03 June 2012 and has since travelled between Greece and Albania on seven further occasions. This evidence indicates that your uncle has not been confined and has had no restrictions to travel in and out of the country freely since the alleged incident in May 2012."

9. On 26 September 2016 the appellant's case was heard by the FTT. In advance of the hearing the appellant's solicitors sought disclosure of the evidence relied upon in the respondent's refusal letter to establish that the appellant's uncle had returned to Albania on a number of occasions. An order was made by the FTT requiring the respondent to serve "all documentary evidence" relied upon to establish the facts alleged in the refusal letter. On the morning of the FTT hearing the respondent submitted a letter dated 28 July 2015 from the British Embassy in Tirana. The letter was stated to contain "results of checks undertaken by the General Directorate of Civil Registry at the Ministry of Interior of Albania relating to the Albanian National: AL". It further stated:

"Following your request for verification checks with the Albanian authorities relating to AL...

I am pleased to report that, with the assistance of trusted colleagues at the Albanian Ministry of the Interior, I have successfully conducted checks with the Directorate of Civil Registry at the Ministry of the Interior. In accordance with the Memorandum of Understanding between the British Secretary of State for the Home Department and the Minister of Interior of the Republic of Albania, this information has been exchanged securely and confidentially between designated officials having deemed there are necessary grounds for this exchange of information for immigration-related purposes."

Correct information as to the date of birth of AL, the composition of his family, together with an undisputed date in 2014 when the appellant left Albania for Italy was also included. The letter continued:

"Checks, conducted with the Albanian Border and Migration Department, have indicated the following official travel movement abroad for the subject's paternal uncle, Ferit ... Albanian national:

Travel out

29.10.2011 to Greece
03.06.2012 to Greece
05.09.2012 to Greece
05.11.2012 to Greece

Travel in

29.12.2011 from Greece
12.07.2011 from Greece
22.09.2012 from Greece
04.01.2013 from Greece

The subject's paternal uncle has travelled 5 more times to and from Greece in 2013. This travel pattern indicates that the subject's uncle, Ferit ..., has not been confined and has had no restrictions to travel in and out of the country.

British Embassy Tirana can attest the veracity of the enclosed results. The verification checks were conducted by named individuals from the Albanian Ministry of the Interior and the British Embassy Tirana, as stipulated in the data sharing agreement, and were carried out in a manner consistent with each country's immigration and data protection laws, regulations and policies."

10. Supplied with the letter were personal family certificates for the appellant and a man named Ismail Lita. No underlying evidence relating to the appellant's uncle's purported travel was disclosed. There was no disclosure of the communications between the respondent, the British Embassy in Tirana and the Albanian authorities.
11. At the FTT hearing the appellant and his brother gave evidence in support of the appeal. The determination notes that the respondent had provided an 11-page bundle of documents which it had been directed to provide by 16 September 2016 and which related to the assertions in the reasons for refusal letter at paragraphs 38, 39 and 40. The appellant had approximately one and a half hours before the hearing commenced to take further instructions on the documents. No application for an adjournment was made by the appellant and in the determination it is noted that "in any event it did not appear that an adjournment would have been merited as the documents supported what had already been said in the reasons for refusal letter and in fact the witness statements dealt with this". The appellant provided further evidence having had sight of the documents.
12. Judge Farmer found that the appellant was not a credible witness. His reasoning is contained in paragraphs 18 to 23 as follows:

"18. The Appellant claimed that Ferit immediately left for Greece after he killed Ismal Lita (paragraph 12 statement dated 26/01/2015). This mirrors exactly what his brother said in his claim (see Determination paragraph 3(iii)). His account changed after the respondent stated in their RRL that Ferit in fact left the country for Greece on 3 June 2012. The appellant said in his oral evidence that he had never said he left for Greece immediately but just that he fled the scene immediately. This is in contrast to his earlier statement where he states he fled to Greece immediately.

19. I accept the evidence of the respondent that the dates given for Ferit's travel in and out of the country are accurate. The appellant has stated that he only knows of 2 occasions that he came back, when he was granted a besa and that perhaps someone else had used his passport to travel in and out of Albania. Whilst it may be right that people do lend travel documents to each other I find that it is not credible that someone

who is frightened of returning and in fear of their life would lend out their passport to another person. I therefore find that Ferit has been able to travel freely between Albania and Greece and is not in fear of his life. I find that this seriously damages the appellant's credibility and the basis of his claim and it follows that I find that there is no active blood feud existing between the Lita family and the appellant's family.

20. I find that the appellant was able to leave his home and travel to obtain a passport in a public place. This is especially damaging to the appellant's credibility as the appellant also claims that a member of the Lita family works at the town hall and is able to find out about the whereabouts of any registration anywhere in the country. I find the fact that the appellant was able to obtain travel documents damages his credibility that he could not leave the home for fear of his life.

21. As there was a dispute about the correct address of the appellant (ie Paskuqan or Paskuqan 2) the appellant's brother produced an envelope showing that a document had been sent to him from Albania and listing the address of sender as Paskuqan. However it also lists the name of sender as their father. In oral evidence I was told that in fact their mother had posted the documents but had just written his name instead. I find that this document supports the fact that their father was the person sending the document and would not have been in self confinement. Further, the appellant claimed that his father had been in self confinement for about 4 ½ years. I do not find that this is credible in light of the fact he posted the letter and the fact that his brother is able to travel freely in and out of Albania. Further I find that had his life been in danger he would have fled along with his sons.

22. Given that the appellant's brother left almost immediately after the blood feud was declared (only about 3 months later) as at 16 years he would be at risk I find that it is not credible that the appellant waited over a year after his 16th birthday to leave Albania and seek asylum.

23. It follows from my findings that I do not accept the blood feud that I do not accept that Ferit murdered Ismal Lita. However I do not make any finding on whether the documentation produced by the respondent supports their case that Ismal Lita is alive. I accept that he does not fit the description given by both the appellant and his brother, as he is too young to have an adult son. However I do not need to make a finding as to whether he is alive, or in fact exists, as I have found that there is no blood feud as claimed by the appellant."

13. Having made that determination the judge considered the FTT's acceptance in 2013 of the appellant's brother's claim. The judge reminded himself of *AS and AA (Effect of Previous Link Determination) Somalia* [2006] UKAIT 00052 and stated:

"I am not bound by this decision but I should treat it as a starting point but will depart from it in a case where the evidence requires it. Whilst I find that the factual background, to the extent they cover the same period, is consistent I find that since this Determination further evidence is before the Tribunal (namely the uncle's travel dates) and that this assists me in making findings about the appellant's credibility. I therefore find that this is a case where the evidence requires me to depart from this decision."

14. The FTT upheld the refusal of the respondent.

15. Permission to appeal to the UT was granted on two grounds, in reality one was pursued, namely that the FTT had erred in "failing to treat the previous determination as the starting point for findings of fact". At [34] of its determination the UT cited *AA (Somalia) v Secretary of State for the Home Department* [2007] EWCA Civ 1040 as the leading authority on the questions raised by earlier determinations and identified Hooper LJ as giving the judgment of the court. At [34] the UT considered the earlier authority of *TK (Consideration of Prior Determinations) Georgia* [2004] UKIAT 00149 in which Deputy President Ockelton had stated at [19] that:

"Unless some very good reason was advanced to the contrary, for example, compelling new evidence to show that X's evidence ... was mistakenly appraised by the original Adjudicator, a future Adjudicator is, in the Tribunal's view, not merely entitled to read the determination in X's case but also to treat it as determinative as to X's account."

At [36] the UT noted that the particular facts of *AA* were rather different, *AA* was not a party to his sister's appeal, there was only a partial overlap in respect of the claims and in the context of the particular facts of *AA* Deputy President Ockelton formulated the following principle about the status of a previous decision relating to a family member, namely:

"It has no evidential effect. It does not even give rise to a presumption. It is merely a starting point ... the old decision remains but only as long as there is no reason for displacing it."

At [37], having considered the authorities of *AA* and *TK* the UT stated:

"37. However, neither he nor Hooper LJ saw any contradiction between what he was saying in *AA* and what he had previously said in *TK*. So the conclusion we draw is that the strength and cogency of the evidence which is capable of rationally displacing 'the old decision' can, and will, vary from case to case. But we do not accept Mr Cheng's submission that in general the evidence required to displace the old decision needs to meet a

‘high quality’ threshold. His submission in this regard is plainly refuted by authority directly on the point. The analogy which he seeks to draw with *YI*-type cases is unhelpful, as is his alternative analogy with the cogent evidence that is required to depart from country guidance authority. The evidential principles in play in such cases are *sui generis*. They are not applicable to cases such as this, and there are very sound policy reasons as to why they are not, which are fully ventilated in *AA*.”

At [39] to [45] the UT set out its reasoning for dismissing the appeal as follows:

“39. Mr Cheng’s criticism of the judge’s approach is effectively two-fold. The first criticism has echoes of a procedural unfairness argument. Mr Cheng submits that it was not reasonably open to the judge to accept the evidence in the respondent’s supplementary bundle because it was served late, some of it was untranslated and the report from the Embassy was inadequately supported by primary evidence.

40. But as the judge notes at paragraph [8] of his decision, there was no application by the appellant for an adjournment. He was legally represented, and he had one and a half hours to consider the documents with his legal representative. He had known in broad outline what the respondent’s case was since receiving the refusal letter, and he had already prepared a witness statement in rebuttal. We would add that the appellant’s parents in Albania, with whom the appellant is in contact, would have had plenty of time, following the refusal decision, to gather documentary evidence from local sources, such as the police, to support the appellant’s account that Ramazan Lita’s father had been killed in the appellant’s home village in May 2012 by Uncle Ferit.

41. The registration documents did not need to be translated in order to be intelligible, and in the event the judge accepted that the Ismail Lita described by the appellant did not match the details given for the Ismail Lita referred to in the registration documents. So he made no finding one way or another as to whether they were the same person.

42. The author of the report identifies his source for the information given about the uncle’s movements, and it was not the appellant’s case before Judge Farmer that the information was or might be inaccurate per se. There was also no reason why the judge should have questioned the reliability of the information, given that it originated from an official source. The appellant accepted that his uncle had not left Albania until 3 June 2012. His case was that, apart from the two occasions in which his uncle returned on a besa (both of which would fall outside the scope of the report, as it only covers the uncle’s movements until the end of 2013), his uncle had not come back since leaving

the country on 3 June 2012, but his passport may have gone to and fro in the hands of a third party.

43. Mr Cheng's second and related criticism is that the evidence about the uncle's travel movements was not good enough to displace the finding by Judge Devittie that the uncle remained in Greece as it was too dangerous to come back, and/or that the judge did not give adequate reasons for rejecting the appellant's explanation for the uncle appearing to be going to and fro, when in fact it was his passport going to and fro in the hands of a third party.

44. We consider that the judge could have made more of the report by way of justifying his rejection of this explanation and the core claim generally. The report showed that Uncle Ferit had been in Albania for some six months prior to his departure on 3 June 2012. Before that he had only been on a short visit to Greece. So the documented evidence of the uncle's movements wholly contradicts the core claim of the uncle being mainly based in Greece in 2011-2012 with the consequence that it was the appellant's father, not him, who was entrusted with the task of dealing with the local land registry. The report also shows that the uncle (purportedly) came back to Albania after a month in July 2012; and he then remained in Albania for two months, before going for a short time to Greece. Before Judge Devittie, RL's evidence was that his uncle had a residence permit for Greece so that he could freely come and go, and his recorded movements in 2012 and 2013 bear this out. Conversely, the amount of time that the uncle was apparently spending in Albania in the second part of 2012, and the timing of the trips to and from Greece, is not consistent with the uncle remaining in Greece but sending back his passport with a third party so as not to breach a three month time limit.

45. The judge dismissed the appellant's explanation on the ground that it was not credible that his uncle would have lent his passport to someone else. We accept that the judge has misstated the appellant's case in that the appellant was not suggesting that his uncle lent his passport to someone else for their benefit, but that he paid someone else to use his passport so that it would appear to the Greek authorities that he was not residing in Greece for periods in excess of three months at a time. However, the judge's stated reason for his disbelief holds good. It was open to the judge to find it was not credible that the uncle would entrust his passport to someone else if he was genuinely in fear of his life and genuinely in fear of returning. It was also clearly open to the judge to adopt the finding made in the report that the uncle was travelling freely between Greece and Albania, and hence that he was not in confinement in Greece and that he was not in fear of his life on his frequent returns to Albania."

16. The UT refused permission to appeal. Permission to appeal to the Court of Appeal was granted by Arden LJ (as she then was).

Ground 1: Approach to the previous determination

The appellant's case

17. The UT correctly accepted that the leading authority on the approach to previous determination in linked cases is *AA (Somalia)* (above). However, the UT incorrectly identified Hooper LJ as giving the judgment of the court. The approach of Hooper LJ is set out at [29] of the authority:

“In cases where the parties are different, the second tribunal should have regard to the factual conclusions of the first tribunal but must evaluate the evidence and submissions as it would in any other case. If, having considered the factual conclusions of the first tribunal, the second tribunal rationally reaches different factual conclusions, then it is those conclusions which it must apply and not those of the first tribunal. In my view *Ocampo* and *LD* do not stand in the way of this simple approach. Both cases make it clear the first decision is not binding and that it is the fundamental obligation of the judge independently to decide the second case on its own individual merits. All that I am doing is simplifying and clarifying the law. Simplification and clarification have the advantages of making it easier for immigration judges for whom the law is already far more complicated than it should be and of making it less likely that there will be appeals on whether the second tribunal was, or was not, bound by the decision of the first. It also has the advantage that the same rule applies whether the previous decision was in favour or against the Secretary of State.”

18. The appellant contends that it was the judgment of Carnwath LJ (as he then was) which was endorsed by Ward LJ in preference to that of Hooper LJ. In his judgment Carnwath LJ referred to the authority of *Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 00702 and the guidelines identified by the Immigration Appeal Tribunal in respect of previous findings by one adjudicator or judge on a later appeal involving the same parties. The guidelines were subsequently approved by the Court of Appeal in the context of a second appeal by the same claimant in *Djebbar v Secretary of State for the Home Department* [2004] EWCA Civ 804, [2004] INLR 466. They were subsequently extended to cases which, although not involving the same parties, did involve a material overlap of evidence: *Ocampo v Secretary of State for the Home Department* [2006] EWCA Civ 1276. Carnwath LJ extracted what he identified as the most relevant points for the purpose of the appeal from the *Devaseelan* guidelines as follows:

“53. ...

‘(1) The first Adjudicator's determination should *always* be the starting-point. ...

(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. ...

(6) If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator, and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time, 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 relitigated ...

(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 ...?

54. As Hooper LJ has noted, this passage is prefaced by a statement that the first determination is not 'binding' on the second Adjudicator. However, I understand this to be saying to more than that it is not binding in the technical sense of issue estoppel or res judicata. The whole purpose of the guidelines is to indicate the circumstances in which it is appropriate to follow the first decision rather than allow the issue to be relitigated. This is most explicit in the above extract from guideline (6) (directed specifically at an Article claim based on the same reasons as a refugee claim). The same point is underlined by the remainder of guideline (6), which explains the limits to the new evidence which might justify reopening the first decision:

'We draw attention to the phrase "the same evidence as that *available to the Appellant*" at the time of the first determination. We have chosen this phrase not only in order to accommodate guidelines (4) and (5) above, but also because, in respect of evidence that was available to the Appellant, he must be taken to have made his choices about how it should be presented. An Appellant cannot be expected to present evidence of which he has no knowledge: but if (for example) he chooses not to give oral evidence in his first appeal, that does not mean that the issues or the available evidence in the second appeal are rendered any different by his proposal to give oral evidence (of the same facts) on this occasion.'

In considering the decision in *Ocampo* (above) Carnwath LJ suggested two qualifications to the decision, namely:

“69. While I do not think it is open to us to depart from *Ocampo* I would suggest two qualifications, which seem to me consistent with it. First, Auld LJ said that the guidelines are relevant to ‘cases like the present’ where the parties are not the same but ‘there is a material overlap of evidence’. The term ‘material’ in my view requires some elaboration. It recognises I think that exceptions to the ordinary principle that factual decisions do not set precedents (see above) should be closely defined. To extend the principle to cases where there is no more than an ‘overlap of evidence’ would be too wide, and could introduce undesirable uncertainty. In all the cases in which the principle has been applied so far, including *Ocampo*, the claims have not merely involved overlapping evidence, but have arisen out of the same factual matrix, such as the same relationship or the same event or series of events. I would respectfully read Auld LJ’s reference to ‘cases such as the present’ as limiting the principle to such cases.

70. Secondly, in applying the guidelines to cases involving different claimants, there may be a valid distinction depending on whether the previous decision was in favour of or against the Secretary of State. The difference is that the Secretary of State was a direct party to the first decision, whereas the claimant was not. It is one thing to restrict a party from relitigating the same issue, but another to impose the same restriction on someone who, although involved in the previous case, perhaps as a witness, was not formally a party. This is particularly relevant to the tribunal’s comments, in *Devaseelan*, on what might be ‘good reasons’ for reopening the first decision. It suggested that such cases would be rare. It referred, for example, to the ‘increasing tendency’ to blame representatives for unfavourable decisions by Adjudicators, commenting:

‘An Adjudicator should be very slow to conclude that an appeal before another Adjudicator has been materially affected by a representative’s error or incompetence ...’

I understand the force of those comments where the second appeal is by the same claimant, but less so where it is by a different party, even if closely connected. Although I would not exclude the *Devaseelan* principles in such cases (for example, the hypothetical series of cases involving the same family, cited in *TK Georgia*), the second tribunal may be more readily persuaded that there is ‘good reason’ to revisit the earlier decision.”

19. The appellant submits that the FTT and UT erred in their approach to the determination in the case of the appellant’s brother. It was for the FTT to demonstrate that it had directed itself that there was a sufficiently good reason for departing from earlier findings. The approach of the FTT and the UT indicated that the determination in the brother’s appeal was merely a factor to be considered along with the appellant’s

credibility when determining the appeal. The UT relied on the judgment of Hooper LJ in *AA (Somalia)* and not on the judgment of the majority. This error led to the finding that the strength and cogency of the evidence that can displace the previous determination will vary from case to case, it does not have to be of high quality. Following *AA (Somalia)*, evidence needs to be particularly strong to justify reopening previous findings. The respondent was a party to the earlier appeal, by implication there needed to be a particularly good reason to allow earlier findings to be reopened.

20. In ordinary civil proceedings issue estoppel applies to prevent parties from relitigating an issue which has already been determined. The appellant accepts that the rule is subject to a special circumstances exception where further material relevant to the correct determination of a point involved in the earlier proceedings, which could not by reasonable diligence have been adduced, is introduced. A similar test should apply where the respondent seeks to reopen findings made in an earlier asylum appeal in a linked case arising out of the same factual matrix. The respondent must be required to demonstrate that he could not reasonably have produced the evidence relied upon in the earlier appeal.

The respondent's case

21. The ground of appeal argued before the UT was that the findings made in R's determination were the starting point for the determination in his brother's appeal, it being alleged that the FTT had failed to treat the earlier findings as a starting point. There was no ground of appeal to the UT that some test other than "starting point" applied, thus it cannot be said that the UT made an error of law in respect of this issue. The effect of the *Devaseelan* guidelines is that the earlier determination is the starting point and should be followed in the absence of very good reason not to do so. Following the decisions in *Ocampo* and *AA (Somalia)* that is the approach which should be applied in cases such as this. The availability of the new evidence before the FTT constituted a good reason for it to depart from the determination in R's case as the evidence contradicted the core of the appellant's claim. The decisions of the FTT and the UT contained no material error of law. The fact that the FTT referred to the case of *AS and AA* and the UT referred to Hooper LJ's minority judgment in *AA (Somalia)* does not represent a material error of law.
22. The appellant's contention that some form of issue estoppel or *Ladd v Marshall* test should apply is contrary to Court of Appeal authority. In *Djebbar v Secretary of State for the Home Department* [2004] EWCA Civ 804 Judge LJ (as he then was) at [30] said of the guidance in *Devaseelan* that "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." He stated that the language of the guidelines was "not the language of *res judicata* nor estoppel. And it is not open to be construed as such." In *Ocampo* (above) Auld LJ rejected any application of the strict principles of *res judicata*, issue estoppel or the principles in *Ladd v Marshall*. At [26] Auld LJ found that "the AIT rightly rejected any application in the circumstances of this case of the strict principles of *res judicata* or issue estoppel".

Discussion

23. The approach to be taken by a tribunal to earlier findings of fact made in a determination relating to a different party, such as a family member, but arising out of the same factual

matrix is now established. In *AA (Somalia)* Carnwath and Ward LJ (Hooper LJ dissenting) held, applying *Ocampo*, that in such a case the guidelines given by the Immigration Appeal Tribunal in *Devaseelan* apply. Those guidelines begin with the premise that the first tribunal's determination should be the starting point.

24. The fundamental difficulty for the appellant is that the ground of appeal pursued by him before the UT was that the FTT had failed to treat the previous determination in R's case as the starting point for findings of fact. It went no further. The appellant's case now appears to be that the FTT and the UT should have approached the earlier determination in R's case as something stronger than a starting point when making its findings of fact in the appellant's case. This is contrary to his ground of appeal before the UT and is inconsistent with the guidance in *Devaseelan*, upheld by the Court of Appeal in *Ocampo* and *AA (Somalia)*.
25. Further, following the *Devaseelan* guidelines, not only is the earlier determination the starting point, it should be followed unless there is a very good reason not to do so. The FTT treated the determination in R's appeal as the starting point but departed from the findings of fact because of the evidence of the uncle's travels. In my judgment that evidence did constitute a very good reason for departing from the determination in R's case as it contradicted a core aspect of the appellant's claim, namely that his uncle had fled from Albania because of the blood feud, was fearful of being killed and could not safely return. The FTT's reliance on that evidence in order to depart from the findings made in R's determination demonstrates no material error of law. Correspondingly there was no material error of law in the UT declining to interfere with the FTT's decision. The fact that the FTT referred to the case of *AS and AA* and the UT referred to Hooper LJ's minority judgment in *AA (Somalia)* does not represent a material error of law as each identified the correct guidance and followed it.

Ground 2: Sufficiency of the later evidence

26. It is the appellant's case that the fresh evidence relied upon by the FTT and the UT to justify departing from the earlier determination was essentially the evidence regarding the travels of the appellant's uncle. The primary evidence upon which the summary of the records was based has never been provided, thus the appellant is unable to verify the reliability of the primary evidence and the stated summary of the travels. The findings of the FTT regarding Ismail Lita demonstrate that on this issue the records were unreliable.
27. In *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650. Lord Bingham stated:
 - “4. Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says. There may, however, be reasons (arising, for example,

from confidentiality, or the volume of the material in question) why the document should or need not be exhibited. ...”

28. The principle identified in *Tweed*, namely that underlying evidence must be disclosed rather than a summary, has been applied in an immigration context in *MN (Somalia) v Secretary of State for the Home Department* [2014] 1 WLR 2064 in which the Supreme Court endorsed UT guidance that a report of a language test should not be relied upon unless there was disclosure of the sound recording of the interview upon which the report was based.
29. A comparison was sought to be drawn between the evidence of the uncle’s travels and fingerprint evidence, namely fingerprint matches obtained through the EURODAC system, a database containing the fingerprints of asylum seekers and illegal immigrants within the European Union. A number of authorities were relied upon, which included *YI (Eritrea)* [2007] UKAIT 54 in which the Asylum and Immigration Tribunal stated that:

“12. ...EURODAC data is produced by the Respondent in cases such as this essentially to assert deception/fraud by an Appellant. The burden of proof rest with the person making the assertion...

15. An Immigration Judge will ... as a matter of fairness, have to be satisfied that the Appellant has had the facility to access information about the assertion against him that would enable him, if he so wishes, to make a meaningful forensic rebuttal beyond mere denial...”
30. Further, the appellant contends that what is alleged by the respondent is fraud on the part of the appellant in giving the account which he had of his uncle’s travels, thus the burden of proof lies upon the respondent to prove it.

Discussion

31. The evidence relied upon by the respondent of the appellant’s uncle’s travels between Albania and Greece was first identified in the respondent’s asylum decision letter dated 1 April 2016. At [39] of the letter two points were made, namely: (i) that Uncle Ferit did not leave Albania for Greece until 3 June 2012, nearly a month after the alleged event; and (ii) he had since travelled between Greece and Albania on seven further occasions. Following receipt of this letter, the appellant was on notice that the respondent was relying on his uncle’s travels to undermine the appellant’s account of the blood feud and its consequences. By the date of the FTT hearing in September 2016 the appellant would have had ample opportunity to communicate with his parents as to the alleged movements of his uncle. Before the FTT it was no part of the appellant’s case that his uncle was deceased. His evidence was that he knew of only two occasions when his uncle had returned, he having been granted a “besa” by the Lita family, the first was to take his mother to hospital, the second was to attend the funerals of two cousins.
32. Further, in finding that the appellant was not a credible witness the FTT relied not only on the respondent’s evidence of the dates given for the uncle’s travel, it identified a

number of other reasons for finding that the appellant was not a credible witness, namely:

- i) In his witness statement dated 26 January 2015 the appellant had claimed that Ferit immediately left for Greece after he killed Ismail Lita. This mirrored what his brother had said in his own claim. The appellant's account changed after the respondent stated in their reason for refusal letter that Ferit in fact left the country for Greece on 3 June 2012. In his oral evidence to the FTT the appellant said that he had never said his uncle left for Greece immediately, just that he fled the scene immediately. The FTT stated that this oral evidence was in contrast to the earlier statement he had made.
 - ii) The appellant stated in evidence that in respect of the alleged travel on the part of his uncle perhaps someone else had used the uncle's passport to travel in and out of Albania. The FTT accepted that some people do lend travel documents to each other but he did not find it credible that someone who was so frightened of returning and in fear of their life would lend their passport to another person. The FTT found that Uncle Ferit had been able to travel freely between Albania and Greece and was not in fear of his life, a finding which was found to seriously damage the appellant's credibility and the basis of his claim as a result of which he found there was no active blood feud between the Lita family and the appellant's family.
 - iii) The FTT found that the appellant was able to leave his home and travel to obtain a passport in a public place, that was damaging to the appellant's credibility as the appellant had claimed that a member of the Lita family worked at the town hall and would be able to find out the whereabouts of any registration anywhere in the country. That was another finding which the FTT stated damaged the appellant's credibility, that he could not leave his home for fear of his life.
 - iv) The FTT found that it was not credible that the appellant waited for over a year after his sixteenth birthday to leave Albania and seek asylum when his brother had left almost immediately after the blood feud was declared.
33. The FTT did accept that documentation produced by the respondent which was said to support the respondent's case that Ismail Lita was alive did not fit the description given both by the appellant and his brother but made no finding as to whether Ismail Lita was alive or in fact exists upon the basis that it found there was no blood feud as claimed by the appellant.
34. From the above I conclude:
- i) The appellant was in a position, through contact with his own family, to make enquiries as to his uncle's movement between Greece and Albania. He was on notice of the allegation for some seven months prior to the FTT hearing. The appellant had the ability to access information, he had the time to do it, this would have enabled the appellant to respond to the evidence of his uncle's travels. As found by the FTT, the appellant altered one aspect of his evidence to reflect the identified travel movements of his uncle in the month following the blood feud. The evidence of the uncle's travels was not evidence, the primary source of which was inaccessible to the appellant. The analogy sought

to be drawn with EURODAC data is misconceived. The appellant and his family were in a better position than many to check up on the accuracy of the alleged travel by his uncle. Moreover, had there been real concerns at the FTT hearing as to whether the evidence was accurate an adjournment could have been sought by the appellant's legal representative in order to challenge the evidence. The appellant was able to and did comment upon the reliability of the respondent's evidence of his uncle's travels.

ii) The respondent's evidence of the uncle's travels was but one of the findings relied upon by the FTT in concluding that the appellant was not a credible witness.

35. The findings of fact made by the FTT and upheld by the UT were findings which it was open to the tribunals to make. They were findings which were directly related to the credibility of the appellant and the case which he presented. The factual findings provided a very good reason to depart from the earlier determination in R's appeal.

36. The appellant's contention that the evidence of the uncle's travels amounted to an allegation of fraud by the respondent is overstating the case. This was evidence which was directed to an issue of credibility, an approach commonplace in courts and tribunals. Of itself, it does not amount to an allegation of fraud.

Ground 3: Flawed approach to the appellant's explanation

37. The appellant submits that a further reason why the approach to the fresh evidence was said to be flawed was that the UT found that the FTT had misunderstood the appellant's explanation for the records of his uncle's travels. That explanation had to be treated with particular care by reason of the fact the fresh evidence was being relied upon by the respondent as a basis for reopening previous findings. It might make sense for a person in the uncle's position to take steps to have his passport stamped in order for it to appear that he had been resident in Greece for short periods, his residence in Greece was time limited and he did not wish to return to Albania. There was nothing inherently incredible in the appellant's explanation to the FTT.

38. It is fair to record that this ground of appeal was not pursued with the same vigour as grounds one and two. Firstly, the assessment of the appellant's credibility was a matter for the FTT. Secondly, as the UT found at [45]:

“It was open to the judge to find it was not credible that the uncle would entrust his passport to someone else if he was genuinely in fear of his life and genuinely in fear of returning.”

The reasoning of the UT is sound. There is nothing in this ground of appeal.

Conclusion

39. For the reasons given, each ground of appeal fails. The appeal is dismissed.

Lady Justice Asplin:

40. I agree.

Lord Justice Bean:

41. I also agree.