Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04112/2019
HU/04114/2019, HU/04119/2019
HU/04127/2019, HU/04131/2019
HU/04132/2019, HU/04136/2019

THE IMMIGRATION ACTS

At: Manchester Civil Justice Centre (remote)
On: 19th October 2020

Decision & Reasons Promulgated
On: 27th October 2020

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

AS
SZ
C1-C5
(anonymity direction made)

Appellants

And

Entry Clearance Officer (Sheffield)

Respondent

For the Appellant: **Ms M. Knorr, Counsel instructed by Wilson & Co**
For the Respondent: **Mr C. Bates, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellants are a family of Palestinians currently living in a refugee camp in Tyre, Lebanon. The first and second Appellants are husband and wife; the remaining five are their minor children, currently aged between and 4 and 17.

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2. The family seek entry clearance to the United Kingdom in order to settle here with two other children of the family, both of whom have been recognised as refugees. These refugees, now adults aged 18 and 20, are referred to hereinafter as S1 and S2.

3. The linked appeals were dismissed by the First-tier Tribunal (Judge Traynor) on the 7th May 2020. Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Coker on the 10th August 2020 who found there to be several arguable errors of law in the First-tier Tribunal decision.

Background and Matters in Issue before the First-tier Tribunal

4. S1 arrived in the United Kingdom in October 2017, when he was 17. S2 arrived in the United Kingdom in January 2018, aged 16. They both claimed asylum on the basis that they had a well-founded fear of persecution in Lebanon for reasons of their membership of a particular social group/imputed political opinion. They had become embroiled in a vicious dispute with the children of a powerful Hezbollah commander, which led to the family as a whole attracting the adverse attention not only of Hezbollah but of their allies in Fatah and the Lebanese authorities. S1 and S2 being at the centre of the dispute their parents arranged for their departure to the United Kingdom. By July 2018 they had both been recognised as refugees.

5. The applications for entry clearance were made on the 21st November 2018 when S1 was still a minor.

6. The Respondent, having found no category under the rules which could avail the Appellants, considered whether there were "exceptional circumstances" that would justify granting entry. Finding there to be none, the applications were refused on the 3rd February 2019.

7. The case before the First-tier Tribunal was that it would be a disproportionate interference with the family and private lives of all members of this family to refuse to grant entry clearance. Particular reliance was placed on the following matters, which the Tribunal was asked to weigh cumulatively:

    i) That S1, at the date of the appeal still living in foster care, has been diagnosed with very severe PTSD, moderate depression and anxiety. Medical opinion was provided attributing these conditions to both the trauma experienced by S1, but also to his ongoing separation from his family and his overwhelming fears for their safety;

ii) The targeting of the family in Lebanon is ongoing. An uncle of S1 and S2 wrongly arrested in the dispute remains in custody. In the absence of S1 and S1 the adverse attention of the agents of persecution has transferred to A3 and A4 who are unable to leave Lebanon illegally due to lack of funds;

iii) Until S1 and S2 are married and found families of their own they are, in the cultural context from which they come, considered to be members of their father's household;

iv) A2 is finding is their continued separation particularly difficult. Her mental and physical health has declined and she "cries all the time";

v) Because S1 and S2 are recognised as refugees (and indeed because the Appellants are themselves refugees in Lebanon) the only realistic prospect of family reunification lies in the United Kingdom;

vi) It is contrary to the best interests of the minor Appellants to be separated from their siblings, but also to witness the ongoing emotional pain experienced by their parents as a result of that separation.

The Decision of the First-tier Tribunal

8. Having directed itself that the matter in issue was whether the decision was a proportionate response under Article 8, the Tribunal found as follows:

i) In respect of the claim that the family continue to face difficulties in Lebanon "they have never been specific in identifying the form of harassment, who perpetrates it and in what circumstances" [§65]: such evidence that there is is found to be "vague and in some respects self-serving". The Appellants are not facing any particular difficulties in accessing food, medication or treatment [§79].

ii) The parents of this family made a "conscious decision" to send their eldest sons to the United Kingdom because they already had family here, namely their maternal aunt who is settled here by marriage [§67, 80]. This aunt visited Lebanon on several occasions in the years before the boys arrived and the Judge deduces from this that during these visits the family discussed

together the "clear attraction" of the whole family moving to the United Kingdom.

iii) As to the opinion of the Consultant Clinical Psychologist Dr Heke that S1 is suffering complex mental health problems as a result of his experiences, the Tribunal postulates that "it is clear" that a contributing factor to this would be his "physiological development and maturing" as an adolescent, something that the doctor does not appear to have taken into account. The Tribunal further attributes S1's emotional difficulties to the family's "decision" to place him into foster care. Finally the Tribunal deduces from the doctor's comment that S1 appeared smartly dressed and "calm" that his symptoms are being exaggerated: if he needed more mental health support he would have sought it [§70, 71, 76].

iv) S1 is supported by his aunt, college friend, brother and foster carer, with whom he enjoys a good relationship. He also maintains contact with his parents and siblings by telephone and social media. He is moving towards independence and has good self-care [§75, 77]

v) No weight can be given to the "threat" that in the event that these appeals fail C1 and C2 will be sent abroad by their parents using illegal smuggling networks *contra* to their best interests.

9. Having weighed all of those matters in the balance the Tribunal concludes that the appeals must be dismissed.

Error of Law: Discussion and Findings

10. Ms Knorr's first complaint is that the Judge was wrong to state that there was no credible evidence before him demonstrating that the Appellants, and in particular the two eldest children left in Lebanon , are experiencing harassment and threats from the Hezbollah family who caused S1 and S2 to flee. The evidence is described by the Judge as "vague", "self-serving" and "not credible". Ms Knorr rightly takes issue with each of these terms.

11. The evidence cannot rationally be described as vague. The Tribunal was not faced with unparticularised assertion. The witness statements detailed a number of specific incidents, for instance the eldest daughter being surrounded by a number of boys, sworn at, touched, and having her school books knocked out of her hand. About 2 months before the appeal both she and her brother were approached at school by outsiders who asked them where S1 and S2 were:

the headmaster intervened and had the individuals removed from the school property. The children did not attend school for 20 days after this incident because they were fearful for their safety. Both S1 and S2 gave unchallenged evidence about their fears for their family, and that they genuinely hold such subjective fear was confirmed by their aunt and the medical report. Although the decision acknowledges that some of the Appellants have provided witness statements, it does appear that the Tribunal may have missed some of the contents: otherwise it is difficult to understand its conclusion that the evidence on this matter was "vague".

12. Nor is the term "self-serving" particularly illuminating. As the current President Mr Justice Lane observes in R (on the application of SS) v Secretary of State for the Home Department ("self-serving" statements) [2017] UKUT 00164 (IAC) "the expression itself tells us little or nothing". Unless there is a specific and obvious reason to conclude that a piece of evidence has been deliberately manufactured for the purpose of supporting an appeal, it is a meaningless conclusion. Here the First-tier Tribunal attempts to use such justification when it states:

> "it is self-serving because it is clear that this is being used as a reason in order to suggest that circumstances which the family face in Lebanon are themselves worsening".

With respect, that does not bring the allegation within the rubric set out by Lane J. Any evidence adduced by claimants is likely to support their case. That does not mean that it should be dismissed as "self-serving". In this case the Tribunal was faced with entirely consistent statements made by multiple people which were, in the context of the asylum claims already accepted by the Respondent, entirely unremarkable. The claims advanced by S1 and S2 were that they had become involved in a bitter dispute with a powerful Hezbollah family who were furious that S2 had accused one of their number of stealing. In the context of power dynamics in Lebanon the dispute escalated to involve a real risk of direct physical harm being caused to S1 and S2. Their stand against this family was interpreted as insubordination, which had to be punished. It was not therefore the Appellants case that the position of their family was "worsening". It was simply that the background conflict which had led S1 and S2 to flee had not disappeared. The animosity faced by the family had not, as they had hoped, been diminished by the departure of the two eldest boys. That this was causing S1 and S2 considerable distress was evidenced in their unchallenged witness statements and by the doctor's report on S1. Against the background of the successful asylum claims it was quite wrong for the Tribunal to suggest that the evidence was self-serving. It did no more than confirm the status quo already accepted by the Secretary of State.

13. That being the case I find that there was no lawful reason advanced for the conclusion expressed at [§68]: "I find that they have not provided any credible evidence which establishes that they are suffering problems as a consequence of events involving their elder brother". The evidence was not vague, nor could it legitimately be described as self-serving. The evidence was, in fact, detailed and wholly consistent with the facts already accepted in the asylum claims of S1 and S2.

14. Ground 2 concerns the case theory settled upon by the Tribunal that these applications were the final part of a long-term plan to facilitate the family's migration from Lebanon to the United Kingdom. The decision repeatedly returns to the idea that the First and Second Appellants discussed this idea with the Second Appellant's sister on her visits home to Lebanon: the Tribunal speculates that they actively "chose" to send their sons to the United Kingdom to claim asylum, and so finds "whilst there is an impact of separation, it is not as a consequence of the Respondent's decision" [§80]. It is submitted on behalf of the Appellants that the Tribunal here engaged in impermissible speculation, and reaching findings not supported by evidence or reasons.

15. I am satisfied that this ground is made out. It is *possible* that as long ago as 2014 [see the FTT §67] the adults in this family cooked up this scheme. It is *possible* that the parents of S1 and S2 sent their teenage sons off with people smugglers to travel to the United Kingdom so that the rest of the family could later make applications for entry clearance. It is *possible* that before they did so they coached S1 and S2 to maintain a consistent and detailed account which would enable them to get asylum. It is *possible* that each of the witness statements now advanced are the culmination of that cynical scheme. The difficulty is that there is absolutely no evidential foundation for any of that. All of the evidence in fact pointed the other way.

16. Ground 3 is concerned with the approach taken by the First-tier Tribunal to the evidence of Consultant Clinical Psychologist Dr Heke. Dr Heke is Director of the Institute of Psychotrauma, East London Foundation NHS Trust. In her 23 year career in the NHS and private practice she has worked extensively with people who have experienced psychological traumas including trafficking, childhood abuse, torture, or war. She formerly managed the Post Traumatic Stress Disorder Service in her East London post and is currently providing specialist trauma supervision for the 40 psychological therapists attached to the Grenfell Health and Wellbeing Service who are dealing with the aftermath of the fire.

17. Prior to her consultation with S1 Dr Heke had access to all of the relevant documentation and background information. Bringing her clinical expertise to bear Dr Heke applied the relevant diagnostic criteria to diagnose S1 as suffering from very severe PTSD, moderate depression and moderate anxiety. She

attributes these conditions to his traumatic experiences, separation from his family, and his "overwhelming fears for their safety". Her report is detailed, cogent and, Mr Bates confirms, unchallenged by the Respondent.

18. The conclusions reached by the Tribunal on this report are set out at [§70]:

> "I have considered the expert report of Dr Heke and her view that the only reason why there has been any change in [S1]'s demeanour is because of events which he has encountered. I find that little weight has been given to the fact that he has been experiencing his adolescence and maturing from a young boy into a young man and that this, of itself, is likely to bring about a degree of change and the manner in which he would project himself and communicate with others. Whilst not minimising the fact that he has been recognised by the UK authorities as someone who would be at risk upon return to Lebanon, it is clear that his emotional difficulties arise not only as a consequence of separation from his family, but also as a result of his own physiological development and maturing"

And at [§77]:

> "The medical evidence of Dr Heke also informs me that the matter in which [S1]'s circumstances are being presented are to a degree exaggerated. In her report Dr Heke refers to [S1] being calm in his demeanour, well kempt, smartly dressed and that when describing his difficulties was initially distressed, but then became calm"

19. All of this leads the Tribunal to conclude at [§81]:

> "I find there is no evidence that the separation between [S1] and his parents is having any greater effect than would be expected on a young person moving away to university, or leaving home for the first time".

20. It is of course axiomatic that credibility is a matter for a judge not an expert witness, and that Tribunals are not only entitled, but obliged, to make their own assessments of the case which can legitimately entail the reaching of conclusions different from those expressed by the expert. This does not however mean that decision makers can simply supplant the views of a properly qualified expert with their own 'expert' opinion on the matter in hand. As Jowitt J puts it in R (ex parte Khaira) v Secretary of State for the Home Department [1998] EWHC Admin 355: "it is not appropriate for a civil servant without medical expertise to reach a conclusion contrary to that reached by a psychiatrist simply by drawing on his own native wit".

21. The matter in hand here was the complex mental health needs of this child refugee. Dr Heke's considered opinion about both the extent and causation of these conditions is apparently set aside by the Judge because he believes that she has not given sufficient weight to the fact that S1 is a teenager and so undergoing "a degree of change". Nor, apparently, has she noticed that S1 was smartly dressed and able to compose himself after a period of distress. In fact, finds the Judge, S1 is just like a young man who has moved to university, and who misses his family. In support of her submission that this approach was legally impermissible Ms Knorr cites several well-known authorities. I need not set them all out here since Mr Bates for the Respondent had no hesitation in agreeing that this ground is made out. I will therefore confine my commentary to this. In the absence of a challenge to the expertise or methodology of Dr Heke the Tribunal could, and should, assume that she knows what she is doing. Dr Heke was well aware that S1 was a teenager, and we know that she observed that he was smartly dressed and able to compose himself because *they were her observations*. It can, and should, therefore be assumed that she has taken those matters into account. The conclusion reached by the Tribunal – that S1 was akin to a fresher at university – was a perverse negation of all of Dr Heke's expert evidence, S1's grant of refugee status and indeed all of the evidence before the Tribunal.

22. The final ground concerns the Tribunal's failure to undertake a 'best interests' assessment in accordance with its duties under s.55 of the Borders Citizenship and Immigration Act 2009 in the context of Article 8. I need not dwell on this save to say that the Secretary of State accepts that the Tribunal failed to conduct a lawful examination of the best interests of S1, and failed to apply the spirit of the section in respect of the minor Appellants.

23. For the foregoing reasons I am satisfied that all four grounds are made out. The decision of the First-tier Tribunal is flawed for error of law and it must be set aside.

The Re-Made Decision

24. These appeals are brought under s82(1)(b) of the Nationality, Immigration and Asylum Act 2002 which provides that an appeal may be brought where the Secretary of State has refused a human rights claim. The ground of appeal is as set out at s84(2) of the Act:

> (2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

25. Section 6 of the Human Rights Act 1998 provides that it is "unlawful for a public authority to act in a way which is incompatible with a Convention right".

26. The Convention right in play here is Article 8 of the ECHR:

> *Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

27. In migration cases involving removal the question for decision makers is whether the removal would result in an interference with Article 8 (1) rights which would be disproportionate to the legitimate aims set out in Article 8(2). In cases such as this, involving entry clearance, the question is whether the decision to refuse entry is a disproportionate "lack of respect" for the family and/or private life of the parties concerned: Shamim Box v Entry Clearance Officer (Dhaka) [2002] UKIAT 02212. The parties further agreed that the human right that I am concerned with is the family life of both the Appellants and their United Kingdom Sponsors: Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 38.

28. In Secretary of State for the Home Department v SS (Congo) & Ors [2015] Civ 387 the Court of Appeal further explored the principles to be applied in Article 8 entry clearance cases, in particular examining the interplay between the Immigration Rules and the United Kingdom's wider obligations under the Convention:

> 14. [..]The width of the gap between what the Immigration Rules set out by way of entitlement to enter or remain in the United Kingdom and the requirements resulting from application of a relevant Convention right – in these appeals, we are concerned with rights under Article 8 – may be highly relevant in certain contexts. This is because, in the immigration field, the fair balance required to be struck pursuant to Article 8 between individual interests protected by that provision and the general public interest typically involves bringing into account certain public interest considerations in relation to which the Secretary of State has a legitimate role to fulfil by formulating an approach which gives them proper value and weight. The Secretary of State is responsible for the overall operation of the immigration system as a fair system which properly reflects and balances a range

> of interests, including important aspects of the public interest, and she is accountable to Parliament for what she does.
>
> 15. In the Convention case-law of the European Court of Human Rights ("ECtHR") it is well recognised that the national authorities are in principle better placed than the Court to make judgments regarding the needs and resources of their societies (see, e.g., Stec v United Kingdom (2006) 43 EHRR 47, para. [52]) and that "questions of administrative economy and coherence are generally matters falling within the margin of appreciation" which this approach implies (ibid.). Within the national legal order, it is the Secretary of State and Parliament who are in principle best placed to make such judgments. Accordingly, in appropriate contexts, weight may be given by the courts to their assessments about what is required. Typically, this finds expression in allowing a wider margin of appreciation or discretionary area of judgment where such considerations are required to be brought into play in striking the relevant balance between individual and public interests.

29. It is in this context that the relevant Immigration Rules must be read. In part 11 of the Rules the Secretary of State has made provision for close family members to seek family reunification with persons recognised as refugees in the United Kingdom. Only two categories of applicants benefit from these rules. Paragraph 352A is concerned with partners:

> 352A. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the partner of a person granted refugee status are that:
>
> (i) the applicant is the partner of a person who currently has refugee status granted under the Immigration Rules in the United Kingdom; and
>
> (ii) the marriage or civil partnership did not take place after the person granted refugee status left the country of their former habitual residence in order to seek asylum or the parties have been living together in a relationship akin to marriage or a civil partnership which has subsisted for two years or more before the person granted refugee status left the country of their former habitual residence in order to seek asylum; and
>
> (iii) the relationship existed before the person granted refugee status left the country of their former habitual residence in order to seek asylum; and
>
> (iv) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or Article 1F of the Refugee Convention if they were to seek asylum in their own right; and
>
> (v) each of the parties intends to live permanently with the other as their partner and the relationship is genuine and subsisting
>
> (vi) the applicant and their partner must not be within the prohibited degree of relationship; and
>
> (vii) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

And paragraph 352D is concerned with the minor children of adult sponsors:

> 352D. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who currently has refugee status are that the applicant:

> (i) is the child of a parent who currently has refugee status granted under the Immigration Rules in the United Kingdom; and
>
> (ii) is under the age of 18; and
>
> (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
>
> (iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of their habitual residence in order to seek asylum; and
>
> (v) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or Article 1F of the Refugee Convention if they were to seek asylum in their own right; and
>
> (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

30. No provision is made for the parents or siblings of child refugees to join them in the United Kingdom. In AT and another (Article 8 ECHR – Child Refugee – Family Reunification) Eritrea [2016] UKUT 00227 (IAC) the former President McCloskey J (as he then was) explores the legal background to the rules:

> 10 The Secretary of State's policy in the realm of family reunification, as expressed in the Immigration Rules, dates from the year 2000. Its most important feature, for the purposes of these appeals, is that no provision has ever been made for family reunification in the case of a child who has gained refugee status in the United Kingdom. This discrete regime is currently contained in Part 8 of Appendix FM to the Rules, at paragraphs 352A – 352G and 819L – 819U. In short, spouses and minor children of a "sponsor" can, subject to satisfying the governing conditions, secure family reunification in the United Kingdom by the grant of leave to enter. However, this possibility does not exist where the sponsor is a child.
>
> 11 Thus a blanket prohibition is in operation. Historically, there was a short lived exception to this prohibition relating to the parents of unaccompanied children who had fled Kosovo and secured asylum in the United Kingdom. This concession was confined to the short time frame of July to September 1999. With effect from 02 October 2000, the family reunification regime enshrined in the Immigration Rules contained the aforementioned blanket prohibition. From then to 2006 the Secretary of State operated a policy of permitting the parents or siblings of unaccompanied minor refugees to enter the United Kingdom for the purpose of reunification only where compelling and compassionate circumstances were demonstrated. Since 2006 the Secretary of State's policy has extinguished this possibility. While these appeals have generated much documentary evidence pertaining to this discrete issue, it is striking that there is no evidence bearing directly on the policy aims and justification underpinning this exclusion…

31. I pause here to note that McCloskey J was wrong to categorise the lacuna in the Rules as amounting to a "blanket prohibition": see KF and others (Entry Clearance, relatives of refugees) Syria [2019] UKUT 00413 (IAC) [at §16(c)]. Nothing in the rules *mandates* refusal of entry clearance to the close family members of child refugees: the point is that there is no positive provision. He is

however correct to say that the Secretary of State has not to date, at least in any published policy document or case of which I am aware, offered any justification for the exclusion.

32. The rules then, make no provision for individuals such as the Appellants in this case. Returning to SS (Congo) I remind myself that the national authority – here the Secretary of State for the Home Department – is in principle better placed than the Tribunal to make judgments regarding the needs and resources of their society, and where the balance should accordingly be struck between the rights of the individuals concerned and the wider public interest. This margin of appreciation is not however a fixed boundary [at §17]:

> 17. If the gap between what Article 8 requires and the content of the Immigration Rules is wide, then the part for the Secretary of State's residual discretion to play in satisfying the requirements of Article 8 and section 6(1) of the HRA will be correspondingly greater. In such circumstances, the practical guidance to be derived from the content of the Rules as to relevant public policy considerations for the purposes of the balance to be struck under Article 8 is also likely to be reduced: to use the expression employed by Aikens LJ in MM (Lebanon) in the Court of Appeal, at [135], the proportionality balancing exercise "will be more at large". If the Secretary of State has not made a conscientious effort to strike a fair balance for the purposes of Article 8 in making the Rules, a court or tribunal will naturally be disinclined to give significant weight to her view regarding the actual balance to be struck when the court or tribunal has to consider that question for itself. On the other hand, where the Secretary of State has sought to fashion the content of the Rules so as to strike what she regards as the appropriate balance under Article 8 and any gap between the Rules and what Article 8 requires is comparatively narrow, the Secretary of State's formulation of the Rules may allow the Court to be more confident that she has brought a focused assessment of considerations of the public interest to bear on the matter. That will in turn allow the Court more readily to give weight to that assessment when making its own decision pursuant to Article 8….

I further note that in these cases the refusal notices offer no explanation of the matters weighed in the balance in the Entry Clearance Officer's proportionality balancing exercise.

33. The Court in SS (Congo) concluded by summarising the applicable principles:

> 39. In our judgment, the position under Article 8 in relation to an application for LTE on the basis of family life with a person already in the United Kingdom is as follows:
>
> i) A person outside the United Kingdom may have a good claim under Article 8 to be allowed to enter the United Kingdom to join family members already here so as to continue or develop existing family life: see e.g. Gül v Switzerland (1996) 22 EHRR 93 and Sen v Netherlands (2001) 36 EHRR 7. Article 8 does not confer an automatic right of entry, however. Article 8 imposes no general obligation on a state to facilitate

the choice made by a married couple to reside in it: R (Quila) v Secretary of State for the Home Department [2011] UKSC 45; [2012] 1 AC 621, para. [42]; Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471, [68]; Gül v Switzerland, [38]. The state is entitled to control immigration: Huang, para. [18].

ii) The approach to identifying positive obligations under Article 8(1) draws on Article 8(2) by analogy, but is not identical with analysis under Article 8(2): see, in the immigration context, Abdulaziz, Cabales and Balkandali v United Kingdom, paras. [67]-[68]; Gül v Switzerland, [38]; and Sen v Netherlands, [31]-[32]. See also the general guidance on the applicable principles given by the Grand Chamber of the ECtHR in Draon v France (2006) 42 EHRR 40 at paras. [105]-[108], summarising the effect of the leading authorities as follows (omitting footnotes):

"105. While the essential object of Art.8 is to protect the individual against arbitrary interference by the public authorities, it does not merely require the State to abstain from such interference: there may in addition be positive obligations inherent in effective "respect" for family life. The boundaries between the State's positive and negative obligations under this provision do not always lend themselves to precise definition; nonetheless, the applicable principles are similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole, and in both contexts the State is recognised as enjoying a certain margin of appreciation. Furthermore, even in relation to the positive obligations flowing from the first paragraph, "in striking [the required] balance the aims mentioned in the second paragraph may be of a certain relevance".

106. "Respect" for family life … implies an obligation for the State to act in a manner calculated to allow ties between close relatives to develop normally. The Court has held that a state is under this type of obligation where it has found a direct and immediate link between the measures requested by an applicant, on the one hand, and his private and/or family life on the other.

107. However, since the concept of respect is not precisely defined, states enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals. 108. At the same time, the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight."

iii) In deciding whether to grant LTE to a family member outside the United Kingdom, the state authorities may have regard to a range of factors, including the pressure which admission of an applicant may place upon public resources, the desirability of promoting social integration and harmony and so forth. Refusal of LTE in cases where these interests may be undermined may be fair and proportionate to the legitimate interests identified in Article 8(2) of "the economic well-being of the country" and "the protection of the rights and freedoms of

others" (taxpayers and members of society generally). A court will be slow to find an implied positive obligation which would involve imposing on the state significant additional expenditure, which will necessarily involve a diversion of resources from other activities of the state in the public interest, a matter which usually calls for consideration under democratic procedures.

iv) On the other hand, the fact that the interests of a child are in issue will be a countervailing factor which tends to reduce to some degree the width of the margin of appreciation which the state authorities would otherwise enjoy. Article 8 has to be interpreted and applied in the light of the UN Convention on the Rights of the Child (1989): see In re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27; [2012] AC 144, at [26]. However, the fact that the interests of a child are in issue does not simply provide a trump card so that a child applicant for positive action to be taken by the state in the field of Article 8(1) must always have their application acceded to; see In re E (Children) at [12] and ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4; [2011] 2 AC 166, at [25] (under Article 3(1) of the UN Convention on the Rights of the Child the interests of the child are a primary consideration – i.e. an important matter – not the primary consideration). It is a factor relevant to the fair balance between the individual and the general community which goes some way towards tempering the otherwise wide margin of appreciation available to the state authorities in deciding what to do. The age of the child, the closeness of their relationship with the other family member in the United Kingdom and whether the family could live together elsewhere are likely to be important factors which should be borne in mind.

v) If family life can be carried on elsewhere, it is unlikely that "a direct and immediate link" will exist between the measures requested by an applicant and his family life (Draon, para. [106]; Botta v Italy (1998) 26 EHRR 241, para. [35]), such as to provide the basis for an implied obligation upon the state under Article 8(1) to grant LTE; see also Gül v Switzerland, [42].

40. In the light of these authorities, we consider that the state has a wider margin of appreciation in determining the conditions to be satisfied before LTE is granted, by contrast with the position in relation to decisions regarding LTR for persons with a (non-precarious) family life already established in the United Kingdom. The Secretary of State has already, in effect, made some use of this wider margin of appreciation by excluding section EX.1 as a basis for grant of LTE, although it is available as a basis for grant of LTR. The LTE Rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the Rules. In our view, the appropriate general formulation for this category is that such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave….

34. On the matter of children it is apposite to note that Article 3 is not the only provision of the CRC which may be relevant here. Article 6(2) provides that State parties shall ensure, to the maximum extent possible, the survival and development of the child. By Article 9 State parties agree to respect the rights of the child to maintain personal relations and direct contact with both parents (except where such contact would be contrary to the child's best interests). Article 22 specifically addresses the position of child refugees:

> **Article 22**
>
> *"1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.*
>
> *2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason , as set forth in the present Convention."*

35. In this context the Tribunal in AT (supra) further cites United Nations General Comment Number 6/2005, *Treatment of Unaccompanied and Separated Children outside their Country of Origin*. Paragraph 79 of the Comment states that the ultimate aim in addressing the fate of unaccompanied children is to identify a durable solution which wherever possible, leads to that child not being separated any more. Paragraph 82 points out that in the case of child refugees family reunification in the country of origin is not in the best interests of the child: the granting of refugee states constitutes a legally binding obstacle to that child's return. Paragraph 83 mandates that the State's obligations under the CRC should govern its decision making on family reunification:

> *States parties are particularly reminded that "applications by a child or his or her parents to enter or leave a State party for the purpose of family reunification shall be dealt with by States parties in a positive, humane and expeditious manner"*

36. Whilst I note that the CRC and associated commentaries are not incorporated into United Kingdom law, as we are signatory to this international treaty it would be material if my decision were in harmony with the aims and principles set out therein: Mathieson v Secretary of State for Work and Pensions [2011] UKSC 4.

37. It is against that legal background that I make my findings.

38. Although I have set the decision of the First-tier Tribunal aside for the errors identified above, the parties were in agreement that the detailed record of the oral evidence made by the Tribunal was unaffected by my decision. Mr Bates further confirmed that the Respondent did not wish to challenge any of the written or expert evidence. I could therefore accept all of the evidence at face value. The only issue between the parties is whether or not the facts disclose a sufficiently compelling case to conclude that the refusal of entry would be disproportionate.

39. The first question I must ask is whether there is a family life between the Appellants and Sponsors such that a refusal to grant entry might engage Article 8. I note that neither the Entry Clearance Officer nor First-tier Tribunal made a clear finding on this matter. Relevant to my enquiry are the following factors. Both S1 and S2 are now adults. As such there can be no legal presumption that at the date of this appeal they retain a 'family life' with their parents, or indeed their siblings: Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31. Nor will the love and affection that the Appellants and Sponsors unsurprisingly hold for each other be sufficient to engage the Article: there must be something more. Family life will be established between adult children and their parent and siblings where it can be demonstrated that there is between them some form of real, committed and effective support. That is not to introduce a requirement of dependency, or exceptionality. It all depends on the facts: per Sir Stanley Burnton in Singh v Secretary of State for the Home Department [2015] EWCA Civ 630 [at §24].

40. In the instant case I bear in mind that the Sponsors have been living apart from the Appellants for, respectively, 2 and 3 years. Both have demonstrated a certain degree of resilience in making their way across the Middle East to Europe, and then navigating the asylum system. They do not live together. S2 lives with his aunt in Hatfield but her flat is small and she is unable to accommodate both of them so for now S1 lives with his foster mother[1]. Those matters notwithstanding I am satisfied that the Sponsors have not ceased to have a family life with the Appellants. There continues to be a close bond between them and it clear from the evidence relating to S1 in particular that he looks to his family in Lebanon for real emotional support. S1 speaks to his mother every single day, and the rest of the family two or three times per week. He is in daily social media contact with C1 and C2. S2 is also in daily contact the family in Lebanon and speaks of missing his mother's "soul". He is also conscious of how much he misses and needs his father whom he looks to for guidance.

[1] Aunt explains in her witness statement how she accommodates herself, her husband, their two children and S2 in a two-bedroomed flat. At the time of writing she was pregnant, and also accommodating her two stepchildren at weekends.

41. I am satisfied, having regard to the relatively low threshold for engagement, that the decision does betray a lack of respect for the family life shared between the Appellants and Sponsors.

42. It is not in dispute that the decision was lawful, that is to say that the Entry Clearance Officer had the power in law to make it.

43. I remind myself that Article 8 does not confer an automatic right of entry. It will only be facts of a particularly pressing nature that will found a good claim under Article 8 to be allowed to enter the United Kingdom to join family members already here so as to develop existing family life. The facts must be compelling.

44. The Appellants are unable to meet the requirements of the rules. As I have canvassed above, this appears to be for no reason other than the fact that the Secretary of State has not seen fit to lay before parliament a rule providing for the family reunion of child refugees. The reason for that omission remains opaque. Had the locations of the various family members been transposed, there is no dispute that S1 would have qualified for leave to enter: materially he has not established an independent life, was under 18 at the date of decision, no questions of exclusion arise and all concerned were part of the same household before the flight from Lebanon. That is a matter of some relevance. The omission appears to be *prima facie* inconsistent with the United Kingdom's obligations under the CRC and indeed the statutory obligation under s.55 of the Borders Citizenship and Immigration Act 2009. I have taken this into account, whilst recognising the ordinarily wide margin of appreciation: SS (Congo).

45. A number of factors do however weigh against the Appellants: s117B of the Nationality, Immigration and Asylum Act 2002. It is in the public interest that immigration control is maintained. This is because the state has seen fit to control migration into the United Kingdom in order to protect public resources and to promote social integration and cohesion. This is a large family and the potential costs of admitting all of the Applicants is striking – this is a family which will need to be housed, the children must be educated and healthcare provided. I mention these matters not as an exhaustive list but as illustration of how expensive it could end up being for the taxpayer. That is a matter which attracts a substantial weight in the scales. As far as I am aware none of the Appellants can speak English to any degree of fluency. This weighs against them, because it is in the public interest that people seeking to settle in this country are able to speak English, since this promotes their integration and lessens the burden on the state. There is no evidence before me to indicate that any of the Appellants will be financially independent. Again, to admit them would for that reason by contrary to the public interest. A court must be slow to find an implied positive obligation which would involve imposing on the state significant additional expenditure. It might also be said – although I stress not

by Mr Bates, and so this is conjecture on my part – that to admit them would be to fill the gap in the immigration rules that I have identified, and the Secretary of State may well have sound public policy reasons for not providing for such a class of applicant: she may wish, for instance, to discourage the migration of unaccompanied children.

46. I have taken all of those matter into account. Against them I weigh the following matters.

47. This was a pre-existing family life. In Lebanon the whole family lived together, sharing loving and close relationships with each other. As such this is not a case where I need consider the status of any of the parties when the relationships were formed. In the context of Palestinian culture the expectation and norm would be that all children of the family would remain living at home as part of that family unit after they reach majority. Girls will stay at home until they marry, but for boys the practice would be for them to remain in the family home indefinitely, even after they marry and have children of their own.

48. That family life was interrupted not by choice, but by fear of persecution. S2 and then S1 left their family home because they had to. This has been recognised by the Secretary of State in the grant of refugee status. The older boys' departure is described variously by members of the family as "painful" and "heartbreaking".

49. This is not a family life that can be continued anywhere else. Whilst my decision has necessarily focused on the fact that S1 and S2 are refugees, it is also relevant to note that in fact they, in common with the rest of their family, were already refugees. They are Palestinians permitted to live in Lebanon. They all live in a refugee camp, and always have done. I was shown no evidence, and certainly the Respondent did not suggest, that they would able to gain entry or leave to remain in any other country to enable them to be reunited with S1 and S2.

50. The family in Lebanon are living in precarious and frightening circumstances. The witness statements describe how the family managed over the years to eke out a relatively comfortable existence. The adults managed to bring in an income, and the children were able to go to a better, privately paying, school outside of the camp. The unchallenged evidence in the statements is that this situation has deteriorated in recent years. Political instability in Lebanon has seen the economy decline and this has unsurprisingly had an impact on refugees as well as the indigenous community. The camp is becoming increasingly overcrowded and A2 reports there to be a "complete lack of security or protection". Nor have the problems with local Hezbollah figures dissipated as the family had hoped. None of the Appellants suggest that the harassment encountered by C1 and C2 has yet reached a level where it could be

said that the have been *persecuted*, but they are understandably very afraid of the animosity towards them from this family: they are refugees with no power, influence or weapons, whereas this family are locally connected, powerful and armed. I find the incidents described in the witness statements to be entirely credible: they are consistent with the history already known and established, and there is nothing to indicate any exaggeration. As Ms Knorr submits, if they had intended to fabricate a claim that they were in immediate mortal danger, they could have done.

51. Each witness statement speaks of the emotional pain that the separation of this family is causing to all of them. What is striking however is how hard all of this is for A2, the mother of the family. It is not difficult to accept that the mother of children sent away to another continent in these circumstances will feel a terrible torment: she will miss them, worry about them, and feel desperately impotent and guilty about the fact that they were forced to leave. The witness statements report that A2 "cries all the time" and that her physical as well as mental health has declined. She is diabetic and the stress is making her condition much more difficult to manage. She has started to experience heart palpitations. This decline in her overall health is in turn having a detrimental impact on the children that remain with her. Her husband A1 says that she wakes in the night having had nightmares and that she is refusing food. A2 has been seen by a psychiatrist Dr Fadel Shihimi, who confirms that she is suffering from depression and other, unspecified psychological problems.

52. The impact of separation on S1 in particular is severe. Whilst Dr Heke is of the opinion that his co-morbid psychological conditions are rooted in various problems – including his traumatic experiences in Lebanon – she identifies his ongoing fear for his family, and his dislocation from them, as being "the most significant" factor:

> "[S1] cannot cope with the separation from his family, and is overwhelmed with worry about his parents and siblings which exacerbates his depressed mood. Clearly the significant loss of not being able to be with his parents has contributed to and exacerbated his vulnerability to developing these psychological problems"

53. Dr Heke recommends that S1 commence trauma-focused psychological therapy as soon as possible, but she is of the opinion that continued separation from his family continues to be the "biggest barrier to his recovery", since treatment for his PTSD is unlikely to be effective without their support. She goes so far as to raise a concern that there may be a risk of suicide if the situation is not resolved: "hopelessness is the most significant factor related to acting on suicidal thoughts". Even absent such a risk she believes that a final negative decision would have long term consequences for S1's mental health and could lead to "life-long problems". She believes that at present he is only

able to cope with his mental health problems "by holding onto the hope that he will be reunited with his family".

54. Dr Heke's assessment is entirely consistent with other observers who know S1 well. S2 says that his brother is "sad all of the time" and that when they speak of their mother he cries. S2 does not think that S1 is coping at all. The efforts that S2 is making to try and help S1 are often rejected because his depression is such that he has no motivation to do anything. Aunt describes S1 has being a "funny and lighthearted" boy when she used to visit him in Lebanon. She writes that he was active and positive – now he just cries and appears upset and tired. S1's foster carer describes him as being unhappy and stressed; she is in regular contact with Aunt about her concerns. Similarly the boys' mother A2 comments that she fears that her sons have lost their ambition since they came to the United Kingdom. S1 always wanted to be an engineer or a lawyer but has lost all motivation. S2 always did well at school and worked hard but has now settled for a plumbing course, which she sees as out of character.

55. S1 himself says that he feels that his life is "empty without them and there's a hole that can't be filled". He is unable to concentrate for any length of time and this has adversely effected his school work – he failed the exams he sat shortly before the First-tier Tribunal hearing. He feels tired all the time and has no energy. He cries every night and finds it difficult to sleep. When he does manage to drift off he often dreams about his other. He feels unable to eat and has had episodes of spontaneous vomiting which Dr Heke considers are likely stress related. S1 writes "the only thing that gets me through is my belief in God and my faith that with him I will see my family again". In respect of the family's ongoing problems in Lebanon S1 explains that his own issues only started as he got older – as C1 and C2 reach adulthood he is extremely frightened that they will in turn be targeted and that the harassment they have recently experience will get worse. He is really concerned for his sister because he fears she could be targeted for sexual harassment. He writes:

> "There's a chance that if the court refuses their appeal I could go crazy and do something like go back to Lebanon. It would put me at risk of being killed, but if I stayed here without them my life would be destroyed anyway, so it would be better to die being with them".

I note that the First-tier Tribunal read this as a "threat". I find it to be entirely consistent with all of the evidence about S1's very desperate and low state of mind.

56. I have read Dr Heke's assessment mindful that S1 is not entirely alone in the United Kingdom. He has his brother, with whom he is very close, his foster mother with whom he enjoys a good relationship, his aunt and a college friend to whom he can turn: this boy is a Syrian refugee separated from his own

family so understands S1's problems. S1 describes being happy when he sees Aunt and S2 but states that the problem is that he often feels so low he does not have the motivation to go and see them. He loves his aunt but he also finds it hard to spend time with her because she reminds him of his mother.

57. In her original report Dr Heke opines that the prognosis for S1, should the family be reunited, is likely to be good. She identifies a number of factors leading her to that conclusion. The fact that he had a healthy attachment relationship with his parents growing up, means that with their support he will be able to engage meaningfully with his recovery. If they are with him in the United Kingdom he will no longer be preoccupied with worry about their fate and will be able to focus on the future rather than dwelling on his past, and the traumatic experiences that this entails.

58. Since the decision of the First-tier Tribunal Dr Heke has prepared a second report, dated and admitted into the evidence under Rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Having re-evaluated S1 Dr Heke maintains her diagnosis of very severe PTSD, but finds that applying the diagnostic criteria his level of depression and anxiety has now been elevated from moderate to severe.

59. Finally, I consider matters arising under s.55 of the Borders Citizenship and Immigration Act 2009. As the five children in this appeal are all out of the United Kingdom there was no statutory obligation upon the Entry Clearance Officer to conduct a 'best interests' assessment, but in line with published policy, this was done. The outcome was the unsurprising conclusion that it would in the children's best interests to remain living with their parents. No express consideration is given to the case advanced by the Appellants. That case, put simply, is that without family reunification this family will continue to fracture and decline in fortunes. The parents are both devastated by their separation from their sons, and the mother in particular has suffered serious mental and physical consequences of that distress. I accept that it is contrary to the best interests of C1-C5 to see their mother in that state. The elder children are obviously aware of the difficulties that the family has had with Hezbollah and I accept that going to school every day in fear is likely to be strongly contrary to their best interests.

60. Further it is extremely unlikely that S1 – a child at the date of application – will be able to fulfil his potential as a human being. In common with the claimant in AT & Anr, his will be a "disfunctioning, debilitated and under achieving" family. As McCloskey J puts it: "the under performance of family members and family units, in this respect, does not further any identifiable public interest. On the contrary it is antithetical to strong and stable societies".

61. I remind myself that ordinarily the weight to be attached to maintaining the public interest in refusing leave to *seven* people who do not otherwise qualify for entry is immense. Even assuming that each of the children in this family grows up to make a positive contribution to our society the cost to the taxpayer is likely to be very high. I also bear in mind that these appeals concern applications for leave to enter and that in those circumstances the margin of appreciation is ordinarily wide. The question remains whether the negative consequences for the people concerned can be said to be "unjustifiably harsh", disproportionate or to disclose, in the Respondent's preferred formulation, "exceptionally compelling circumstances". I am satisfied, having had regard to all of the foregoing that these high tests are met.

62. The consequences for the children involved is negative in the extreme. Left in the insecurity of the refugee camp they are likely to witness their mother's mental and physical health further decline. They will be left as young children to deal with the emotional consequences of separation from their brothers who, absent success in these appeals, they are very unlikely to ever see again in the flesh. The consequences for the Sponsors in this country, and in particular S1, is equally harsh. All of the evidence – from S1 himself, from those who know him best and from an experienced Consultant Psychologist – is that this teenager is suffering extreme and debilitating mental illness, which would be immediately and significantly improved if he were permitted to reunite with his family. I am unable to see any positive outcome for S1 if these appeals are dismissed. There appears to be no prospect of him recovering from PTSD and his associated depression and anxiety whilst he remains terrified for his family, and misses their presence in the way that he does. Conversely Dr Heke believes that a meaningful recovery is likely should family reunification take place. This is a young refugee whose hopes of qualifying in a profession such as engineering or law have receded, but may well come back into view should he regain hope. I am accordingly satisfied that the decisions to refuse entry were strongly contrary to the best interests of all of the children involved, and although this is no trump card, it is a primary consideration capable of narrowing the margin of appreciation: SS (Congo).

63. I have further weighed in the balance the United Kingdom's stated commitment to the family reunification of refugees; the fact that this family were separated not by choice but by the threat of serious harm, and crucially that there is no prospect of family life being continued anywhere else. The likely consequence of the Respondent's decision would be the nullification of any kind of normal family life going forward.

64. Taking all of this into account I am satisfied that the continued refusal of entry clearance would for this family be unjustifiably harsh, disproportionate and so unlawful under s6(1) of the Human Rights Act 1998. The appeals must accordingly be allowed.

Anonymity Order

65. This appeal concerns children, and refugees. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellants and Sponsors in this case are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any other member of this family. This direction applies to, amongst others, both the Appellants and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decisions

66. The decision of the First-tier Tribunal contains errors of law such that it must be set aside in its entirety.

67. The decision in the appeals are remade as follows: the appeals are allowed on human rights grounds.

68. In view of the fact that this is an appeal involving the family reunification of children I would respectfully request that the Respondent expedite processing of this decision.

69. There is an order for anonymity.

Upper Tribunal Judge Bruce
22nd October 2020