Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2021-001350 [HU/00831/2021]**

UI-2021-001351 [HU/01019/2021]

THE IMMIGRATION ACTS

Heard at Field House, London
On Monday 1 August 2022

Decision & Reasons Promulgated
On Wednesday 07 September 2022

Before

UPPER TRIBUNAL JUDGE SMITH

Between

YMM
HO
[ANONYMITY DIRECTION MADE]

Appellant

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity order was made by the First-tier Tribunal. YMM and HO seek family reunion with a person accorded protection status in the UK and also claim to be at risk in their current situation. It is appropriate in those circumstances to anonymise their identity to also protect the identity of the Sponsor. Unless and until a Tribunal or court directs otherwise, YMM and HO are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

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Representation:
For the Appellant: Mr D Sellwood, Counsel instructed by Luqmani Thompson & Partners
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. By a decision promulgated on 5 July 2022, I found an error of law in the decision of First-tier Tribunal Judge Davey itself promulgated on 8 December 2021 allowing the Appellants' appeals against the Respondent's decisions dated 25 September 2020 refusing their human rights claims. Those claims are made in the context of an application for family reunion to join their father/spouse (respectively), MM (hereafter the Sponsor). The Sponsor has been recognised as a refugee in the UK. My error of law decision is appended hereto for ease of reference.

2. My error of law decision was, as is there explained, made on the papers as the Appellant conceded that Judge Davey's decision could not stand. The Appellant asked that the appeal remain in this Tribunal whereas the Respondent contended that it should be remitted. For the reasons set out at [12] and [13] of the error of law decision, I accepted the concession made by the Appellant and concluded that the appeal should remain in this Tribunal for redetermination.

3. The relevant factual background appears at [2] of my error of law decision. In short, the Appellants are an Eritrean minor child and mother, currently living in Ethiopia. The Sponsor is also an Eritrean national who is recognised as a refugee from that country. The First Appellant is accepted to be the Sponsor's daughter and the genuineness of the relationship between the Second Appellant and the Sponsor is not disputed. The issue is whether the relationships are one of family life (given that the relationships have been conducted at a distance for some time) and whether interference with that family life by way of the refusal of entry clearance is a proportionate response. There is also an issue in the latter context concerning the Sponsor's ability to join his wife and child in Ethiopia.

4. I have before me the Appellant's bundle before the First-tier Tribunal ([AB/xx]) and the Respondent's bundle to which I do not need to refer. I also had a country expert report of Dr Lauren Carruth, PhD dated 23 September 2021 ("the Expert Report") which was before the First-tier Tribunal. By letter dated 27 July 2022, the Appellants made an application pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce further evidence, namely a supplementary witness statement from the Sponsor dated 27 July 2022 ("the Supplementary Statement") and a Home Office Policy document

entitled "Family Policy: Family life (as a partner or parent) and exceptional circumstances" ("the Home Office Policy"). Those documents were admitted without objection by the Respondent. I also had the Appellant's skeleton argument before the First-tier Tribunal and an addendum skeleton argument produced for the hearing before me. I have read all the evidence but refer only to that evidence which is relevant to the issues before me.

5. At the outset of the hearing, an issue arose concerning the availability of an interpreter. Although I had indicated in my error of law decision that the Appellants were to notify the Tribunal within seven days from when that decision was sent if an interpreter was required, they did not do so. However, I was informed by Mr Sellwood that this was because the Appellants' solicitors had already communicated the need for an interpreter when corresponding with the Tribunal in relation to the error of law issue. Unfortunately, that e-mail had been overlooked and in consequence no interpreter was booked.

6. I therefore canvassed with the parties whether the hearing could be effective. Mr Sellwood indicated that although the Sponsor speaks English reasonably well, he would not feel confident giving his evidence in that language. On the other hand, he was also anxious not to face an adjournment of the hearing. That was not necessary since Mr Tufan indicated that, although he had a few questions which he would ideally have liked to ask, he was satisfied that the appeal could be determined on the written evidence and by way of submissions only.

7. I therefore heard submissions from both parties, following which I indicated that I would reserve my decision and provide that in writing which I now turn to do.

LEGAL BACKGROUND

8. As an appeal on human rights (Article 8) grounds, the only issue for me is whether the Respondent's decision under appeal breaches the Appellants' human rights as a disproportionate interference with their family lives if they enjoy such family lives with the Sponsor. However, whether the Appellants are able to meet the Immigration Rules ("the Rules") is a relevant consideration when assessing proportionality. I therefore begin with the Appellants' case in that regard.

9. The appellants contend that they are able to meet paragraphs 352D and 352A of the Rules respectively. Those paragraphs read as follows (so far as potentially relevant to the facts of these appeals):

> **"Family Reunion Requirements for leave to enter or remain as the partner of a refugee**
>
> 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 permission to stay 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) …; and

(v) each of the parties intends to live permanently with the other as their partner and the relationship is genuine and subsisting

(vi) …; and

(vii) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

…

Requirements for leave to enter or remain as the child of a refugee

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 and refugee permission are that the applicant:

(i) is the child of a parent who currently has refugee status and refugee permission granted under the Immigration Rules in the United Kingdom; and

(ii) (a) is under the age of 18; or

(b) …;

(iii)…; 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) …; and

(vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity."

10. It is not suggested by the Appellants that they meet the provisions of the Rules in relation to family life under Appendix FM to the Rules. However, even if the Appellants are unable to show that they meet the Rules, the issue which arises thereafter (assuming that I find that family life exists) is whether the refusal of entry clearance has unjustifiably harsh consequences for the Appellants (and the Sponsor). The Appellants pray in aid the Supreme Court's judgment in Agyarko v Secretary of State for the Home Department [2017] UKSC 11 ("Agyarko"). At [60] of the judgment, the Supreme Court said this:

> "60. It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word 'exceptional', as already explained, as meaning 'circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate'. So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that 'exceptional' does not mean 'unusual' or 'unique."

11. The correct approach to proportionality remains the five-stage test outlined by Lord Bingham in R (oao Razgar) v Secretary of State for the Home Department [2004] UKHL 27 as follows:

> "[17] ... (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference 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?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

In an entry clearance case, the first and second of those questions are often the most crucial (in contrast with a case where an appellant seeks to remain in the UK where the final stage is generally the more important).

12. When considering Article 8 outside the Rules, if and when I reach questions (3) to (5) of the Razgar test, I am still bound to take account of the public interest and to have regard to the considerations set out in section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B"). I set out the relevant part of that section in context below:

> **"PART 5A**
>
> **ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS**
>
> **117A Application of this Part**

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B….

(3) In subsection (2), “the public interest question” means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

…”

13. These appeals involve a minor child. As such, when considering Article 8 ECHR and proportionality of the decision under appeal, the First Appellant’s best interests are a primary consideration. They are however not the primary consideration nor are they paramount. The appropriate analysis in that regard is set out at [33] of the judgment of the Supreme Court in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 (“ZH (Tanzania)”) as follows:

> “We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations…..”

14. With that outline of the legal issues, I now turn to consider the relevant evidence.

EVIDENCE AND FINDINGS OF FACT

15. The Sponsor has made two witness statements, the first on 8 May 2021 ([AB/A20-30]) and the Supplementary Statement dated 27 July 2022. For the reasons I have already explained, the Sponsor did not give oral evidence and was not cross-examined. However, that was because Mr Tufan had indicated that he would have had very few questions for the Sponsor in any event. For that reason, I take the Sponsor's evidence and that of the Second Appellant as read. The Second Appellant's statement is at [AB/A3-19] and is dated 14 July 2021.

16. The Sponsor and the Second Appellant provide a consistent account of the development of their relationship before the Sponsor left Eritrea. They met at school. They could not conduct their relationship openly as it would have been disapproved by others. The Second Appellant explains that, in Eritrea, relationships are not accepted outside marriage and marriages are generally arranged. For that reason, she did not have even tell her close friends or siblings of the relationship. Her father, with whom she lived (her mother having left Eritrea illegally) would not have accepted the relationship as the Sponsor is the same age as the Second Appellant, both were very young at the time (sixteen to seventeen years) and the Sponsor had no job or money. Notwithstanding the difficulties they faced, the Sponsor says that they used to spend about four nights per week together, each time for about two hours or so.

17. The Sponsor left Eritrea when he was seventeen years, and the Second Appellant was sixteen. The Second Appellant says that the Sponsor did not tell her he was leaving. She had assumed they would leave together. However, she understood that leaving Eritrea illegally was dangerous and therefore, although she was initially upset and angry, she came to recognise that he had to do this to avoid military service. She says though that if the Sponsor had told her that he was leaving, she would have gone too in spite of the risks inherent in the journey.

18. The Second Appellant was by this time pregnant. She realised this a few months after the Sponsor left. The Second Appellant's father was very angry when he found out. Although initially the Second Appellant ran away, she returned to her father's house and was able to remain there for a short period before she was sent to live with her aunt. The First Appellant was born on 3 January 2018. After that, the Second Appellant's siblings were sent to her aunt's house to live with her, at her mother's request. The Second Appellant had by then decided that she needed to leave Eritrea in order to be with the Sponsor. She waited until the First Appellant was old enough to travel and then contacted her mother who agreed that they should leave provided her siblings also went with her. They left with the assistance of an agent arranged by the Second Appellant's mother.

19. The Sponsor was unaware of the Second Appellant's pregnancy when he left Eritrea. He says that had he known, he would have married her

notwithstanding the difficulties and would have lived with her there. However, he would still have had to leave to avoid indefinite military service and he would probably have made the journey alone given the dangers. The Second Appellant told the Sponsor about the birth of the First Appellant when she reached Ethiopia.

20. In relation to their current circumstances, the Appellants initially rented a flat with money provided by the Second Appellant's mother. They were advised by others however to register as refugees in order to obtain an identity document. Having applied to register as refugees, they lived in Adi Harush camp for about three months. The Appellants were then given UNHCR documents and returned to Addis Ababa where they continue to live. The Sponsor and Second Appellant speak regularly. He also speaks to the First Appellant.

21. The Second Appellant explains in her statement that the UNHCR document gives her access to healthcare, but she would be charged for medication. She says that the Appellants are treated badly because they are Eritrean. The UNHCR document has to be renewed regularly. She also says that the Ethiopian authorities have started to round up Eritreans and she does not feel save.

22. In the Supplementary Statement, the Sponsor details a journey he made to see the Appellants in Ethiopia on 23 March 2022. He travelled because his four-year-old daughter was sick. When he arrived, the First Appellant's condition was improving. The Sponsor was however able to help by obtaining medication for her.

23. The Sponsor explains that the situation in Ethiopia which he has now witnessed first-hand is very difficult. As Eritreans, the Appellants face discrimination and ill-treatment and are at risk of being returned to Eritrea. He says that the Second Appellant goes out as little as possible to avoid the risks. She is in any event unable to work given her status and therefore is unable to access services or support. The First Appellant will not be entitled to access education given her status.

24. The Sponsor returned to the UK in May 2022. He says that he did not feel safe in Ethiopia given the situation for Eritreans there and the risk of being returned to Eritrea. He also would not be permitted to work there.

25. The Sponsor and the Second Appellant both insist that they were a family unit before the Sponsor left Eritrea. They were in a relationship and were only unable to live together due to cultural objections to co-habitation outside of marriage and the tendency for marriages to be arranged. They also insist that they continue to be a family, speaking as often as they can via video calls and messaging. It is not now disputed that the First Appellant is the child of the Sponsor and was conceived before he left Eritrea. The Sponsor has input into decisions concerning his child's upbringing in conversation with the Second Appellant and speaks regularly with the First Appellant.

26. The country expert responsible for the Expert Report is a medical anthropologist, sociocultural anthropologist and professor of international affairs, focussing on inter alia the politics and cultures of the Horn of Africa. She is based at American University in Washington, USA. The Expert Report sets out her experience and qualifications in more depth. It also includes the standard expert self-direction. I am satisfied that Ms Carruth is suitably qualified to offer relevant evidence in this appeal. Her report is at times repetitious but is of assistance in some limited regards.

27. Ms Carruth recognises that her experience does not entitle her to offer an opinion on cultural norms surrounding marriage in Eritrea. Her opinion in that regard (which is consistent with the testimony of the Sponsor and Second Appellant) is derived from research. She also confirms that the testimony of the Sponsor and Second Appellant about the way in which they have continued to maintain their relationship is consistent with the availability of remote forms of communication in Ethiopia.

28. The central focus of the Expert Report is the situation for Eritrean refugees living in Ethiopia. Ms Carruth says that “Eritrean refugees throughout Ethiopia face a dire humanitarian situation” as a result of the continuing conflict between Eritrea and Ethiopia. They face economic hardship and have limited employment prospects. Women in particular are “at particular and credible risk of harm and exploitation”. Eritrean refugees also “face credible dangers of discrimination and prejudice”. They risk being targeted by the Ethiopian authorities and being refouled to Eritrea.

29. In relation to the Sponsor, Ms Carruth opines that he could not safely live in or travel to Ethiopia due to the risks outlined above. The Expert Report pre-dates the Sponsor’s visit to Ethiopia. I obviously have to take into account that the Sponsor did manage to travel to and stay in Ethiopia for two months. That was though in the context of a visit and not with any intention of remaining there permanently.

30. The Appellants rely also on the report of an independent social worker, Mr Peter Horrocks. His report is at [AB/B1-33]. Although I have no difficulty in accepting Mr Horrocks’ expertise as an independent social worker, his report is necessarily very general as he has not had the opportunity to observe either of the Appellants face to face or to see the Appellants (particularly the First Appellant) in the company of the Sponsor. As such, the report is of limited assistance.

31. Nor can I place any weight on the views offered by Mr Horrocks about the situation facing the Appellants in Ethiopia. I acknowledge that he spoke with the Second Appellant remotely but his view about the risks to the Appellants in that country come only from what he has been told. As he accepts, he is not an expert on Ethiopia and Eritrea. In any event, I now have the Expert Report which is of far greater assistance in that regard.

32. I can readily accept however that it would be better for the First Appellant to grow up with both parents and in a stable setting. Based on the Expert Report, I accept that life in the UK would be considerably more stable than life in Ethiopia as a refugee. The First Appellant would also benefit from some form of education which the Second Appellant says that she is unable to access as a refugee in Ethiopia. It appears that the Second Appellant told Mr Horrocks that the reason why the First Appellant does not attend nursery is due to danger rather than inaccessibility but, either way, it appears that the child does not currently go to school.

33. I turn then to the Home Office policy documents to which my attention was drawn. The first, entitled "Family Reunion: for refugees and those with humanitarian protection" dated 31 December 2020 ("the Home Office Family Reunion Policy") is at [AB/D1-52]. This is particularly relevant to the Appellants' claim within the Rules. My attention was drawn in particular to [AB/D5-6] and [AB/D47-49]. The first of those sections deals with the policy intention to "deliver a fair and effective family reunion process which supports the principle of family unity" by, in summary, allowing pre-flight spouses and children to reunite with the sponsor in the UK. The second refers to the need to take into account the best interests of a minor child of a person recognised as a refugee.

34. The Home Office Family Reunion Policy has since been updated (29 July 2022). That is in much the same terms as the earlier policy in terms of its objective. The essential question in this case is whether the Appellants formed part of the Sponsor's family unit before he fled Eritrea. The Second Appellant and Sponsor are not married, and the Respondent takes issue with whether she is able to qualify given that they had not lived together for two years before the Sponsor left Eritrea. However, the policy guidance also makes clear that if that requirement is not met, consideration should be given to any compassionate circumstances including whether living together would have put the couple in danger. The position in relation to the First Appellant is however much clearer. Although the First Appellant was not born when the Sponsor left Eritrea, the guidance makes clear that "[a] child conceived before the sponsor fled to seek asylum in the UK but born postflight should be treated as part of the pre-flight family of the sponsor" ([AB/D18]).

35. Although Mr Sellwood made reference to the Home Office Family Policy, I do not need to refer to it. As I have noted at [10] above, the Appellants do not claim to be entitled to enter under Appendix FM to the Rules and therefore their Article 8 claim is one outside the Rules. The legal principles which apply to that claim are those set out at [10] to [13] above and are uncontroversial.

DISCUSSION AND FINDINGS

36. I begin with the position of the First Appellant as that is the more factually straightforward case. The First Appellant is accepted by the

Respondent to be the biological child of the Sponsor. She was born after the Sponsor left Eritrea but was conceived before he did so.

37. The First Appellant satisfies all the requirements of paragraph 352D of the Rules save, the Respondent says, for (iv) which required her to be part of the Sponsor’s family unit when he left Eritrea. It stands to reason that she could not strictly have been so as she was not born at the time. However, I have drawn attention to the Home Office Family Reunion Policy which provides guidance to the Respondent’s caseworkers. That makes clear that as a child conceived before the Sponsor left Eritrea, the First Appellant should be treated as part of his pre-flight family. For those reasons, the First Appellant meets paragraph 352D of the Rules.

38. The position in relation to the Second Appellant is more finely balanced. She and the Sponsor were clearly in a relationship before he left as the conception of the First Appellant testifies. I accept the evidence of the Sponsor and the Second Appellant as to the reasons why they were not living together for two years before the Sponsor left. Both were very young, not even adults. Even if they had been, a relationship of cohabitation outside marriage would have been frowned upon. Marriages are arranged and the Second Appellant has explained why the Sponsor’s circumstances were such that her father would not have accepted a proposal from him.

39. On the other hand, it is difficult to describe the relationship as existed in Eritrea before the Sponsor left as one of family life. They did not live together. Both lived with their respective families. They did not form a family unit. Whilst I have no doubt that the relationship was and still is a genuine one as partners, I am unable to find that it is one which was akin to marriage or a civil partnership in the period prior to the Sponsor leaving Eritrea. The Second Appellant does not therefore meet paragraph 352A of the Rules.

40. The issue for me in these appeals is not in any event whether the Appellants meet the Rules but whether the Respondent’s decisions refusing them entry clearance disproportionately interfere with their Article 8 rights to respect for their family life. I turn to consider that issue in the context of the findings I have made above.

41. It is generally the case that family life exists between parent and minor child. Irrespective of the general presumption, I am satisfied that it does so in this case. I accept the Sponsor’s evidence that he speaks with his daughter regularly. He discusses with the Second Appellant his daughter’s upbringing. His commitment to his daughter is most starkly demonstrated by his travel to Ethiopia when she was ill notwithstanding the risk which he considers exists there (as confirmed by Ms Carruth) that he might be discovered and sent back to Eritrea. I am satisfied that the Sponsor enjoys family life with the First Appellant.

42. I am also satisfied that the Sponsor enjoys a relationship which is properly described as family life with the Second Appellant. I have accepted their evidence about the relationship. Whilst they did not live together in Eritrea before the Sponsor left that country (for the reasons I have set out), the fact that they have lived since at a long distance apart due to circumstances beyond their control does not mean that this cannot be family life. They have both described how their relationship is continued. I repeat what I say above about the Sponsor's visit to Ethiopia which was necessitated by the Second Appellant's need for his support at a time when the First Appellant was ill.

43. For those reasons, I find that the Appellants have a family life with the Sponsor for the purposes of Article 8 ECHR. It goes without saying that the refusal of entry clearance is an interference with the family lives of both the Appellants and the Sponsor. They are able to maintain a form of relationship by remote means but are unable to live together as a family unless they can settle either in the UK or Ethiopia (it being accepted that they cannot do so in Eritrea because the Sponsor is at risk of persecution there).

44. I turn then to the issue of justification and proportionality.

45. When considering proportionality, the best interests of the First Appellant are a primary consideration. Although I did not find Mr Horrocks' report of much assistance, I have accepted that it is in the First Appellant's best interests to be brought up with both her parents.

46. The situation in which the Appellants find themselves in Ethiopia is, as I have accepted, less stable than it would be in the UK. Even if they are not directly at risk (as there is no evidence that they have so far faced a threat of being returned to Eritrea), they face discrimination and harassment as Eritrean refugees in Ethiopia. The Second Appellant has said (and I accept) that the First Appellant is not in education either because she is not entitled to be, or the Second Appellant considers it too dangerous for her to go to school. Either way, the First Appellant who is now approaching the age of compulsory education in this country is being denied access to education. I take into account that the Appellants do not speak English and that the First Appellant is likely to take time to adjust to the UK. She is still quite young though and therefore should find it easier to adapt. For all of those reasons, I find that the First Appellant's best interests are to be in the UK.

47. The Respondent's position is that both parents could live in Ethiopia with their child. I reject that submission. I have accepted the Expert Report and the evidence of the Second Appellant about her circumstances. Although I acknowledge that the Sponsor has recently travelled to Ethiopia and therefore has been prepared to take the risk of doing so in order to be with his partner and child, as I have already pointed out, there is a difference between going somewhere for a short visit and living there permanently. I accept the evidence that the Sponsor would face the

risk as an Eritrean living in Ethiopia of being sent back to Eritrea where it has been accepted that he would be at risk of persecution.

48. I take into account the public interest. In so doing, I have regard to Section 117B so far as relevant to this case.

49. I have already found that the First Appellant meets the Rules for family reunion with the Sponsor. The Appellants have quite properly applied for entry clearance for them to join the Sponsor. They have not and are not seeking to circumvent the Rules. I have explained why the First Appellant meets the Rules. Although the Second Appellant does not meet paragraph 352A of the Rules on my findings, I have concluded that the First Appellant’s best interests are to be in the UK and with both parents. There is no strong public interest weighing against the Appellants in relation to the maintenance of effective immigration control.

50. The only other factors relevant in this case are Section 117B (2) and (3). Mr Sellwood accepted that the Appellants do not speak English. I have already referred to the fact that the First Appellant is very young and probably does not speak any language to a high level. She is likely to be able to adapt quite quickly to learning a new language due to her age. The Second Appellant may find it more difficult. However, Mr Sellwood said that the Sponsor is seeking to integrate and trying to learn English. He can therefore assist the Second Appellant to do the same. Whilst this does weigh against the Appellants, it is not a strong factor.

51. In relation to financial independence, whilst the Sponsor does not appear to earn much (looking at the bank statement evidence in the Appellant’s bundle), Mr Sellwood confirmed that the Sponsor is not reliant on public funds. The Appellants would in any event not be given recourse to public funds on arrival. For that reason, this is a neutral factor.

52. Balancing the interference with the family lives of the Sponsor and Appellants against the public interest as set out above, I conclude that the refusal of entry clearance is a disproportionate interference with their Article 8 rights. That is particularly so since the First Appellant meets the Rules in relation to family reunion as the Sponsor’s biological child and that her best interests are to be in the UK with her father.

CONCLUSION

53. The Respondent’s decisions to refuse the Appellants entry clearance are a disproportionate interference with the family lives of the Appellants and the Sponsor. As such, they are unlawful as contrary to section 6 Human Rights Act 1998 (Article 8 ECHR). I therefore allow the appeals.

DECISION

I allow the appeals on human rights (Article 8) grounds.

Signed L K Smith Dated: 19 August 2022
Upper Tribunal Judge Smith

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-001350
[HU/00831/2021; HU/01019/2021]

THE IMMIGRATION ACTS

Decision made on the papers **Determination Promulgated**
On Tuesday 5 July 2022
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DECISION AND DIRECTIONS

1. This is an appeal by the Entry Clearance Officer. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Davey promulgated on 8 December 2021 ("the Decision"). By the Decision, the Judge allowed the Appellants' appeal against the Respondent's decisions dated 25 September 2020 refusing their human rights claims. Those claims were made in the context of an application for family reunion to join their father/spouse (respectively), MM (hereafter the Sponsor). The Sponsor has been recognised as a refugee in the UK

2. The Appellants are nationals of Eritrea currently living in Ethiopia. The First Appellant is the daughter of the Second Appellant. It is accepted that the First Appellant is also the child of the Sponsor. However, the Respondent did not accept that the Second Appellant had been in relationship with the Sponsor for a sufficient period prior to his departure from Eritrea.

3. The Judge accepted on the expert evidence that the Appellants faced credible risks in their current situation. He accepted that the Sponsor is the father of the First Appellant but did not accept that the Sponsor had enjoyed family life prior to leaving Eritrea ([9]). He found that "the present situation was not one of an interrupted family life so much as that desire to make a new life for themselves" ([11]). He thereafter expressed the issue as being whether that family life should be enabled in the UK or could be formed in Ethiopia where the Appellants currently reside ([13]). He then found that "this was a paradigm example of effecting the establishment of a family life between the First Appellant and the Second Appellant with the Sponsor" ([14]). Given his findings about the difficulties of family life being established in Ethiopia and that he accepted the relationship to be genuine and subsisting, he went on to allow the appeals on the basis that Respondent's decisions were disproportionate ([16] and [17]).

4. The Respondent appeals on three grounds as follows:

   Ground one: the Judge has misdirected himself in law by failing to have regard to section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B")

   Ground two: the Judge has failed to provide adequate reasons

   Ground three: the Judge has given weight to immaterial matters, namely the best interests of the First Appellant and evidence which was untranslated.

5. Permission to appeal was granted on 21 January 2022 by First-tier Tribunal Judge Komorowski in the following terms:

   "... 2. All grounds are arguable.

> 3. It is arguable the judge has omitted to consider whether the appellants are able to speak English (Nationality, Immigration and Asylum Act 2002, section 117B(2) and whether they are financially independent (s117B(3)). If either of those questions was to be answered in the negative, it is arguable the judge has failed to take account of these matters in the assessment of proportionality.
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> 4. It is arguable that the judge has erred in finding that the appellants' interests in establishing a family life that does not presently exist engage ECHR, Article 8, or that a decision refusing the appellants entry clearance to begin family life constitutes an interference with anyone's rights under Article 8. See Kopoi [2017] EWCA Civ 1511, para 23.
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> 5. It is arguable that the judge erred in taking into account the best interests of a child abroad. The Upper Tribunal has appeared somewhat uncommitted to whether this is relevant (KF (entry clearance, relatives of refugees) Syria [2019] UKUT 00413 (IAC), para 15, last two sentences). Given that those abroad do not have rights protected by the ECHR (KF, ibid), it is arguable that their best interests are irrelevant.
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> 6. It is arguable that the judge's reasoning, in places, is so unclear as to leave the informed reader in reasonable doubt as to why the judge reached the conclusions the judge did."

6. The matter therefore comes before this Tribunal to determine whether there is an error of law in the Decision and if it concludes that there is whether the Decision should be set aside. If the Decision is set aside, this Tribunal then needs to determine whether the appeal should be remitted for the purpose of re-making or whether the decision can be re-made in this Tribunal.

7. The appeal was listed for an error of law hearing on Wednesday 6 July 2022. However, the Appellants filed a Rule 24 Reply dated 30 March 2022 in which they accept that the Judge has materially erred by failing to have regard to Section 117B (ground one). They also accept in relation to ground two, that the Decision is "incoherent in various respects" particularly in relation to the findings as to whether they have an extant family life with the Sponsor. The Appellants therefore accept that there is an error in this regard and that fresh findings of fact need to be made. The Appellants do not concede ground three. They contend that the best interests of the First Appellant are relevant and that some of the material said to be untranslated was in fact translated. The Appellants concede however that, in light of the errors which are accepted, the Decision should be set aside and directions given for a resumed hearing in this Tribunal with no findings of fact preserved.

8. By an email sent on Friday 1 July 2022, the parties were asked whether they consented to a decision being made on the papers, reflecting the Appellants' concessions, setting aside the Decision and giving directions for a resumed hearing.

9. By an email dated later that day, the Appellants' representatives consented to that course. They indicated that the Appellants wished the appeals to remain in this Tribunal, did not seek to have any findings preserved and did not seek any directions other than that there be a resumed hearing.

10. By an email dated 5 July, the Respondent's representative also agreed that the error of law could be decided on the papers. She agreed that no findings of fact should be preserved. However, she contended that the appeals should be remitted to the First-tier Tribunal as there would be extensive fact-finding required.

11. In response, the Appellants' representatives reiterated their view that the appeals should remain in this Tribunal. They pointed out that the evidence was relatively recent, that no updating evidence was required and that the appeals could be disposed of more quickly if they remained in this Tribunal.

12. I accept that the Appellants' concessions are rightly made. The Judge has erred by failing to take account of the public interest considerations set out in Section 117B. The Judge's findings in relation to the existence, continuation or formation of family life are unclear. It is therefore not clear on what basis the Judge reached the conclusion he did.

13. I also agree with both parties that it is not appropriate to preserve any findings of fact. As such, the appeals will need to be heard entirely de novo. However, the issues are relatively narrow and the parties do not seek to adduce any further evidence. I therefore see no reason why the appeals need to be remitted for redetermination. I have therefore given directions for a resumed hearing in this Tribunal.

CONCLUSION

14. For the reasons given, I conclude that the Decision contains errors of law. I set aside the Decision. No findings are preserved. I make the following directions for a resumed hearing in this Tribunal.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Davey promulgated on 8 December 2021 is set aside. No findings are preserved. I give directions below for the re-making of the decision in this Tribunal.

DIRECTIONS

The appeals will be relisted for a resumed hearing before any Judge on a face-to-face basis on the first available date. Time estimate ½

day. The Appellants are to notify the Tribunal within 7 days from the date when this decision is sent whether an interpreter is required and if so which language and dialect.

Signed L K Smith Dated: 5 July 2022
Upper Tribunal Judge Smith