IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001909

First-tier Tribunal No: HU/00724/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

8th December 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

SHARMARKE WASUGE OMAR
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr P Richardson of Counsel instructed by CNA Solicitors
For the Respondent: Ms A Ahmed Senior Home Office Presenting Officer

Heard at Field House on 10 November 2023

DECISION AND REASONS

1. There has been no request for anonymity in these proceedings, whether in respect of the appellant or his family members in the United Kingdom. Although we note that the appellant's family members in the United Kingdom are refugees, we see no reason on the facts of this case to issue an anonymity order of our own volition.

2. By a decision promulgated on 25 July 2023, we set aside the decision of First-tier Tribunal Judge Bart -Stewart ("the Judge") promulgated on 2 November 2021 dismissing the appellant's appeal against a decision of the respondent dated 19 December 2020, to refuse his application for family reunion made on 17 September 2020. The Judge heard the

appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002.

Background

3. In this decision we are remaking the decision on appeal acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. The context of this remaking decision is our error of law decision annexed to these reasons, which sets out the background to the appellant's appeal. In short, the appellant is a Somalian national currently living in Ethiopia. The sponsor is his mother and she is a Somalian national who was granted asylum by the respondent in 2017, the sponsor is recognised as a refugee from that country as a member of a minority clan on the basis of her fear of Al -Shabaab, the Abgal and the Habargidir clans in Mogadishu.

4. Without rehearsing the error of law decision in full, the issue is whether the appellant is entitled to a grant of leave to enter the UK as the child of a refugee on the basis that:
    a. he is not leading an independent life (paragraph 352D (iii)), and
    b. he was part of the sponsor's pre- flight family unit (paragraph 352D(iv)), or
    c. his exclusion amounts to an unjustifiable interference with his and his mother's rights under Article 8 ECHR.

5. In our error of law decision, we concluded that the Judge's reasons were inadequate in one material respect in relation to the finding that the appellant is unable to meet the requirements of paragraph 352D(iv) of the Immigration Rules as we set out at §34:
    "In our judgment, the difficulty with the judge's finding that the appellant was not part of the sponsor's family unit in 2011 is that she failed to reconcile that finding with her earlier finding that the appellant had not formed an independent family unit. As Mr Richardson noted, the judge had accepted that the appellant was the appellant's son, that they were separated when he was in the region of ten years old, and that they enjoyed a family life at the date of the hearing before her. Those findings pointed towards a conclusion that the appellant was indeed part of the sponsor's family unit in 2011 and we cannot understand from [29] the basis upon which the judge did not reach that finding. The lack of clarity in the chronology given by the sponsor does not rationally supply that reason, without more, and Mr Richardson is entitled to submit that the judge's reasons are insufficient to ensure that the losing party, the appellant, was left in no doubt as to why he lost."

6. Having found the Judge's analysis of the appellant and sponsor's pre-flight situation was inadequately reasoned, we set aside the Judge's decision as a whole.

The hearing

7. The remaking hearing took place on 10 November 2023. The appellant relied on what was referred to as a supplementary bundle [SB] filed in two parts comprising a total of 180 pages [SB:16 to 18]. The representatives confirmed that the supplementary bundle is a comprehensive bundle and includes all that is required to determine the appeal.

8. A Rule 15(2A) application had been made on behalf of the appellant to admit evidence of the death on 10 June 2023 of Abdullahi Mohamed Muse (the sponsor's stepson) which included an additional witness statement from the sponsor dated 31 October 2023, photographs of the deceased and other documents relating to the death. Ms Ahmed did not object to the admission of this evidence. Since this is new and potentially relevant evidence which did not exist at the date of the First-tier Tribunal hearing and as there was no objection from the respondent, we agreed to admit the evidence.

9. The sponsor attended the hearing together with the appellant's stepbrother, Mr Abdi Muse. The sponsor adopted her three witness statements dated 19 July 2020 [SB:78], 8 October 2021 [SB:36] and 31 October 2023 [SB:16] and gave oral evidence through a Somali interpreter whom she confirmed she understood. Mr Abdi Muse who had given evidence at the hearing before Judge Lever was present at the hearing before us but was not called to give evidence.

10. At the end of the hearing, we reserved our decision.

11. We do not recite the evidence in full or the parties' respective submissions, except where it is necessary to resolve disputed findings of fact and explain our conclusions. We have considered all of the evidence to which we were referred, whether we make reference to it or not.

Decision and reasons

12. Despite the concerns expressed in our error of law decision at [2] that the chronology of events is somewhat unclear, unfortunately the appellant's supplementary bundle did not include a more defined chronology. We are grateful to both representatives for their efforts in attempting to clarify the chronology during the hearing.

13. The issues before us were to determine whether the appellant formed a part of the sponsor's pre- flight family (352D(iv)) and whether the appellant is leading an independent life (352D(iii)). A finding that the appellant was a part of the Sponsor's pre – flight family and is not

leading an independent life, will be determinative of the appellant's appeal. Alternatively we are required to determine whether the respondent's refusal amounts to an unjustifiable interference with the appellant's and his mother's rights under Article 8 ECHR.

14. In addition to the sponsor's oral and written evidence we also had letters of support from various friends. There is an undated statement from Mr Ibrahim Mohamed Salad, a Somali citizen currently living in Melbourne, Australia [SB:112-113]. He claims to have known the sponsor and her children when they were in Somalia and also supports the sponsor's claim to have escaped from Somalia to Ethiopia and to have lost touch with her children. He claims he found the sponsor's children when searching for his own children and he helped them to travel Addis Ababa and he asked friends to inform the sponsor that her children were alive and well. Although the statement is undated and does not include a statement of truth and Mr Salad did not attend the hearing before us and so his evidence could not be tested under cross examination, we give some weight to his statement given the level of detail in it.

15. The appellant has also produced an undated statement from Mr Ahmed Mohamud Sebye [SB:89-90] who claims he lives in Ethiopia and is a family friend. He claims the sponsor asked that that he accommodate and care for her children. He also claims that he cares for the appellant. He states that her other children are currently attending school trying to catch up the years they lost when they were separated from their mother. This is inconsistent with the sponsor's latest witness statement and her oral evidence in which she states that both Abdullahi Muse and Dequo Wasuge Omar had left Ethiopia and had travelled back to Somalia although we appreciate that an explanation for this may be that Mr Sebye's statement pre-dates Abdullahi's and Dequo's departure. The sponsor in response to cross examination admitted that she had asked Mr Sebye to say what he has in his statement. This admission undermines the corroborative value of the statement. We give little weight to this statement.

16. There is an undated statement from Mr Keydsane Mahamoud Gacal [SB: 115-116] who claims to have known the Sponsor and her son in the UK (we assume this is a reference to the sponsor's stepson Abdi Muse). There is also an undated statement from Kaaho Abdi Elmi [SB:118-119] who claims to be a friend of the sponsor and to have grown up with her in Mogadishu. She also claims to have known the sponsor and her children in Somalia. The sponsor in response to a question from us confirmed that Kaaho Abdi Elmi and Dahabo Elmi are sisters. We note that according to the evidence given to Judge Lever [20] by Abdi Muse he is married to Dahabo Elmi.

17. The appellant is now an adult so it is surprising there is no statement from him.

18. The various witnesses who have provided statements did not attend the hearing and so their evidence could not be tested. Although we give some weight to the statement of Mr Salad we give little weight to the other statements as their evidence could not be tested. We appreciate that Mr Salad and Mr Sebye are both abroad so it may have been difficult for them to attend, however this was not an explanation offered in this case and the other witnesses live in London so it is surprising that they chose not to attend the hearing to support the appeal.

19. The Sponsor in her latest witness statement states that her son Abdullahi Mohamed Muse who was one of the three appellants in the appeal before Judge Lever returned to Somalia from Ethiopia sometime around December 2022 and sadly on 10 June 2023 he was shot whilst driving and subsequently died. The appellant's bundle includes photographs and documentary evidence in support of the death.

20. Mr Richardson very pragmatically acknowledged that this further evidence submitted on behalf of the appellant is peripheral and does not go to the core of the account and at best it demonstrates the harm that befell the sponsor's stepson and at worst it is an attempt to bolster the appellant's claim. We agree with Mr Richardson that this evidence does not assist us in determining the issues before us. Nevertheless we assess the documentary evidence applying the principles in Tanveer Ahmed (Documents unreliable and forged) Pakistan [2002] UKIAT 00439 in that it is for the appellant to show that the documents on which he seeks to rely can be relied upon.

21. There are numerous difficulties with the further evidence. Ms Ahmed identified a deficiency in the hospital letter in that it gives the wrong date of birth for the deceased, the photographs do not bear a date and do not include any details which would assist us in identifying the person shown in them as the sponsor's stepson Abdullahi Mohamed Muse. We give little weight to this evidence and find it to be an attempt to bolster the appellant's claim.

22. In relation to our consideration of whether the appellant was a part of the sponsor's pre-flight family unit, Mr Richardson referred to guidance given by the Upper Tribunal in BM and AL (352D(iv), meaning of "family unit") [2007] UKAIT 55, which is succinctly set out in the headnote as follows:

    "What is a 'family unit' for the purposes of para 352D(iv) Immigration Rules is a question of fact. It is not limited to children who lived in the same household as the refugee. But if the child belonged to another family unit in the country of the refugee's habitual residence it will be hard to establish that the child was then

part of two different ‘family units’ and should properly be separated from the ‘family unit’ that remains in the country of origin.”

23. The respondent accepts the sponsor is the biological mother of the appellant. The requirement of 352D(i) of the Immigration Rules is met.

24. Both representatives agreed that the starting point in this appeal is the decision of Judge Lever promulgated on 17 March 2020 (Devaseelan [2002] UKIAT 00702; [2003] Imm AR 1) as it is the authoritative assessment of the appellant's status at the time it was made. Facts happening since the first decision (in this case Judge Lever’s decision) can always be taken into account, however if the appellant relies on facts that are not materially different from those relied on previously these issues should be regarded as settled by the first decision rather than allowing the matter to be re-litigated.

25. Although Judge Lever in his decision [25] did not accept the appellant was under the age of 18 at the date of application, this is not an issue that is raised by the respondent in the refusal dated 19 December 2020 which is the subject of this appeal. Ms Ahmed confirmed at the hearing before us that the respondent now accepts the appellant was not over 18 years of age at the date of the application and so this issue falls away. The evidence before us includes a copy of the appellant’s Somali passport issued on 30 September 2020 which gives his date of birth as 17 October 2002 [SB:39]. The appellant’s passport was issued almost six months after Judge Lever’s decision was promulgated. It is new evidence which permits us to depart from Judge Lever’s finding as to the appellant’s age at the date of the application. Accordingly, we proceeded on the basis that that the appellant was under 18 years of age at the date of his application and meets the requirement under 352D(ii) of the Immigration Rules.

26. Judge Lever’s finding that the sponsor is the biological mother of the appellant his sister Dequo Wasuge and his brother Abdi Muse and also the stepmother of Mr Abdullahi Mohamed Muse [18] is not challenged and is consistent with the evidence before us. However, Judge Lever made no findings as to their father(s).

27. Ms Ahmed on behalf of the respondent, despite submitting that the sponsor’s evidence was unreliable, evasive, unclear and untruthful, having heard from the sponsor accepted that the sponsor had two husbands Omar Wasuge and Mohamed Muse.

28. In her evidence before us the sponsor clarified that Omar Wasuge is the father of the appellant and Deqo Wasuge. The sponsor explained that she was married to Omar Wasuge but he left her and that sometime in or around 1999/2000 she married Mohamed Muse who is the father of Abdullahi Mohamed Muse and Abdi Muse. In the absence

of any evidence to the contrary we accept this aspect of the sponsor's evidence.

29. The sponsor in her asylum interview states after her husband was killed in 2005, she fled with her three children to a refugee camp on the outskirts of Mogadishu (AIR Ques: 31-39).

30. It is not disputed the sponsor has been granted refugee status this is supported by a copy of the sponsor's biometric residence permit and passport [SB: 37-38]. Judge Lever in his decision recognises that the sponsor having entered the UK on 27 October 2016 as an adult dependent relative of her son (Abdi Muse) who had obtained refugee status in the UK subsequently claimed asylum in November 2017. The sponsor's application for asylum was granted by the respondent following an asylum interview on the basis of her fear of Al -Shabaab, the Abgal and the Habargidir major clans in Mogadishu as she is from a minority clan.

31. It is therefore accepted that the sponsor left Somalia as she is from a minority clan. The sponsor from the outset has consistently maintained that she lost contact with the appellant when he was around 8 years old in 2011 when a fight broke out in the camp in Mogadishu and there was shooting and people were running (AIR Ques: 41- 45). The appellant's age as stated by the sponsor in her asylum interview is consistent with the copy of his passport (SB:39). We accept the appellant would have been 8 years old in 2011 when the incident occurred causing the sponsor to flee Somalia. Although we have no evidence in support of the sponsor's claim that she had been living with the appellant and her other children in a refugee camp in Mogadishu other than the witness statements from friends, given the young age of the appellant at the time we consider it likely that he lived with his mother, the sponsor as part of the family unit. Accordingly we find the appellant was a part of the sponsor's pre-flight family and meets the requirement of paragraph 352D (iv) of the Immigration Rules.

32. Turning to the question of whether the appellant is leading an independent life. Mr Richardson relies on the guidance of Upper Tribunal in NM ("leading an independent life") Zimbabwe [2007] UKAIT 00051, as to the meaning of " leading an independent life, The headnote of NM states as follows:

> "Where a child (who may be over 18) is seeking limited leave to remain as the child of a parent with limited leave, in order to establish that he is not "leading an independent life" he must not have formed through choice a separate (and therefore independent) social unit from his parents' family unit whether alone or with others. A child who, for example, chooses to live away from home may be "leading an independent life" despite some continuing financial and/or emotional dependence upon his parents."

33. Essentially, the question is whether the appellant if he is leading an independent life has done so through choice.

34. Ms Ahmed submitted that the burden of proof is on the appellant and he had not shown he has ever lived with the sponsor and that it was reasonable to conclude that he may have lived with another family and has always been independent of his mother. Ms Ahmed submitted that evidence of the sponsor was not reliable, it was unclear before Judge Lever and remained unclear. We acknowledge the difficulty with the sponsor's evidence however we find there is force in Mr Richardsons submission that regardless of the unreliability or lack of credibility of the sponsor the question is whether the appellant has led an independent life through choice or as a consequence of events that led to his separation from the sponsor and to her claim for protection.

35. It is uncontroversial to note that due to the nature of conflict and persecution forcing people to flee their country of origin often in a clandestine manner and at speed to seek asylum, families can become fragmented. In this case we have little detail about the incident that took place in 2011 when the sponsor claims she was separated from her children (including the appellant) save that, a fight broke out, there was shooting all around the place and people were running. Whatever occurred during this incident, on the evidence, this is the point at which the sponsor was separated from the appellant and fled Somalia. The respondent recognised the sponsor as a refugee as it was accepted she fled Somalia due to being a member of a minority clan and her fear of the majority clans. On the basis of these facts surrounding the separation, the subsequent life led by the appellant cannot be said to have been through choice. The appellant was compelled by the conflict, persecution and separation to live apart from his mother, this does not amount to the appellant living an independent life through choice. We find the appellant meets the requirements of paragraph 352D(iii).

36. In conclusion, on a consideration of all the evidence we find the appellant meets the requirements of paragraphs 352D of the Immigration Rules for a grant of leave to enter the UK. This is determinative of the appellant's human rights appeal.

Notice of Decision

The FtT's decision to dismiss the appellant's appeal was set aside.

We remake the decision on the appeal by allowing the appeal on human rights grounds.

There is no order for anonymity.

Case No: UI-2021-001909
First-tier Tribunal No: HU/00724/2021

N Haria
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 December 2023

ANNEX

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001909

First-tier Tribunal No: HU/00724/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE BLUNDELL
and
DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

SHARMARKE WASUGE OMAR
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Paul Richardson, of counsel, instructed by CNA Solicitors
For the Respondent: Arifa Ahmed, Senior Presenting Officer

Heard at Field House on 27 April 2023

DECISION AND REASONS

1. There has been no request for anonymity in these proceedings and the appellant's name appears in full as a result. As we shall come to explain, however, the appellant seeks to join family members in the United Kingdom, both of whom are recognised refugees. There is no need to refer to those family members by name.

Background

2. The appellant is a twenty year old citizen of Somalia. He was born in Mogadishu in October 2002. He is one of three siblings. His older brother lives in London with his mother, the sponsor. His sister remains is in Ethiopia. His father is deceased.

3. It is a hallmark of this case that the chronology of events is somewhat unclear. In outline, however, it is claimed that the appellant lived with his mother and siblings in Somalia until 2011. They were separated at that point as a result of the civil war. The sponsor fled to Ethiopia, leaving her children. She spent several years there before she was sponsored to come to the UK by her eldest son, who had entered and been granted leave to remain as a refugee some years before.

4. The sponsor was granted leave to enter to join her son. She subsequently claimed asylum in her own right. She underwent an asylum interview on 23 April 2018. During the course of that interview, she named the appellant and his two siblings and gave an account of what had befallen them in Somalia. She stated that she had not been in touch with the appellant and his sister since they were separated in 2011. The sponsor was granted asylum in 2018.

5. The sponsor is said to have regained contact with the appellant and his sister in 2018. They had left Somalia and travelled to Ethiopia. The sponsor visited them in Ethiopia in 2019. Later that year, the sponsor made applications for the appellant, his sister and their stepbrother to join her in the United Kingdom. The applications were supported by various documents including a DNA report which established that the sponsor and the appellant were related as claimed.

6. Those applications were refused and the decisions were upheld on review by an Entry Clearance Manager on 11 November 2019. The appellant's application was refused because the ECO did not accept that the appellant was part of the sponsor's pre-flight family unit or that he had not formed an independent life. It was not accepted that paragraphs 352D(iii) and (iv) of the Immigration Rules were met, therefore. Nor was it accepted that the appellant and his siblings were under the age of eighteen at the date of application. The visa officers did not accept that the appellants' exclusion amounted to an interference with Article 8 ECHR rights.

The First Appeal

7. The appellant and his siblings appealed to the First-tier Tribunal and their appeals were heard by Judge Lever, sitting at Newport, on 4 February 2020. He heard evidence from the sponsor and her eldest son before hearing submissions from the respondent's Presenting Officer and counsel for the appellants.

8. In his reserved decision, Judge Lever expressed concern about fundamental inconsistencies between the accounts given by the sponsor and her eldest son. There were inconsistencies surrounding the date of the sponsor's husband death, the timing of the sponsor and her eldest son regaining contact, and the means by which they did so: [19]-[20]. He was not satisfied that the appellant and his sister were under the age of eighteen, since the sponsor would have been in her mid-fifties when she gave birth to them if that were true: [25]. In the same paragraph, Judge Lever noted that the sponsor had only named one child when she made her own application for entry clearance in 2013. At [26], the judge found that the appellants were unable to meet paragraph 352D(ii) (under eighteen at date of application) or paragraph 352D(iii) (not leading an independent life). Judge

Lever made no explicit finding in relation to the question of whether the appellant and his siblings were part of the sponsor's pre-flight family unit. We were informed by Mr Richardson at the hearing that an appeal against Judge Lever's decision was ultimately unsuccessful.

9. In the meantime, the appellant made a second application for entry clearance to join his mother. He did so in September 2020, shortly before the date on which he would have turned eighteen, according to the date of birth he had originally given. This second application was refused on 19 December 2020. This is the decision under appeal in these proceedings.

10. In the second decision, the Entry Clearance Officer noted the previous refusal and the decision of Judge Lever. She set out the evidence relied upon by the appellant. The ECO concluded that the appellant had been leading an independent life and had not formed part of the sponsor's pre-flight family unit. This application was accordingly refused under paragraphs 352D(iii) and (iv) of the Immigration Rules. The ECO did not consider the refusal of admission to breach Article 8 ECHR.

The Second Appeal

11. The appellant appealed for the second time to the First-tier Tribunal (IAC). His appeal was heard by Judge Bart-Stewart, sitting at Taylor House in October 2021. The appellant was represented by Mr Coleman of counsel. The respondent was unrepresented. The judge heard oral evidence from the sponsor and a submission from counsel before reserving her decision.

12. In her reserved decision, the judge noted counsel's submission that the relationship between the sponsor and the appellant was accepted to be one of mother and son and that no issue had been raised by the ECO about the appellant's age: [14]. She accepted that submission, as is clear from [27]. Counsel also accepted, without conceding the point, that he was in some difficulty in relation to the appellant not having been part of the sponsor's pre-flight family unit: [15]. The case was therefore advanced principally in reliance on Article 8 ECHR.

13. The judge began her detailed analysis of the appeal by setting out a concise summary of Judge Lever's decision: [16]-[19]. She was evidently conscious of the approach required by Devaseelan [2003] Imm AR 1 in that connection, since she made reference to that decision at [26]. The judge then considered the evidence which had been adduced by the appellant in an attempt to persuade her to depart from Judge Lever's conclusions. Like Judge Lever, she had before her the sponsor's asylum interview: [20]. She also had statements from three gentleman who spoke to the events in Somalia, the circumstances in Ethiopia, and the age of the sponsor: [21]-[23]. The judge also had what purported to be identity documents for the appellant which had been issued in Mogadishu in September 2020, which the judge considered to 'raise doubts about the appellant's circumstances': [24].

14. Having set out some of the requirements of paragraph 352D of the Immigration Rules, the judge turned to her own findings of fact at [27]. She recalled that the only issues before her were whether the appellant had formed an independent family unit and whether he was 'part of the

sponsors [sic] family when she left the country of her habitual residence which is Somalia': [27]. Her conclusions on those two issues appear at [28] and [29] respectively and it is necessary to reproduce those paragraphs in full:

> "[28] There is no evidence to suggest that the appellant is married or a civil partner. He is said to live with his two older siblings in accommodation provided by a third party. I consider it more likely than not that the appellant is living with his siblings and in light of his given age unlikely to be leading an independent life. The evidence is the sponsor was separated from her children from 2011 when the appellant would have been 9 years old. There is no evidence of how the appellant and his sibling supported themselves during the claimed period of separation. Whilst the sponsor sends money, this in itself does not evidence dependency. The two eldest siblings are in Ethiopia and the appellant able to continue living with them. However, I have regard to the authority in NM ("leading an independent life") Zimbabwe [2007] UKAIT 00051 "the crucial issue is always to ask whether the child has, through choice, separated from his parents' family to form his own social unit". This is unlikely to have been the case and therefore I find that the appellant has not formed an independent unit. I depart from the finding of the previous judge o, [sic] this issue as the earlier finding was predicated on the appellant not being the age claimed.
>
> [29] Mr Coleman did not concede but has difficulty arguing that the appellant was part of the sponsors [sic] pre-flight family. The evidence before the previous judge was inconsistent and it is still not clear having read the asylum interview what precisely the position was when they sponsor left Somalia. It is not clear that she and the children were in a camp in Mogadishu. Mr Abraham Mohamed Salad's statement does not have any dates. That the sponsor might not know the whereabouts of her children when she was applying for a visa, does not explain why she did not put their names on the application. She applied to come to the UK as an adult dependant relative of a son. I find that appellant has failed to show that on the balance of probabilities he was part of the family unit of the sponsor at the time that she left the country of their habitual residence in order to seek asylum. The application therefore fails under the Immigration Rules."

15. At [30]-[34], the judge gave reasons for finding that the refusal of entry clearance was not contrary to Article 8 ECHR. She noted that the appellant had not lived with the sponsor for the majority of his life but she accepted that there was a protected family life between them: [31]. She recalled what had been said about proportionality in R (Razgar) v SSHD [2004] 2 AC 368. At [33], she recalled the requirements of section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") but she noted that the appellant was an adult and that he had the support of family members in Ethiopia. At [34], she considered there to be insufficient evidence to show that the appellant would be adequately financially supported and accommodated in the UK. There was therefore 'no compelling reason for

entry clearance to be granted' and the decision was a proportionate one: [34].

The Appeal to the Upper Tribunal

16. The grounds of appeal to the Upper Tribunal were settled by trial counsel and contended, in summary, that the judge had omitted relevant matters from her assessment of proportionality and section 55 of the 2009 Act. First-tier Tribunal Judge Gibbs considered these grounds to be arguable.

17. The appeal came before Deputy Upper Tribunal Judge Bowler on 14 February 2023. Mr Richardson of counsel represented the appellant and Ms Ahmed represented the respondent, as they did before us.

18. Mr Richardson made an application at that hearing (without prior notice to the respondent) to amend the grounds of appeal. The ground of appeal which he sought to introduce was that the judge had misdirected herself in law in failing to treat Somalia as the country in which the appellant and the sponsor were required by paragraph 352D(iv) of the Immigration Rules to have comprised a family unit. Ms Ahmed did not object to the variation of the grounds of appeal, but she did seek an adjournment in order to respond to the new point. Judge Bowler granted those applications, but she refused Ms Ahmed's application to 'cross appeal' against the judge's conclusion that the ECO had not raised the issue of the appellant's age in the notice of decision.

19. Shortly before the resumed hearing, Mr Richardson filed and served amended grounds of appeal. The first seventeen paragraphs developed the argument he had foreshadowed at the hearing before Jude Bowler. The final substantive paragraph was in the following terms:

> Finally, it is submitted that, given that the appellant's relationship to his mother has been established through DNA evidence and that he was 9 years old when she fled in 2011, the only reasonable conclusion that could be reached is that he was part of her family unit and that paragraph 352D is satisfied.

Submissions

20. In his opening submissions, Mr Richardson indicated that the original grounds of appeal were maintained, although he did not propose to make submissions on those points. He submitted that the judge had not been assisted by the ECO, who had taken the wrong point in time for considering whether the appellant was part of the sponsor's pre-flight family unit. The judge had adopted that error, he submitted, and had not clearly focused on the situation which obtained in 2011, before the sponsor left Somalia. Counsel had not conceded the point in the FtT.

21. Mr Richardson continued, noting that at [28], the judge had found in the appellant's favour that he had not formed an independent life, which tended to suggest that the judge had accepted that the appellant was a part of the sponsor's family unit at the date of the hearing in the FtT. That finding was to be considered alongside the other matters which were found in the appellant's favour. He was accepted to be the sponsor's child. It was

accepted, seemingly, that he was eight or nine years old when he separated from his mother. There was accepted to be a protected family life between the appellant and the sponsor at the date of the hearing. There were no adequate reasons given for not drawing the obvious inference that the appellant was part of the sponsor's family unit at the time that she fled in 2011. It was wholly unclear, Mr Richardson submitted, why the judge had been able to accept that the appellant and the sponsor were part of a family unit in 2021 but not in 2011.

22. Ms Ahmed began her submissions by observing that Mr Richardson's submissions had strayed beyond the original and amended grounds. She submitted, in particular, that the reasons challenge which he sought to develop was not prefigured in either document. She objected to the point being raised at such a late stage.

23. We asked Mr Richardson to respond to that objection. He submitted that the reasons challenge was adequately prefigured in [18] of the amended grounds. Whilst that was expressed on its face as a rationality challenge, the adequacy of the judge's reasons for finding against the appellant under paragraph 352D(iv) was clearly in issue. They were two sides of the same coin, in his submission.

24. We took time to consider the ECO's objection in the absence of the representatives. On resuming, we noted that we had read the papers carefully before the hearing began and that neither of us had detected a departure from the amended grounds in Mr Richardson's submissions. Whilst the reasons challenge could have been more clearly articulated in [18] of the amended grounds, we accepted Mr Richardson's submission that the irrationality challenge encompassed a contention that the judge had given inadequate reasons for finding against the appellant under paragraph 352D(iv) when she had accepted that he was not leading an independent life. We asked Ms Ahmed whether she was in difficulty and required additional time to consider the point. She asked for five minutes. We gave her ten minutes, after which she confirmed that she was prepared to proceed.

25. Ms Ahmed submitted that it was plain from the judge's decision that she had correctly understood the temporal focus of paragraph 352D(iv). Even if the ECO's decision was wrong in that respect, [16] and [29] of the judge's decision showed that she clearly understood the correct approach. Further paragraphs from the judge's decision showed that to be the case: [19], [20], and [27]. As for the reasons given by the judge for finding that the appellant was not part of the sponsor's pre-flight family, those were to be considered against the backdrop of Judge Lever's findings. It was clear that there were difficulties with the account given by the sponsor (and her eldest son) and the judge's decision reflected those difficulties.

26. Ms Ahmed submitted that the original grounds were nothing more than a disagreement with the judge's decision. It was to be recalled that the appellant was not a child at the date of the hearing and section 55 of the 2009 Act was of no application.

27. Mr Richardson responded briefly. He submitted that various parts of the decision which had been highlighted by Ms Ahmed were not part of the

judge's analysis. Insofar as the instant judge and Judge Lever had found the sponsor's account to be problematic, those problems did not bear rationally on the question of whether the appellant was part of the sponsor's family unit in 2011.

28. We asked the advocates for submissions on relief. Both submitted that the appeal should be retained in the Upper Tribunal for remaking in the event that we set aside the FtT's decision. We then reserved our decision on the questions posed by section 12(1) and (2) of the Tribunals, Courts and Enforcement Act 2007.

Paragraph 352D of the Immigration Rules

29. The relevant Immigration Rules have been amended since the judge heard the appeal and again since we heard the appeal to the Upper Tribunal. The clear and familiar requirements of paragraph 352D are now to be found in Appendix Family Reunion (Protection), at FRP 6.1 in particular. Whilst those requirements are materially identical to their predecessor, the transitional provisions in HC 719 and HC1160 mean that it is the following version of paragraph 352D which continues to apply in this appeal:

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

Analysis

30. There is no merit in the original grounds of appeal and Mr Richardson wisely opted to say very little about those grounds. The focus of the challenge in those grounds is on the adequacy of the judge's assessment under Article 8 ECHR and section 55 of the 2009 Act. The challenge to the Article 8 analysis is nothing more than a disagreement with the judge's decision. The challenge to the section 55 analysis is even less meritorious for the reason given by Ms Ahmed: by the date of the hearing before the judge, the appellant had attained his majority. Mr Richardson did not take us to any authority in which it has been accepted that the statutory obligation [1]continues beyond the point at which the individual turns eighteen.

31. Nor do we consider the first seventeen paragraphs of Mr Richardson's amended grounds to establish an error of law on the part of the judge. We accept Ms Ahmed's submission that the judge did not fall into the same

[1] or the 'spirit' of it which applies in the entry clearance context: Mundeba v ECO (Nairobi) [2013] UKUT 88 IAC refers

error as the Entry Clearance Officer in the temporal focus of her assessment of paragraph 352D(iv). Whilst she was not assisted by counsel on this question, it is clear from the judge's self direction at [27] that she considered whether the appellant was part of the sponsor's family unit "when she left the country of her habitual residence which is Somalia."

32. We are satisfied, however, that the reasons challenge which Mr Richardson rather opaquely prefigured in [18] of his amended grounds of appeal is made out. As we have recorded above, the challenge was originally framed as one of irrationality. The contention, in other words, was that the only rational finding which the judge could have made, in light of all that she had accepted, was that the appellant was part of the sponsor's family unit in 2011. We accept Mr Richardson's submission, however, that a ground expressed in that way necessarily encompasses a reasons challenge, which is that the judge's reasons were not rationally sufficient to justify the adverse finding, in light of all that she had accepted. It is notable that Ms Ahmed, who was characteristically well prepared, only requested five minutes in order to gather her thoughts to consider her response to this change of emphasis on Mr Richardson's part.

33. We have reproduced [28] and [29] of the judge's decision in full. Having heard the sponsor's evidence, she was prepared to accept that the appellant had not formed an independent family unit. That represented a departure from the finding previously made by Judge Lever. Applying the test in NM (Zimbabwe) [2007] UKAIT 51 (IAC), the judge found that the appellant had not, through choice, separated from the sponsor's family to form his own social unit. That finding chimed with the later finding that the appellant and the sponsor enjoyed a protected family life for Article 8 ECHR purposes.

34. In our judgment, the difficulty with the judge's finding that the appellant was not part of the sponsor's family unit in 2011 is that she failed to reconcile that finding with her earlier finding that the appellant had not formed an independent family unit. As Mr Richardson noted, the judge had accepted that the appellant was the appellant's son, that they were separated when he was in the region of ten years old, and that they enjoyed a family life at the date of the hearing before her. Those findings pointed towards a conclusion that the appellant was indeed part of the sponsor's family unit in 2011 and we cannot understand from [29] the basis upon which the judge did not reach that finding. The lack of clarity in the chronology given by the sponsor does not rationally supply that reason, without more, and Mr Richardson is entitled to submit that the judge's reasons are insufficient to ensure that the losing party, the appellant, was left in no doubt as to why he lost. Applying the test in Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377, we find that the judge's reasons are inadequate to support the finding that the appellant is unable to meet the requirements of paragraph 352D(iv) of the Immigration Rules. We find therefore that the decision is erroneous in law and that the error – which represented the sole basis for finding that the Immigration Rules were not met – was material to the outcome of the appeal. We will set aside the decision of the judge for that reason.

35. The question which then arises is as to the relief which should follow. Had we accepted that the judge's finding on paragraph 352D(iv) was irrational, we

would have substituted a decision allowing the appeal, since the only rational finding open to us would have been that the appellant satisfied this requirement of the Immigration Rules. But that was not our conclusion and it is clear to us that the facts of this case require further consideration in order that a clear and reasoned finding can be reached on this aspect of the Immigration Rules. In order to reach that finding, it will be necessary to hear oral evidence from the sponsor, and from any other witnesses which the appellant wishes to call.

36. In common with the advocates, we see no reason why that enquiry should not take place in the Upper Tribunal. In reaching that conclusion, we have reminded ourselves of the terms of the SPT's Practice Statement and of the recent guidance in Begum (remaking or remittal) [2023] UKUT 46 (IAC). The appellant has not been deprived of a fair hearing or an opportunity to put her case.

37. It remains for us to consider the extent of the fact finding which is necessary, however. Mr Richardson would no doubt have submitted that the appellant should retain the benefit of the positive findings made by the FtT, and that the enquiry should be limited to the question of whether the appellant and the sponsor were part of the same family unit in 2011. To approach the matter in that way would in our judgment be to overlook the clear need in this case to consider the whole of the chronology with care. To preserve the judge's finding that the appellant is not leading an independent life would create an artificial fetter on the ability of the Upper Tribunal to make findings on the evidence as a whole. As has been made clear in AB (Iraq) [2020] UKUT 268 (IAC); [2020] Imm AR 1451, it can be difficult in practice to draw a bright line around certain findings and to order that they should be preserved, particularly where those findings centre, as here, on conclusions reached about a person's credibility.

38. In our judgment, therefore, the proper course is as follows. Having found that the judge's analysis of the pre-flight situation was inadequately reasoned, we consider that the evidence will have to be reconsidered as a whole with a view to making findings on the true position at that point in time. In order to do so, we consider it necessary to set aside the judge's decision as a whole. The appeal will therefore be considered afresh in the Upper Tribunal. Given the panel's familiarity with the case, we will endeavour to have the matter listed before one or both of us on a date to be fixed. A Somali interpreter will be provided for the hearing, which will be an in person hearing at Field House. Standard directions will be issued in due course, but the parties are at liberty to apply for further directions should they wish to do so.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. That decision is set aside in full. The decision on the appeal will be remade in the Upper Tribunal, with no findings of fact preserved.

M.J.Blundell

Judge of the Upper Tribunal