IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001225
UI-2024-001226
FtT No: HU/59514/2022;
LH/05956/2023
HU/59513/2022; LH/05954/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 22nd October 2024

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Raho Muse Ibrahim
Sharmake Ismail Musa
(No anonymity order made)

Appellants

and

Entry Clearance Officer, Addis Ababa

Respondent

Representation:

For the Appellant: Ms Hashmi, Counsel instructed by Mamoon Solicitors (remote)
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

Heard in Manchester Civil Justice Centre on the 9th September 2024

DECISION AND REASONS

1. The Appellants are both nationals of Somalia, currently residing in Ethiopia. They are respectively a mother (born 15th March 1985) and her son (15th June 2004. They seek entry clearance as the pre-flight family members of their refugee Sponsor. The Sponsor states that the Appellants are his wife and son.

2. The applications for entry clearance were made on the 20th December 2021. The Appellants asserted family reunion rights under what were then paragraphs 352 and 352D of the Immigration Rules.

3. The applications were refused on the 8th November 2022. The ECO observed that there were inconsistencies in the account provided by the Sponsor. When he had been interviewed in connection with his asylum claim he had said he was single with no children, and on another occasion had provided names of a wife and son which were completely different to those now provided by the Appellants. The ECO was not satisfied that the Appellants were in fact the Sponsor's wife and son and so found the refugee family reunion provisions were not engaged.

4. The appeals came before First-tier Tribunal Judge Thorne, who by his written decision of the 28th November 2023 dismissed them. He noted that the Sponsor left Somalia in 2008, and that he does not appear to have ever lived with either of the Appellants. Although DNA evidence had been produced demonstrating that the Second Appellant is in fact the son of the Sponsor and the First Appellant, this did not demonstrate that there was a subsisting family life between them.

5. The Appellants appealed to the Upper Tribunal. The matter came before Deputy Upper Tribunal Judge Woodcraft who by his decision of the 28th December 2023, set the decision of Judge Thorne aside. At that hearing the Secretary of State was represented by Senior Presenting Officer Mr C. Avery, who conceded that the grounds of appeal had been made out in the following terms:,

> 6. At the outset the Presenting Officer indicated that on the basis of the accepted facts, there did appear to be a material error of law in the determination and as such the respondent consented to the determination being set aside and the matter re-heard. The sponsor had mental health issues and there was evidence of financial support, phone calls and visits……
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> 7. Much of the respondent's original objections to this application have been met as the case has progressed. The DNA evidence which showed that the sponsor and appellant were the parents of the 2nd appellant and the evidence of financial support and visits tends to indicate that there is family life between the parties even if it is not being conducted in one country. In those circumstances I agree with the submission of the respondent that the judge needed to analyse the relationship between the appellant and sponsor in more detail. Whilst the appellant and sponsor have only had a relatively short time living together this does not of itself mean there is no family life.

8. Judge Woodcraft directed that the matter be retained in the Upper Tribunal and relisted for remaking and this is how the matter has come before me; a transfer order was signed by Judge Blum on the 12th July 2024.

The Applicable Law

9. Although these provisions have now been deleted from the Immigration Rules it is not in issue that the applicable legal framework is to be found in paragraphs 352 and 352D of the Immigration Rules. I set them out here, and highlight the contested parts.

10. In respect of the First Appellant, paragraph 352 reads:

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 leave or 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) 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 (as defined in Section 36 of the Nationality and Borders Act 2022) 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.

11. In respect of the Second Appellant, the relevant paragraph is 352D:

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 has refugee leave or refugee permission to stay are that the applicant:

(i) is the child of a parent who has refugee leave or refugee permission to stay granted under the Immigration Rules in the United Kingdom; and

(ii) (a) is under the age of 18; or
(b) is over 18 and there are exceptional circumstances (within the
meaning of paragraph 352DB);

(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 (as defined in section 36 of the Nationality and Borders Act 2022) 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.

12. In the event that either rule cannot be satisfied, I must still proceed, in these human rights appeals, to proceed to consider whether the decision to refuse entry clearance is lawful pursuant to s6(1) Human Rights Act 1998.

The Facts

13. The Sponsor is refugee who has lived in the United Kingdom since 2008. In 2017 he was diagnosed with paranoid schizophrenia. He continues to receive treatment for this chronic mental health condition. It is not contested that the disease, and the treatment, may impact on his ability to give evidence: his evidence before the First-tier Tribunal had to be abandoned because, as Judge Thorne puts it, it became apparent that he was "suffering from severe mental health problems and was in no fit state to give further evidence". As such he is to be treated as a vulnerable witness.

14. Before me the Sponsor was accompanied to court by a support worker. He was called to give evidence. He did struggle at times, and explained that he finds it difficult to recall certain things with clarity; he finds dates difficult, and the order in which things might have happened. He adopted his statement dated 27th November 2023 and answered questions from both representatives. In the findings that follow I have had regard to the Sponsor's written and oral evidence, including his asylum interviews, and to the findings of First-tier Tribunal Judge Nightingale, who on the 30th September 2019 allowed his appeal. Although he did obviously find it difficult to give his evidence, I found the Sponsor to be a credible witness. He appeared to me to be entirely honest.

15. Much of the Sponsor's personal history, insofar as it is relevant to this appeal, is set out in Judge Nightingale's decision. Although his account had been rejected by the Respondent, and by judges who had considered the case before her, Judge Nightingale had the benefit of expert evidence that had not previously been available. A report by Dr Sinha dated 18th August 2015 sets out that the Sponsor has several areas of scarring to his body, and that many of these scars are typical of, or highly consistent with, him having been tortured. A report by Dr Foster dated 4th April 2016 found the Sponsor to have severe depression and PTSD. Extensive NHS records produced before Judge Nightingale showed that by early 2017 he had suffered an acute episode of paranoid psychosis; by the end of that year a full diagnosis of paranoid schizophrenia had been made. Against the background of this expert medical evidence Judge Nightingale evaluated the

Sponsor's account of serious harm in Somalia and accepted it to be true [at her §88].

16. The Sponsor's account, which I accept to be proven, is as follows.

17. The Sponsor is originally from Mogadishu. In 1994, when he was 11, he was wounded in a shoot out between rival militias in his neighbourhood. As a result of this incident his mother decided to send him to Hargeisa with a neighbour. This neighbour was abusive to him but the Sponsor had no choice but to stay there. In 1999 his mother and siblings, who had remained in Mogadishu, were attacked. His brothers were killed and his sister was raped.

18. It was whilst living in Hargeisa that he met the First Appellant. They fell in love and contracted a marriage (a *nikah*). Her brothers objected to this union and attacked him: he was stabbed and badly wounded. He had to flee Hargeisa for his life. He returned to Mogadishu. The Sponsor and the First Appellant only lived together a short time before her brothers forced him to flee. In his decision Judge Thorne record this period as being 28 days. When the Sponsor left for Mogadishu the First Appellant was pregnant with the Second Appellant. The Sponsor states that it was at that time his intention that she should follow him to Mogadishu, but they lost contact. He did not know if she was alive or if her brothers had killed her. This may have been why he said that he was single when he was interviewed by the Respondent in 2009, but he cannot now recall. The Sponsor's life in Mogadishu is described as follows in the decision of Judge Nightingale:

> "On returning to Mogadishu, the appellant lived next door to the hut his mother had erected on the burnt out plot of their former home. He was there for only two months when the area was attacked by militia. The appellant was kidnapped by the militia and kept for the next three years as a slave. He was beaten and burned and sexually abused during this time. In 2003, the Islamic court suppressed the militia. The appellant was subsequently released. The appellant then had problems with the Ethiopian and Somalian authorities from December 2007 when he was arrested and accused of being part of the Union of Islamic Courts. It was eventually acknowledged that he was innocent but a ransom was demanded for his release. His mother raised
> money on jewellery that she had buried and the deeds of the house and engaged an agent to arrange the appellant's departure".

19. The Sponsor arrived in the UK in 2008 and claimed asylum. He was using a false passport and he was arrested and sentenced to 8 months in prison for using a false instrument. He was refused protection and by May 2010 was considered to be 'appeal rights exhausted'.

20. He was listed by the Home Office as an absconder but it turned out that he had left the country and travelled to Norway, where he had attempted to claim asylum. The Norwegian authorities returned him to the UK under the Dublin Convention procedure then in place. In 2011 he was arrested trying to get back to Norway by leaving the UK using a passport that was not his. He was convicted of using a false instrument and sentenced to prison. The reason that the Sponsor was trying to get back to Norway was that whilst there, he had married a Somali refugee named Suad. They had a son together.

21. Judge Nightingale made no findings one way or the other about whether the Sponsor had in fact married this woman in Norway, but she did record, at her paragraph 35, that he had divorced her. At her paragraph 36 it then says that he had also "divorced his first wife", ie the First Appellant. Having heard the Sponsor's evidence, and having had regard to that part of Judge Nightingale's decision, I am satisfied that this evidence has been recorded wrongly. I accept that what he said was that he had divorced his second wife, ie the wife in Norway. I say that because this evidence is found in a section of Judge Nightingale's decision where he is being specifically asked about the relationship in Norway. Where the evidence strays into talking about the First Appellant it is not particularly clear. Judge Nightingale says, in respect of the First Appellant, "when he last saw his first wife, she was pregnant and someone had told her that she had had a boy". Presumably this should read that someone told *him* that she had had a boy. Before me the Sponsor was adamant that he had never divorced the First Appellant. I bear in mind that he could not, in fact, have legally done so without some difficulty. An Islamic marriage can only be dissolved by an Islamic court, or by the pronouncement of an oral repudiation by the husband (a *talaq*) directly to the wife. This should properly be done in her presence. Although some scholars of Islamic jurisprudence have approved the *talaq* by modern means of communication, it does not appear to be in issue that the Sponsor had no contact at all with the First Appellant until he managed to find her in 2019. I accept that the Sponsor married the First Appellant in 2003 and that they have never been divorced.

22. The Sponsor managed to find the First Appellant again with the help of a friend of his who was a distant relative of hers. This man managed to find her sister, and then her. In 2021 he travelled to Djibouti to meet her, and meet the Second Appellant, now established through the production of DNA evidence to be his son. The bundle contains money remittance receipts showing that since then he has been supporting them financially; there are photographs of the group together in Djibouti and many pages of whatsapp exchanges. It also contains what is said to be a certificate of marriage that is dated 2019. The Sponsor explained that he asked some relatives of the First Appellant in Mogadishu to obtain this. The document itself is no more than a confirmation of oral evidence given to the issuing authorities by people who know the couple. I note that such certification of historical oral contracts often occurs in many Muslim-majority countries, particularly where there is a child of the union.

23. The Appellants are currently living as refugees in Ethiopia.

Applying the Facts to the Law

The First Appellant

24. I begin by considering whether the First Appellant can meet the requirements of paragraphs 352A of the Rules. The first thing to say is that this is a highly unusual set of facts, and obviously there has been an exceptionally long interval of absence in the relationship between the First Appellant and the Sponsor. That said, it seems to me that as things stand she is able to meet all of the requirements of this rule.

25. Sub-section (i) requires her to be the 'partner' of the Sponsor; in the context of the rule this must be read as a term of art, that is to say one that would meet the definition of 'partner' in the Rules overall. She can meet this requirement by demonstrating that she and he were married in 2003 and remain married today.

26. I accept and find as fact that these two people were married by *nikah* in Hargeisa in 2003. The Sponsor satisfied Judge Nightingale that this was the case and so applying the *Devaseelan* principles I need not say much more about that finding, save to say that having heard the Sponsor's credible evidence on the point, I too accept that the marriage took place as claimed. I note that the Sponsor said so in his asylum interview in 2009 and that DNA testing demonstrates that he is the father of the child born to the First Appellant in the following year. Although it would not be unheard of for two young people to have had a child together outside of wedlock in 2003, it would not have been the norm. I accept the Sponsor's evidence that he at one time described himself as 'single' because he had no idea what had happened to the First Appellant. I further accept that the Islamic marriage contracted by this couple would be recognised as valid under Somali law: certainly the Respondent has not argued otherwise. I accept that the marriage 'certificate' issued in 2019 was obtained at his behest by her relatives in an effort to produce documentary evidence of the claim. It therefore adds little to his oral evidence. The little weight that it does attract is simply to reflect that some of her relatives have seen fit to approach a court in order to obtain this document: this would tend to indicate that they believe a marriage to have taken place. One question remains. Was this marriage ever dissolved, either directly or indirectly? Is she still married today?

27. As I note above I accept that there is a mistake in Judge Nightingale's judgment where it is recorded that the Sponsor divorced the First Appellant. He credibly denies this, and as they were not in contact, it is very difficult to see how he could have lawfully effected a divorce. It is not in issue that he did, while in Norway, undergo a second *nikah* with another woman. I accept his evidence that he did so believing the First Appellant to be dead, or at any rate lost to him. There is nothing in Islamic family law, as it is customarily applied in Somalia, to prevent that second marriage. It has no impact at all on the validity of the first. I add that there was no suggestion on the part of the Respondent that the Sponsor's *nikah* in Norway had any force of law in that country.

28. For those reasons I am satisfied that she 'is' his 'partner' as she is still his wife.

29. Sub-section (ii) requires that the marriage took place before the Sponsor left Somalia. I accept that this is the case.

30. Sub-section (iii) goes to a slightly different matter: this requires that the *relationship* existed prior to his departure. This provision is presumably designed to exclude certain kinds of customary marriage where the parties have not in fact yet met. That is not the case here. The Sponsor gives credible evidence that he and the First Appellant fell in love and were married and lived together, albeit for a very short time before he was attacked by her brothers.

31. Turning to the nature of the relationship today, a third question is posed by sub-section (v): this requires that each of the parties intends to live permanently with the other and that their marriage is genuine and subsisting. Mr Bates quite understandably sought to emphasise that these two people did not have any contact whatsoever between 2003 and 2019. It was not until 2021 that they saw

each other again in person. I have taken that into consideration, but I am drawn back to the wording of the rule. The rule in effect asks three questions about the relationship: does it have legal form, was there a relationship of substance prior to the refugee's flight, and is there a relationship of substance today? What is does not ask is whether the relationship has subsisted throughout the entire intervening period. There is, it seems to me, good reason for that omission. The rule is concerned with the unification of families who have been torn apart by forced migration. One would imagine that a good number of applicants have endured periods where they have been separated from their sponsor.

32. I have read the whatsapp messages between the two, and seen the photographs of them together in Djibouti. I accept, on the basis of his bank statements and the remittance receipts provided that he is financially supporting the Appellants. I have heard the Sponsor's evidence. I have had regard to the cultural context in which that evidence is given. I accept that as things stand, the First Appellant and Sponsor intend to live together as husband and wife should she manage to get to the UK.

33. The Respondent has not sought to argue that the First Appellant should be excluded from protection were she to apply in her own right (352D(iv)). Nor is there any suggestion that she and the Sponsor are within the prohibited degrees of relationship (352D(vi)).

34. The First Appellant has shown, on a balance of probabilities, that she meets all of the requirements of the rule and it follows that her appeal must be allowed on human rights grounds.

The Second Appellant

35. It is not now in issue that the Second Appellant is the biological child of the Sponsor, who is a refugee in the UK. He was under 18 when the application was made. There is no suggestion that he is leading an independent life: he is, all the evidence indicates, still living with his mother. Again, no question of exclusion arises.

36. Less straightforward for the Second Appellant is sub-section (iv) of the Rule:

> (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

37. There were two possible arguments open to Ms Hashmi in respect of this requirement, and she made them both.

38. First she sought to argue that as he was *in utero* it can be inferred that he was a pre existing member of the Sponsor's family at the time that the Sponsor left Hargeisa. I say straight away that I reject this suggestion. A foetus is not a legal person. Expectant families might think of their unborn child with all the love and attachment that a parent has for a live child, but as a matter of law and logic that child is not yet a member of the family.

39. In the alternative Ms Hashmi pointed out that the Second Appellant had been born and was living with his mother in Hargeisa at the date that the Sponsor left

Somalia. Can it be said that he was then 'part of the Sponsor's family'? Mr Bates says obviously not. The Sponsor 'heard' that his wife had given birth to a son some time after he left her in Hargeisa, but he did not meet his son in person until 2019. On the ordinary meaning of the words they were never 'part of the (same) family unit'. On the other hand, the rule must be read as a whole. It is, as I note above, concerned with the reunification of families that have been separated by forced migration, and as such must be read with that broad humanitarian purpose in mind. Had someone in Mogadishu, in say 2005, asked the Sponsor if he had any family, I think it likely that he would have said, "yes, I have a wife and son in Hargeisa". They were his family, and they existed as a unit, albeit in his absence, prior to his departure from Somalia. By operation of Somali cultural norms he certainly would have been regarded as having ongoing responsibility for the Second Appellant and his mother at that time, because they are 'his family'. I would allow the appeal on that basis.

40. If I am wrong and that is straining the wording of the rule too far, then I would allow the appeal of the Second Appellant on the alternative ground that to refuse entry clearance would be a disproportionate interference with the Article 8 family life that he shares with his father today.

41. I accept and find as fact that the Second Appellant is the biological son of the Sponsor. There is therefore a strong presumption of family life existing: see X, Y and Z v United Kingdom (1997) 24 EHRR 143. I have heard the evidence of the Sponsor, and had regard to the written evidence and photographs of the two of them together in Djibouti. I fully accept that the Sponsor wants the Second Appellant to come to the UK to live with him and vice versa, and that they want very much to resume a normal family life together. Although there has, again, been a long period in which the Second Appellant had no contact with his father, they have been in regular and meaningful contact since 2019. I find family life to exist in these circumstances.

42. Obviously this is a family who have been separated for many years. As such the decision to refuse entry clearance simply maintains the status quo. As this is an entry clearance appeal I am however not so much concerned with interference, as with whether the decision amounts to a lack of respect for the family life going forward. The threshold for engaging Article 8 is a relatively low one and I find it to be met.

43. The question is ultimately whether the Respondent can show the decision to be proportionate. It is in the public interest that persons who seek to enter the United Kingdom do so in accordance with the immigration rules. If the Second Appellant cannot meet the requirements of those rules that is a matter that must weigh against him in the balance. It is further in the public interest that he should be able to speak English. I have no evidence before me to indicate that this is the case. This too weighs against him. I am told that the Sponsor is currently working and managing to send the Appellants some money, but there is certainly no evidence before me to indicate that he would be able to adequately provide for them should they come to the UK. It is in the public interest that persons who seek leave to enter or remain in the UK should be financially self-sufficient; that the Second Appellant is not, is a matter that weighs against him in the balancing exercise.

44. Balanced against those weighty public interest considerations are the following matters. The Sponsor and the First Appellant did not separate by choice. The

accepted evidence is that her brothers objected to their relationship and physically attacked the Sponsor. He was stabbed and taken to hospital. That is an important part of the narrative that resulted in him being granted refugee status. It was never a choice on the part of the Appellants to be separated from him. The First Appellant has never married again, nor has she had any other children. For the first 15 years of her son's life she was a single mother. For the first 15 years of his life he had no father. It would therefore have been a huge relief and excitement to them when contact with the Sponsor was re-established. The Appellants have, for many years, been in about as vulnerable a position as it is possible to be: a single mother and child living a precarious life of refugees in Ethiopia. It is in my view plainly in the Second Appellant's best interests, albeit that he has now turned 18, that he be able to live as normal a life as is possible with his father.

45. Turning to the Sponsor I remind myself that he too is very vulnerable. He has been diagnosed with a serious mental illness, perhaps an inevitable consequence of a series of horrific life events. The Sponsor's evidence, which led to his recognition as a refugee, is that at the age of 11 he was injured in crossfire during the civil war; during his 'internal flight' in Hargeisa he was abused by the adult his mother had entrusted to look after him; his brief period of happiness with the First Appellant was interrupted by her brothers' attacking him; he fled back to Mogadishu where he found his siblings gone, murdered or fled; he was kidnapped and enslaved by an armed militia group for 3 years, a period in which he was burned, beaten and sexually abused, gaining the scars that Dr Sinha was to later describe as highly consistent with torture; he was then arrested and questioned by the Somali army, presumably on the basis that he may have been complicit in the work of the 'Islamic Courts' who had driven out his captors. After all of that he found himself arrested and imprisoned in the United Kingdom for having travelled here on a false instrument.

46. Taking all of that together I find that this is a family who are facing what can reasonably be described as 'exceptionally compelling circumstances'. War and persecution have kept them apart, and even having regard to the great weight to be attached to the public interest in maintaining the refusal I find that it would be disproportionate today to keep them apart by refusing the Second Appellant entry clearance.

47. For the sake of completeness I record that it has not been argued before me that this family life could subsist by the Sponsor's relocation to Ethiopia. In view of his settled status as a refugee here, and the context in which these claims were made, I would have rejected such an argument had it been made.

Decisions

48. The decision of the First-tier Tribunal is set aside.

49. The decision in the appeal is remade as follows: the appeal is allowed on human rights grounds.

50. There is no order for anonymity.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
5th October 2024