



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/22580/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 6 September 2018

Decision & Reasons Promulgated  
On 17 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

YOSEF MARKOS DEMISSE  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

**Representation:**

For the Appellant: Mr E Wilford, Counsel, instructed by French & Company

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is a remake decision following my error of law decision promulgated on 20 July 2018 (annexed, below). In essence, I concluded that the First-tier Tribunal had failed to address material evidence in the case and had failed to undertake a fully rounded assessment of all relevant matters. That decision was therefore set aside. I adjourned the appeal with directions. These dealt with the need to provide updated evidence in advance of the resumed hearing and confirmed that the scope of the appeal was now fairly narrow: it is concerned with Article 8 outside the context of the Immigration Rules. Both parties were agreed that the relevant date for my assessment of the

Appellant's circumstances would be the date of hearing, that the Appellant is now an adult, and his case must be considered on that basis. I expressly preserved the finding of the First-tier Tribunal that family life existed between the Appellant and his Sponsor (his mother) in the United Kingdom.

### **The hearing before me**

2. Prior to the hearing the Appellant's solicitors had submitted a consolidated bundle including all materials that had been before the First-tier Tribunal (section A) and new information including letters from the Appellant himself, his grandmother and friends of the family who had travelled to Ethiopia (section B). I admitted this in evidence without objection by Mr Kotas.
3. In addition, and without explanation, further evidence was provided on the day of the hearing itself. The absence of explanation is not down to Mr Wilford, and one would have expected at least something from the solicitors. In any event, Mr Kotas did not object to its introduction in evidence, and I admitted it. This further evidence consists of a new witness statement by the Sponsor and evidence from her GP relating to her own health conditions. Mr Wilford provided me with a skeleton argument.
4. The Sponsor and an additional witness, Ms Meskeren, both attended and gave oral evidence. The Sponsor had the assistance of an Amharic interpreter. A full note of the oral evidence is contained in the Record of Proceedings. I summarise it here.
5. The Sponsor adopted her new witness statement. She was then cross-examined by Mr Kotas. She was asked to describe the Appellant's accommodation and current living circumstances. She told me that he lived in a single room containing one bed and a mattress. The single room was part of a larger property in which other people rented rooms. She said that there was communal washing and cooking facilities. When asked about financial support I was told that the Appellant's paternal grandmother had previously been working and using her pension. The work had ceased, but the Sponsor was unable to tell me when this occurred. The Appellant had been studying at high school but had at some stage been "suspended" because of a back injury apparently incurred at some unknown point in time. This injury had prevented him from not only attending school but also undertaking his own cooking. A school friend had assisted him with this particular task. The Appellant had gone to hospital following an injury but had not been admitted. The Sponsor did not have very much information about this or any treatment obtained thereafter. She said that there was insufficient funds for medical assistance. The grandmother was now in the United States receiving medical treatment for kidney problems. The Sponsor was unable to do anything more to assist her son. She emphasised that she wanted him to live with her in this country. In re-examination the Sponsor told me that this was the grandmother's second visit to the United States.
6. I then asked some questions for the purpose of clarification. I was told that there were no hospital documents because the family could not afford check-ups. She did not know whether or not the Appellant had taken any medication for his back problem. There were no school letters in evidence. The Sponsor told me she had tried her best

to find someone to help her get these but had been unable to do so. The Sponsor confirmed that she continued to send money to the Appellant on a monthly basis. She told me that sanitation facilities in what she described as the “compound” in which the Appellant lived were shared.

7. The witness then gave her evidence. She relied on her witness statement at 184 of the Appellant’s bundle. In cross-examination she explained that she had met the Sponsor in this country in 2015. She had gone on holiday to Ethiopia earlier this year. The Sponsor had asked the witness to go and see the Appellant during this trip. The witness did so. She was asked to describe the Appellant’s accommodation. She told me that he lived within a compound in what she described as a “low class” area of Addis Ababa. She described the building itself as being “alright”. Having gone through the main door, she said that she had ascended a couple of stairs and walked into what she described as a, “sitting room”. She then confirmed that the Appellant had been in a separate bedroom. The witness was not sure whether or not the accommodation also had a separate bathroom. She said that there had been a door but she did not know whether this led to either a bathroom or a kitchen area. The witness told me that the Appellant had been in bed when she spoke to him and that he was suffering from a back injury. She had not asked him how this had occurred. There was no re-examination.

### **Submissions of the parties at the hearing**

#### *For the Respondent*

8. Mr Kotas posed the question of whether the decision under appeal had unjustifiably harsh consequences for the Appellant. He suggested that in all the circumstances the answer might be “no”. He pointed to discrepancies and a lack of detail in respect of the oral evidence and relied on the fact that the Appellant was not an adult, albeit not by a significant margin.

#### *For the Appellant*

9. Mr Wilford relied on his skeleton argument. In respect of the back injury, he emphasised the Sponsor’s evidence that there was a lack of funds for any treatment. This meant that no documentary evidence would ever have been produced. The consequences of the back injury were that the Appellant had been cared for by his grandmother prior to her departure and he was now being assisted by a school friend. In respect of the accommodation, the apparent discrepancies should be looked at in light of the evidence as a whole. It was perhaps unclear whether or not there were actually other rooms in the accommodation. The evidence was not clear enough for me to find against the Sponsor. He submitted that family life did still exist in respect of proportionality. He referred me to the decision of the Upper Tribunal in AT and Another (Article 8 ECHR – Child Refugee – Family Reunification) Eritrea [2016] UKUT 00227 (IAC) and despite differences in the circumstances, urged me to accept that the Sponsor was suffering by virtue of the absence of her son. Their separation had been due to factors beyond their control. He asked me to allow the appeal.

10. I reserved my decision on the remaking of the appeal.

**Post-hearing submissions from the Respondent**

11. Somewhat unusually, by an email from Mr Kotas dated 9 September 2018, the Respondent confirmed that he wished to amend the submissions made at the hearing. I set out the body of the email here in full:

“Further to the above appeal where the resumed hearing was heard on 06.09.18 before yourself, the SSHD has since that hearing re-appraised his position relating to this appeal and the submissions that were made on behalf of the ECO, and wishes to amend them in the following terms:

Given the sponsor and appellant were separated through circumstances beyond their control, and given contact was only finally re-established in 2015, there were clearly exceptional factors that warranted a consideration of Article 8 outside the immigration rules contrary to the decision of FTTJ SC Clarke, especially given that the application for entry clearance was made whilst the appellant was still a minor.

Thus should the tribunal conclude that family life continues to exist between the appellant and his mother, which it would seem was the preserved finding by the Upper Tribunal in its error of law decision, the issue becomes whether family life can reasonably be expected to continue in Ethiopia or the United Kingdom, or indeed, continue as it currently does.

Whilst Article 8 does not allow one to choose where to conduct family life, the SSHD would accept given the sponsor has been granted refugee status in the United Kingdom, and is not a national of Ethiopia, family life cannot reasonably be expected to continue in Ethiopia.

On the basis that family life continues to exist, given the SSHD’s duty to promote family life, and notwithstanding his view that the appellant’s living conditions and circumstances are perhaps not quite as claimed, this does not detract from the fact that the SSHD would accept, given the extraordinary circumstances which caused the separation between a son and his mother, and which son has only recently attained majority, and where the extant application for reunion was made whilst the son was still a child, it would, in all the circumstances, be unjustifiably harsh not to grant entry clearance on the particular facts of this case. This is of course subject to the caveat that the Tribunal is satisfied that the public interest considerations under 117B of the 2002 Act in relation to financial independence and English Language ability, which ought to be given significant weight, do not tip the balance back in favour of the public interest.”

12. Given the clear nature of these submissions, I did not consider it necessary to re-convene the hearing or invite further written submissions from Mr Wilford.

## **Findings of Fact**

13. I have made my findings in light of my preserved finding of the judge below and, importantly, the Respondent's position in this appeal, as clarified in the amended submissions.
14. In respect of the more historical background to this case, there is no sound reason for me to go behind what the First-tier Tribunal Judge found, despite some difficulties in the evidence I have now heard (see below). I, like the last judge, find that the Appellant and his mother were indeed separated when the former was only about two years old for reasons entirely beyond their control. Those circumstances were clearly traumatic and in no way involved choice on the Sponsor's part.
15. I find that there was no contact between the two during the period 2000 to 2013. Brief contact was then made, but was again lost for the next two years. I find that contact was re-established in 2015 and there has been regular contact of one sort or another ever since. I find that the Sponsor has travelled to see the Appellant in Ethiopia in 2016 and 2017 and that she has been providing financial assistance since the re-establishment of contact. In light of this, and now having had the opportunity to consider additional evidence, my preservation of the judge's finding on the existence of family life was and remains fully justified.
16. I accept that up until very recently the Appellant has been looked after, to a greater or lesser degree according to his maturation, by his paternal grandmother. It is clear that during, if not the entirety of, certainly the majority of his childhood, the Appellant required the care of his grandmother. I find that the Appellant attended what has been described as elementary school and that he then moved on to high school at some point. It is somewhat odd that the Sponsor has been unable to provide any more detail about the schooling, and I cannot see any particularly strong reason for her being unable to have obtained at least some form of documentary evidence about her son's education. Notwithstanding this, I find that her financial assistance has been the basis of the payment of school fees.
17. I turn to the issue of the grandmother. I am willing to accept, based on the evidence as a whole, including medical certificates contained at 181-182 of the Appellant's bundle that she has been suffering from medical problems, particularly relating to her kidneys. It is said that she has travelled to the United States for medical treatment. Again, it is of some concern that no documentary evidence of this has been provided. The Sponsor says that she is in regular contact with both the son and grandmother and yet I do not even have a copy of the visa for the United States. However, on balance I am prepared to accept that the grandmother has indeed travelled to the United States for medical treatment. On the basis of what I have heard, I find that she has undertaken this trip on one previous occasion. Although I am not entirely clear as to how this was all arranged, I am willing to accept that certain benefactors have assisted her. I find that it is more likely than not that the grandmother will return to Ethiopia following her medical treatment. I say this for three reasons. First, she made a previous trip and then went back. Second, there is no evidence to indicate that the visa

obtained relates to settlement in any way. Third, the evidence from the grandmother herself does not indicate a decision to relocate to the United States on a permanent basis. Although it is not clear how long the trip will last, it is in my view unlikely to be for a significant period.

18. I turn to the issue of the back injury. The subjective evidence from the Appellant, the Sponsor, and the witness is consistent to the extent that a back injury was incurred at some point. I have to say, beyond that the picture is fairly vague. There are no details as to when this occurred, precisely what happened, and what medical follow up took place. It is said that the Appellant attended hospital, but there is no documentary evidence of this whatsoever. Although the Sponsor has raised the absence of funds as a reason for the lack of treatment and/or documentary evidence, he did not actually appear to even know whether the Appellant had taken any medication. On balance, I am willing to accept that the Appellant did suffer an injury to his back at some point. Again on balance, this may have resulted in him being unable to attend school: to that extent the description of him being "suspended" makes some sense. I am not satisfied that the injury is of such severity as to have effectively terminated his attendance at school on a permanent basis.
19. Turning to the Appellant's current accommodation, there are some difficulties with the Sponsor's evidence on this issue. She has clearly told me that the accommodation consisted of a single room and, at least by implication, that it was wholly inadequate and constituted a compelling circumstance. In contrast, the witness has provided a materially different description. She quite clearly said that the accommodation consisted of a living room, and a separate bedroom. On my reading of the evidence she also said that there was another door leading to a room that she did not enter, she speculated that it might either have been a bathroom or a kitchen. In any event, there were at the very least two rooms. On balance, I prefer the witness's evidence. She has visited the accommodation recently, had no, as it were vested interest in exaggerating her evidence in any way, and in my view gave a testimony in a straightforward and open manner. I would accept that washing and sanitation facilities in the compound are not of an ideal standard, but I do not accept that they were dire. With all due respect, the Sponsor simply had been unable to provide very much detail about a number of issues including that of the accommodation. There is no evidence that the accommodation is so substandard as to constitute a risk to health. Despite my concerns with this aspect of the Sponsor's evidence, I do not see it as undermining everything else that she says.
20. Turning to the Sponsor's own circumstances in this country, I accept that she suffers from several significant health problems as evidenced in the documents before me (in particular the most recent GP letter). I have no hesitation whatsoever in finding that the Appellant is desperate for her son to be able to come and join her in this country. She is clearly devoted to him and is indeed suffering as a result of the ongoing separation.

## **Conclusions**

21. I am considering the Article 8 issue entirely outside the context of the Rules. In so doing I follow the Razgar methodology and apply relevant mandatory factors set out in section 117B of the 2002 Act.
22. In reaching my conclusions I have had specific regard to the amended submissions sent in by Mr Kotas after the hearing.

### ***Family Life***

23. I had specifically preserved the decision of the First-tier Tribunal as to the existence of family life. This took matters up to the date of the hearing before the judge. I have now found that the family life continues to exist. It is of course a fact that the Appellant is now nearly twenty years old. However, the prolonged separation through no fault of their own, the re-establishment of contact, the continuing nature of that contact and financial support, all go to disclose truly compassionate and exceptional features on the case and satisfy me that the family life continues to date. There is love and devotion between mother and son, she has clearly provided important financial support on which, at least to a large extent, he has been dependent. Albeit by a relatively narrow margin, the Kugathas test remains satisfied.

### ***Interference/lack of respect***

24. I conclude that the Respondent's decision to refuse entry clearance (for the purposes of this appeal, that being a refusal of a deemed human rights claim) constituted an interference or, to put it more accurately, a lack of respect for the Appellant's family life with the Sponsor. The consequences of this interference are clearly sufficiently serious for Article 8 to be engaged.

### ***In accordance with the law and the legitimate aim***

25. The Respondent's decision was in accordance with the law and it pursues a legitimate aim. There is no dispute about these two matters.

### ***Proportionality***

26. The ultimate question is whether the Respondent's decision strikes a fair balance between the Appellant's protected rights on the one hand and the public interest (including all its relevant facets) on the other.

### ***Proportionality: factors in the Respondent's favour***

27. The effective maintenance of immigration control constitutes a powerful aspect of the public interest.
28. Normally, an inability to meet relevant Rules would also be a factor weighing in the Respondent's favour, however in this case the relevant Rule had been paragraph 352D. The Appellant had been unable to satisfy this provision for very good reason: he had

not been part of his mother's family unit before she left Eritrea because he had been separated from her as a baby, and not through a matter of choice on anyone's part. In these circumstances, I do not attach material *additional* weight to this particular factor.

29. There is no evidence to suggest that the Appellant himself would be financially independent and, in light of the Sponsor's health issues and inability to work at the moment, the family unit, were he to be in this country, would probably struggle, at least initially, to find sufficient funds to support themselves. I place weight upon this matter.
30. In respect of the English language factor, I do not have any evidence to indicate that the Appellant speaks reasonably good English. This factor would also count in the Respondent's favour, albeit not to a very great extent given that the Appellant has only fairly recently attained his majority and would in any event be very likely to learn the language with speed if admitted to this country.

***Proportionality: factors in the Appellant's favour***

31. The overall background to the effectively forced separation of the Appellant from his mother many years ago is clearly a factor weighing very significantly in his favour, as is the ongoing emotional (and to an extent practical) consequences of the continuing separation. This is quite properly recognised in the Respondent's amended submissions. I re-emphasise what is said therein:

"...the SSHD would accept, given the extraordinary circumstances which caused the separation between a son and his mother, and which son has only recently attained majority, and where the extant application for reunion was made whilst the son was still a child, it would, in all the circumstances, be unjustifiably harsh not to grant entry clearance on the particular facts of this case."

32. In light of the Respondent's properly made concession in the amended submissions, I conclude that family life cannot be enjoyed in Ethiopia.

***Overall evaluative judgment on proportionality***

33. Having weighed up what I consider to be all the relevant factors, I conclude that the Respondent's decision does not strike a fair balance and is therefore disproportionate.
34. In essence, the existence of family life and the acceptance of unjustifiably harsh consequences of continuing separation, as accepted by the Respondent, are not counterweighed by the two specific public interest factors highlighted in the Respondent's amended submissions, namely financial independence and English language ability. These factors are clearly relevant, but I have assessed them together in the round with all other matters including, the Appellant's age and the strength of the compassionate and compelling circumstances in play here.
35. For all of these reasons, and reiterating the (what in my view amounts to a very fair) position now adopted by the Respondent, the appeal succeeds.



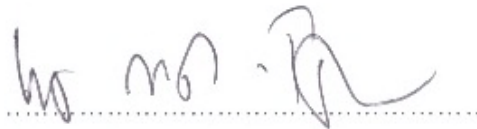
**Notice of Decision**

The decision of the First-tier Tribunal contained material errors of law and I have set it aside.

I remake the decision by determining that the Respondent's refusal of the human rights claim was unlawful under section 6 of the Human Rights Act 1998.

The Appellant's appeal is therefore **allowed**.

No anonymity direction is made.



Signed

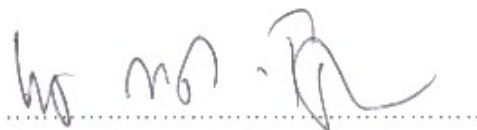
Date: 11 September 2018

Deputy Upper Tribunal Judge Norton-Taylor

**TO THE RESPONDENT**

**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a full fee award of £140.00. The Appellant has succeeded in his appeal and there are no other sound reasons to reduce the award.



Signed

Date: 11 September 2018

Deputy Upper Tribunal Judge Norton-Taylor

**ANNEX: ERROR OF LAW DECISION**



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/22580/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 5 July 2018**

**Decision & Reasons Promulgated**

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**Before**

**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**MR YOSEF MARKOS DEMISSE  
(ANONYMITY DIRECTION NOT MADE)**

**Appellant**

**and**

**ENTRY CLEARANCE OFFICER**

**Respondent**

**Representation:**

For the Appellant: Ms K McCarthy, Counsel, instructed by French & Company  
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge S C Clarke (the judge), promulgated on 23 November 2017, dismissing his appeal against the Respondent's refusal of his human rights claim, dated 10 June 2016. That

claim was based, first and foremost, on paragraph 352D of the immigration rules. The Appellant is the son of a recognised refugee in the United Kingdom (the Sponsor).

2. The second element to the application was based on Article 8 in its more general context. This was because the Appellant had been separated from the Sponsor from a very young age due to circumstances beyond both of their control. They had been reunited first in 2013, and then 2015. There has been ongoing contact since. It was said that the Appellant, who is an Ethiopian national, no longer had anyone who could adequately care for him, his grandmother now being ill. The Sponsor, an Eritrean national, has her own health problems.

### **The Judge's Decision**

3. The judge accepts the Sponsor to have been a credible witness, finds that the background to the case was as claimed, and accepted that there has been contact and financial support since 2015. She finds that at the date of the Respondent's decision the Appellant was seventeen years old, whereas at the date of the hearing he was eighteen.
4. With reference to paragraph 352D of the rules, the judge concludes that the Appellant could not satisfy this provision for the simple reason that he had not been part of the Sponsor's family unit before she left Eritrea. The judge then turns to consider Article 8 in more general terms. She finds that the Respondent's decision amounted to an interference with the Appellant's right to respect for "private and family life with the Sponsor" (although the private life aspect could not have applied in this case), and that Article 8 was indeed engaged. The judge then turns to consider the issue of proportionality and states that she was considering the effect of her decision on the Appellant and the Sponsor. She notes that she was required to take into account the public interest questions identified in section 117B of the Nationality, Immigration and Asylum Act 2002, as amended.
5. The substance of her consideration is contained in [28]. This reads as follows:

"...I find that there are no compelling circumstances which justify a favourable decision on Article 8 grounds not already catered for by the correct application of the Rules and that the Respondent's decision in all the circumstances is proportionate."

6. The appeal was duly dismissed.

### **Grounds of appeal and grant of permission**

7. The succinct grounds of appeal assert that there was inadequate consideration of the wider Article 8 question. Reference is made to section 55 of the Borders, Citizenship and Immigration Act 2009 (in the context of the live issues, this is misconceived), and it is also said that the judge failed to consider the specific aspects of the evidence before her.

8. Permission to appeal was granted by First-tier Tribunal Judge Murray by a decision dated 19 April 2018.

### **The hearing before me**

9. Mr Avery sought to defend the judge's decision but acknowledged, quite rightly, that [28] is very brief. He posed the question of whether any error would be material. Ms McCarthy submitted that there was an error and that it was material. She submitted that nothing had been said, by way of findings and assessment, about the reasons for the separation of the Appellant from his mother over so many years. Further, although the evidence was not particularly detailed, it had been said that the grandmother was ill and no longer able to adequately care for the Appellant. This too had been overlooked by the judge. Ms McCarthy accepted that once it was found that the Appellant could not satisfy the requirements of the particular rule, the relevant date for the assessment of the facts was that of the date of the hearing and therefore the Appellant fell to be treated as an adult. However she also emphasised that there was no bright line as regards a cut off date for the existence of family life and that in any event the judge had accepted that family life existed.

### **Decision on error of law**

10. As I announced to the parties at the hearing I conclude that there are material errors of law in the judge's decision and it is appropriate to set that decision aside.
11. The judge was clearly correct to conclude that the Appellant could not meet the requirements of paragraph 352D. However that was not of course the end of the story insofar as the Article 8 claim was concerned. There was evidence before the judge, some of it expressly referred to and accepted by her, to indicate that there were additional circumstances in the case which warranted proper consideration. The circumstances included the reasons and effect of the separation of the Appellant from his mother. In addition, the Sponsor, who had been deemed a credible witness, did assert, at least in her witness statement, that the Appellant's grandmother was ill and no longer able to care for him.
12. With this in mind, and with all due respect to the judge, I regard that the contents of [28] as being inadequate. There are no findings on the question of the grandmother at all, there is no evaluation of that particular circumstance, and nothing on the specific history of separation and reasons therefor. These matters were not necessarily conclusive in the Appellant's favour but in my view they were material factors. The failure to deal with them in the context of this particular appeal was a material error.

### **Disposal**

13. There was no question of remitting this appeal to the First-tier Tribunal. It is appropriate for me to retain it and to remake the decision. I would have wished to have done so on the evidence currently before me. However, somewhat unfortunately, the Appellant's representatives have not provided up-to-date information by way of a new witness statement from the Sponsor, any statement from

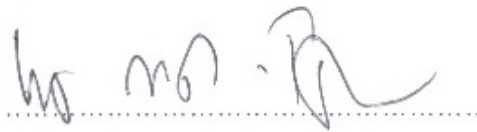
the Appellant, and/or evidence relating to the grandmother's health. In addition, it may be that oral evidence is required. In light of this I have decided to adjourn the appeal and have it listed for a resumed hearing before me in due course. I will issue directions to this effect, below.

**Notice of Decision**

**The decision of the First-tier Tribunal contains material errors of law and I set it aside.**

**I adjourn this appeal for a resumed hearing before me in due course.**

**No anonymity direction is made.**



Signed

Date: 12 July 2018

Deputy Upper Tribunal Judge Norton-Taylor

**Directions to the Parties**

- (1) The Appellant shall file with the Upper Tribunal and serve on the Respondent updated evidence relating to the material issues in this appeal no later than 14 days before the resumed hearing;**
- (2) Any further evidence from the Respondent shall be filed with the Upper Tribunal and served on the Appellant no later than 14 days before the resumed hearing;**
- (3) Oral evidence on relevant issues will be permitted at the resumed hearing, but only if an updated witness statement has been provided in compliance with direction 1, above;**
- (4) Both parties are agreed that the appeal is now concerned with Article 8 outside the context of the rules. Therefore, I will be assessing the evidence as at the date of the resumed hearing. The Appellant is now an adult and I must assess his situation on that basis. Having said that, the judge had found family life to exist and there is no reason to disturb that finding.**