



Case No: JR-2022-LON-002019

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

1 November 2023

Before:

THE VICE PRESIDENT, MR C M G OCKELTON
and
UPPER TRIBUNAL JUDGE MANDALIA

Between:

THE KING
on the application of
(1) THM
(2) NHM
(ANONYMITY DIRECTION MADE)

Applicants

- and -

Secretary of State for the Home Department

Respondent

Ms M Knorr (instructed by the Migrants' Law Project, Islington Law Centre) for
the applicants

Ms R Hill (instructed by Government Legal Department) for the respondent

Hearing date: 10 May 2023

J U D G M E N T

Upper Tribunal Judge Mandalia:

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1. The applicants are nationals of Ethiopia. They are now 17 and 15 years old. They claim to have fled Ethiopia in July 2020 when they were 14 and 12 years old due to a fear of persecution. They travelled to Sudan and are now in Libya. On 31 August 2021, the second applicant was issued with a UNHCR Asylum Seeker certificate by the UNHCR Office in Tripoli. A similar certificate was issued to the first applicant on 8 February 2022.
2. On 24 January 2022 each of the applicants applied for entry clearance as the child of a relative with limited leave to remain in the United Kingdom as a refugee, and or on Article 8 grounds. The applicants seek to join KHM and HH both of whom have leave to remain in the UK as refugees. They were described as being related to KHM and HH as follows;
 - a. THM and KHM are full siblings. They share the same mother and father.
 - b. HH is a half sibling of THM and KHM. They share the same father.
 - c. NHM is the son of another of THM and KHM's brothers, who we refer to as AHM. NHM is therefore the nephew of THM, KHM and HH. However his mother passed away when NHM was very young and he was raised as a *de facto* child of THM and KHM's parents' and was treated as a brother of THM, KHM and HH.
3. As the relevant facilities for enrolling biometrics are not available in Libya, the applicants sought confirmation that the respondent would exercise her discretion and make arrangements to enable the applicants to enrol their biometrics in Tripoli or at a later stage. They also invited the respondent to confirm she will consider the applications pending the biometrics being provided.

The decisions challenged

4. The applications were initially refused by the respondent on 24 May 2022. The respondent withdrew her decisions but has since repeated the decision to refuse the applications for reasons that are now set out in decisions dated 21 September 2022. The material reasons are the same for each applicant. The respondent said:

"3. Biometrics, in the form of a facial image and fingerprints, underpin the UK's immigration system to support identity assurance and suitability checks on foreign nationals who are subject to immigration control. They enable us to conduct comprehensive checks to prevent leave being granted to those who pose a threat to national security or are likely to breach our laws.

4. The submission of biometrics forms part of UKVI's standard operating procedures which require, as part of an online application, attendance at a Visa Application Centre ('VAC') in order to submit a live photograph, biometrics and any identity documents or other evidence. This information is then used as part of the decision-making process on entry clearance applications, by ensuring that mandatory security checks can be completed and only those who are suitable are granted entry clearance and allowed entry to the UK, alongside meeting the requisite eligibility requirements for the visa route applied under.

5. Additionally, a major policy reason for requiring fingerprint biometrics is to prevent abusive applications being submitted using multiple identities.

6. Since the taking of and use of biometrics is critical to protecting the UK and its residents, the threshold for deferring or waiving the biometrics requirement is therefore commensurately high. Biometrics will only be waived or deferred in circumstances that are so compelling as to make them exceptional. The 'Biometric information: introduction' and 'Biometric information: enrolment'

Guidance documents

<https://www.gov.uk/government/publications/biometricinformation>

have been updated to be clear that an individual must, in most circumstances, enrol their biometrics for visa purposes. The enrolment guidance sets out further information about the requirement to enrol biometrics."

5. The respondent then addressed the various claims and suggestions made by the applicants and said:
- a. An official could not be sent from Tunis to Tripoli (as had happened in another case) because the Foreign, Commonwealth & Development ("FCDO") advise against all travel to Libya and the British Embassy in Tripoli does not provide consular services. Neither does the Embassy have the capacity to enrol biometrics.
 - b. The respondent cannot satisfactorily ascertain the applicants' identity to a reasonable degree of certainty and that militates against providing an indication of the likely outcome of a substantive immigration decision prior to biometrics being enrolled. Furthermore, the respondent would be unable to fix the applicant to their identity for the purpose of preventing identity fraud in further applications.
 - c. The status of an indicative decision might be uncertain.
 - d. The absence of credible evidence of identity, such as a passport, supports the requirement for submission of biometrics to enable identity and security checks to take place and prevent fraud.

- e. It is not clear how the applicants made the journey of over 3000km from Ethiopia to Libya, undocumented, as minor's. The applicants have failed to satisfactorily explain why they were unable to seek support with the help of family and provide biometrics while residing in Ethiopia until December 2020.
 - f. The applicants' circumstances are not sufficiently compelling or exceptional so as to outweigh the public interest considerations of protecting public safety and justify treating them differently from other individuals who need to attend a VAC to enrol their biometrics as part of their application.
 - g. The UNHCR certificates are based solely upon the applicants' statements and the respondent cannot be satisfied that the information on the UNHCR certificates is accurate.
6. On the evidence provided, the respondent concluded the applicants have failed to establish they have a family life with KHM and HH such that Article 8 is engaged. In any event, the respondent concluded the decision to refuse entry clearance is proportionate. The provision of biometric information is linked to national security and the applicants have neither submitted biometrics nor provided sufficient evidence to establish their identity to a reasonable degree of certainty. The applicants' circumstances are not sufficiently compelling or exceptional so as to outweigh the public interest considerations of protecting public safety and justify treating them differently from other individuals who need to attend a VAC to enrol their biometrics as part of their application.

The issue

- 7. This claim concerns the respondent's powers to refuse to defer the requirement to provide biometric information, as defined in section 15(1A) of the UK Borders Act 2007 during the application process for entry clearance.
- 8. As set out in the applicants' skeleton argument, the core issue in this claim is whether the respondent's refusal to defer or make alternative arrangements for provision of biometrics, and the consequent failure to decide the substantive entry clearance applications, breaches Article 8 ECHR.

The familial relationship and identity of the applicants

9. The respondent does not accept the applicants are related to KHM and HH as claimed, and so the respondent claims the applications fail at the first hurdle. It is however common ground between the parties that the Tribunal must make its own decision on whether or not the decisions breach Article 8 ECHR and that its determination will be intensely fact specific, applying anxious scrutiny.
10. Having accepted we have a duty to enquire into the Article 8 claim ourselves, we invited Ms Knorr and Ms Hill to address us upon the relationship between each of the applicants and KHM and HH, and their identity first. We informed the parties that if we are persuaded that the circumstances are as they are claimed to be, we should say that sooner rather than later. Our decision as to whether the applicants are who they claim to be, and whether each of them has established they have a family life with KHM and HH will determine the remaining issues to be resolved. Plainly if Article 8 is not engaged the question whether the decision of the respondent is proportionate will not arise.
11. Having taken us through the evidence that is before us Ms Knorr submits there is a considerable volume of evidence, and although there may be some unanswered questions, when properly considered, the evidence of a familial relationship between the applicants, KHM and HH has remained consistent and credible. Ms Knorr accepts it is now apparent from the DNA evidence that the familial relationships between the applicants and KHM and HH are not in fact as first claimed or understood. She submits the respondent is nevertheless unable to point to anything that undermines the evidence of the applicants and the respondent failed to give anxious scrutiny to the material.
12. Ms Hill accepts, as she was bound to following the DNA evidence, that there is a clear familial relationship between KHM, HH and THM. She submits there is one inconsistency and that is the date of birth of THM but that has been explained and corrected by the UNHCR on his 'Asylum Seeker Certificate'. As to NHM, she submits there is no evidence of a biological relationship and no credible evidence of his identity.
13. We have borne in mind throughout that even if we accept the relationships are as claimed, it does not necessarily follow that the applicants are in fact who they claim to be. They might for example have assumed the identity of another member of the family or another individual.
14. Having heard the parties' submissions and having considered the evidence before us we informed the parties that we are satisfied, on balance, that there is a familial relationship between the applicants and KHM and HH for the purposes of Article 8 and that

we are satisfied the applicants are who they claim to be. We are satisfied, on balance, that THM is the half brother of KHM and HH and that although NHM is unrelated biologically, he is the individual that was brought up by KHM's parents in Ethiopia in the way that he claims.

15. After the applications were initially refused by the respondent on 24 May 2022 and during the course of a judicial review claim challenging those decisions the applicants secured a DNA report prepared by Dr Denise Syndercombe Court, a Professor of Forensic Genetics at Kings College, London. She states that considering the genetic results, the most likely set of relationship is that:

- KHM and HH are full siblings. THM is their half sibling, sharing their mother. The Y chromosome tests show that KHM and HH share the same paternal ancestry, but THM's paternal ancestry is different.
- NHM has a different paternal ancestry from the others and the genetic evidence shows that he cannot be related to the other three in either a full or half sibling relationship. His being unrelated is, on a balance of probabilities, more likely than a more distant relationship such as a cousin or half cousin.

16. Drawing together the threads of the other evidence before us, we note in particular:

- a. KHM arrived in the UK in May 2015 as a child. He attended a screening interview on 22nd June 2015, aged 15. He provided the names of his mother and father. He confirmed that in Ethiopia, he lived in Dalo Mana, Bale. He stated his father has two wives and 15 children. He stated he lived at home with his parents and younger siblings. He named six brothers and two sisters. Three of the brothers named (*including AHM*) were said to be older (*aged 22, 21, and 20*) and two were younger (*aged 9 and 7*) than him. THM and NHM were named as the two younger brothers. KHM did not refer to HH in the screening interview, but we are satisfied that at the time, KHM believed HH to be a half sibling, and not a full sibling as the DNA result has subsequently revealed.
- b. HH arrived in the UK as part of 'Operation Purnia' in December 2016, aged 15. He named KHM as his brother and the person that would be caring for him. He completed a written 'Statement of Evidence' form in January 2017 and confirmed he had lived in Dalo Mana, Ethiopia. He provided the name of his father and mother. We note HH and KHM

had both given the same name for their father, but each named a different mother, consistent with their claim and understanding at that time that they were half-brothers. In fact HH described KHM as his half brother. His claim for international protection was refused by the respondent in a decision dated 31 January 2019. His appeal against that decision was allowed by First-tier Tribunal Judge S Smith on 1 April 2019.

- c. Ms Knorr drew our attention to the exchange of WhatsApp messages between the applicants and KHM and HH, and the translations of those messages. The messages commence on 31 August 2021 and it is clear from our reading of those messages that KHM and HH express some concern about the predicament the applicants find themselves in, and about their family. For example, on 31 August 2021, there is an exchange of messages in which KHM and HH ask about the health of their mother. The applicants responded; *"When we left the country she was not in good health situations. After we left the country, we do not have much information and we do not have any news whether she is alive..."*. There is also evidence of money being sent by KHM to Libya for the benefit of the applicants on 7 September 2021.
- d. Contemporaneous with the early exchange of WhatsApp messages, an email was sent by KHM to the UNHCR on 2 September 2021 confirming he and HH have established contact with the applicants in Tripoli and expressing concern for their welfare and setting out the steps they have taken to seek assistance to be reunited. They had also contacted the Refugee Family Reunion Support project run by the Red Cross, at about the same time but they were unable to assist.
- e. We were taken to some photographs of the applicants that were sent to KHM and HH by the applicants on 5 September 2021 using WhatsApp. Exhibited to the witness statement of KHM dated 19 January 2022, is a photograph of him taken outside the family home in Ethiopia with his mother, HH and the applicants. We also have before us a screenshot of a video call between the applicants, KHM and HH on 28 August 2021. On closer examination of each of the photographs we note that THM has a receding hairline and what appears to be some form of bulge on the right of his forehead. We are satisfied that the photograph of the family taken in Ethiopia some years ago, shows the two applicants that now appear in the photographs in the WhatsApp messages. More importantly, the UNHCR 'Asylum Seeker

Certificates' issued to each of the applicants has a photograph of each applicant and we are satisfied that the photograph on the certificates resembles the individuals shown in the WhatsApp messages.

- f. A short form BID (Best Interest Determination) was completed by the UNHCR. The applicants were interviewed on 8 February 2022. THM named his siblings, including half siblings, who were living in Ethiopia when they left Ethiopia. He explained that he had a brother (KHM) and half brother (HH) living in the UK, and that one of his half-sisters and his father's other wife are in Sudan. As part of the assessment, the views of KHM and HH were also sought. KHM described himself to be the *"biological paternal uncle of [NHM] and full brother of [THM]"*. KHM and HH explained that the applicants do not know that NHM is not a brother, but the son of AHM whose wife passed away while giving birth to NHM. The applicants provided an account of their life in Ethiopia, and when and why they were separated from their family. They also provided an account of their journey to Libya and their circumstances in Libya. The account provided by the applicants of their family in Ethiopia and the reasons provided as to why they fled Ethiopia are broadly consistent with the accounts provided by KHM and HH when they made their claims for international protection many years earlier. THM referred to his father supporting the OLF and to his father being arrested and detained. He referred to his mother having said that the family were informed in 2014 by the authorities that his father passed away in prison after his health deteriorated. He claimed that he was separated from his mother and the rest of the family in July 2020 after AHM made arrangements for him and NHM to leave Ethiopia. He managed to establish contact with KHM with the support of someone using social media. We note the account given by THM of his father being arrested and detained and the family having been informed four years later that his father had been imprisoned and died of an unspecified illness is entirely consistent with the account provided by HH in his appeal before FtT Judge Smith.
17. On balance we find that the evidence before us is internally consistent as far as the identity of the applicants and the familial relationships are concerned. The consistency of the account relied upon is not something that has come about since August 2021 when the applicant's re-established contact with KHM and HH, but is longstanding. The internal consistency in particular regarding the events in Ethiopia many years ago, as relayed by KHM and HH when they made their claims for international protection in 2015

and 2016, with the account given by the applicants when they were interviewed by the UNHCR would only be possible if (a) the accounts were true and the applicants have some recollection, or (b), there has been some elaborate attempt to deceive by young individuals who gave their accounts several years apart. On balance, we find the remarkable internal consistency arises because the account is what the applicants remember from their lives in Ethiopia as part of the family. We have considered the possibility that the evidence points to the applicants being of a different identity to that claimed by them, but that would be nothing more than speculation, and is against the weight of the evidence.

Family life

18. The respondent disputes that her decisions breach Article 8 as alleged by the applicants or at all. In considering the Article 8 claim we have considered the decision of the House of Lords in Razgar, v SSHD [2004] UKHL 27. The first issue for us to consider is whether the applicants enjoy family life within the meaning of Article 8(1) with KHM and HH.

19. The DNA evidence before us establishes there is a clear familial relationship between KHM, HH and THM. As far as NHM is concerned, Ms Knorr submits that on the evidence before us, we should find NHM has a family life with KHM, HH and THM and that Article 8 is engaged. Whatever the biological relationship, NHM grew up with KHM and THM and KHM has always treated him as a half-sibling. Ms Knorr referred to the decision of the Court of Appeal in Pawandeep Singh v Entry Clearance Officer (New Delhi) [2005] 2 WLR 325 in which it was held that "Family life" within the meaning of Article 8 can exist where a child sought entry clearance to come and live with his adoptive parents in the UK. The Court of Appeal confirmed an adjudicator had been entitled to hold that family life had been established where there were substantial links between the child and his adoptive parents, and the adoption, although not recognised by UK law, was a further factor which militated in favour of family life. Mr Justice Munby (as he then was) said:

"59. It is also clear that "family life" is not confined to relationships based on marriage or blood, nor indeed is family life confined to formal relationships recognised in law. Thus family life is not confined to married couples. A de facto relationship outside marriage can give rise to family life (*Abdulaziz, Cabales and Balkandali v United Kingdom* at para [63]), even if the parties do not live together (*Kroon v The Netherlands (1994) 19 EHRR 263* at para [30]), and even if the couple consists of a woman and a female-to-male transsexual (*X, Y and Z v United Kingdom (1997) 24 EHRR 143* at para [37]). So there can be family life between father and child

even where the parents are not married: *Keegan v Ireland* (1994) 18 EHRR 342 at para [44]. Likewise there can be family life between a parent and a child even where there is no biological relationship: *X, Y and Z v United Kingdom* at para [37] (family life existed as between the female-to-male transsexual partner of a woman and the child she had conceived by artificial insemination by an anonymous donor). A formal adoption creates family life between the adoptive parents and the child: *X v Belgium and the Netherlands* (1975) 7 D&R 75 , *X v France* (1982) 31 D&R 241 , *Pini v Roumania* (unreported — 22 June 2004) . Family life can exist between foster-parent and foster-child: *Gaskin v United Kingdom* (1989) 12 EHRR 36 .

20. Ms Hill submits the evidence of family life in this case is limited. KHM arrived in the UK in 2015 and HH arrived in the UK in 2016. On their own accounts, they have lived separately from the applicants for several years. THM was 9 when KHM left home and he is now 17. NHM was 7 and is now 15. The applicants did not establish contact with KHM and HH until 28th August 2021 and the extent of their family life is therefore that which they have established since re-connecting 21-months ago.
21. As far as NHM is concerned, Ms Hill referred to the judgment of Munby J in *Singh v ECO* in which he considered at some length several factors that inform our understanding of what is meant in contemporary Britain by the “family life” referred to in Article 8. As to the relevant test, at paragraph [79] he said:
- “I agree with Lord Justice Dyson that what he calls the core principle is to be found in *Lebbink v The Netherlands* at para [36]:
- “The existence or non-existence of “family life” for the purposes of Article 8 is essentially a question of fact depending upon the real existence in practice of close personal ties.”
- Typically the question will be, as the Court put it in the same case at para [37], whether there is “a close personal relationship”, a relationship which “has sufficient constancy and substance to create *de facto* “family ties”.”
22. Ultimately, the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case. The question is highly fact sensitive. In *Kugathas -v- SSHD* [2003] EWCA Civ 31, at [14], Sedley LJ cited with approval, the Commission’s observation in *S v United Kingdom* (1984) 40 DR 196: “*Generally the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case.*”. There is no presumption that a person has a family life, and the Tribunal must consider a range of factors that are relevant. Such factors include a consideration of matters such as the family members with whom the individual has lived, identifying who the

direct relatives and extended family of the appellant are, the nature of the links between them, the age of the applicants, where and with whom they have resided in the past, and the forms of contact they have maintained with the other members of the family with whom they claim to have a family life.

23. As far as NHM is concerned, as Dyson LJ recognised in Singh v ECO, there can be family life between a parent and a child even where there is no biological relationship. There was no biological relationship between NHM and the parents of KHM, HH or THM, but we are satisfied from the evidence before us that NHM lived with the family in Ethiopia and has throughout his life been treated as a sibling of KHM, HH and THM.

24. In Singh v ECO, the Court considered the potential for development of family life as relevant in determining whether family life already exists. Dyson LJ said:

“38. One final point. Mr Garnham submits ... that the obligation under article 8 to grant entry clearance could only arise if the existence of family life had been established in the first place. The source for this submission is the statement in *Marckz* (para 31): “By guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family”. Mr Garnham submits that, with the exception of the decision in *Pini*, the ECtHR has recognised that “potential” family life may be relevant in determining whether family life exists for the purposes of article 8 only in the context of a child and his natural father (see *Nekvedavicius v Germany App No 46165/99 (2004) 38 EHRR CD 12* and *Nyluind v Finland App No 27110/95, decision of 29 June 1999*). But as we have seen (para 29 above), the decision in *Pini* (para 143) shows that the *potential* for development of family life is relevant in determining whether family life already exists, and that this is not confined to cases involving children and their natural parents. I cannot see in principle why the potential for development may only be taken into account in relation to family life between children and their natural parents. Para 143 of *Pini* is plainly inimical to such a restricted view of the scope of the principle. I acknowledge, however, that unless some *degree* of family life is already established, the claim to family life will fail and will not be saved by the fact that at some time in the future it could flower into a full-blown family life, or that the applicants have a genuine wish to bring this about.

25. Although we recognise the force in the submission made by Ms Hill that the applicants have been separated from KHM and HH for several years, we find the applicants have a family life with KHM and HH for the purposes of Article 8(1). KHM and HH themselves left Ethiopia as children. We are satisfied that as children living together in Ethiopia, the applicants enjoyed family life with KHM and HH. We acknowledge the separation when KHM and HH were forced to leave Ethiopia as children, but there is now evidence before us of on-going communication between the applicants and

KHM and HH since they re-established contact. There is evidence before us of the support that is provided to the applicants in the hope that they will all be united in the UK. The evidence before us includes a regular exchange of WhatsApp messages in which KHM and HH express concern about the welfare of the applicants. There is also evidence before us of financial support provided to the applicants. We accept the applicants are in Libya entirely separated from any other members of their family.

26. We accept the ongoing delay in the applicants' ability to be reunited with KHM and HH in the UK has consequences of such gravity as to engage the operation of Article 8. The issue at the heart of this claim is whether the interference is proportionate to the legitimate public end sought to be achieved.

Proportionality

27. In her skeleton argument, Ms Knorr accepts there is, in general, a very strong public interest in registration of biometrics prior to entry to the UK. She also recognises that the public interest in the provision of biometrics is strengthened because the applicants do not have biometrically chipped passports and because once they arrive in the UK, they could not be easily removed. She submits however that the public interest considerations are somewhat attenuated by the specific facts of the applicants' cases. She refers to their ages, their migration journey and the failure of the respondent to identify any factor specific to the applicants, such as their nationality, to suggest they could be a security threat or that they pose a particular risk of making fraudulent immigration applications, and given their location and the UNHCR checks already completed.
28. Ms Knorr submits there are alternatives that are open to the respondent so that the applicants' biometrics can be provided prior to their arrival in the UK. The applicants' biometrics could be obtained in Libya using mobile equipment as has happened in the past. Alternatively, the respondent could make a decision in principle so that the UNHCR can transfer the applicants to and 'Emergency Transit Mechanism (ETM) with Niger being one option. Ms Knorr submits it is neither reasonable nor proportionate for the respondent to refuse to defer biometrics until the applicants' entry, while also failing to facilitate alternative arrangements.
29. Our attention was drawn to an exchange of email correspondence between the applicants' solicitors and the UNHCR discussing the assistance the UNHCR may be able to provide. The UNHCR position in respect of the applicants is set out in an email to the applicants' solicitors dated 9 May 2023. It states:

“Our position to assist these children in reuniting with their family in the UK remains the same - that we will stand ready to find a solution. As previously mentioned in my emails, UNHCR continues to advocate for flexible solutions enabling refugees to access family reunification procedures. I have previously discussed alternative solutions with you, one of which included evacuation from Libya.

If a positive in-principle is rendered, subject to collection of biometrics, UNHCR will assist with evacuation, of which one option is evacuation to Niger.

Ultimately, we would like to see these children reunited with their families in the UK as soon as possible....”

30. Ms Hill submits the respondent’s decisions are essential to maintain immigration controls and protect the safety and security of the public. She submits no alternative provides a realistic or practical solution such as to adequately meet those concerns. The serious policy imperatives behind the requirement for biometrics and the high threshold for deferral are clear from the evidence set out in the witness statements of Kevin Burt and John Allen.

31. Kevin Burt is the Deputy Policy Lead on Biometric Policy for the Border Security and Identity Policy Unit. He explains that an individual has to give biometrics in a controlled environment, and it is not possible to take biometrics from a wet fingerprint as the format is not compatible with the respondent’s system for producing a biometric residence permit. He states:

“4. Biometrics in this context consist of a facial image and up to ten finger-scans. These biometrics enable quick and robust identity assurance and suitability checks on foreign nationals subject to immigration control, allowing the Home Office to (a) establish an identity, through “fixing” an individual’s changeable biographic details (for example, name, date of birth, nationality or gender) to biometric data; (b) verify an individual accurately against an established identity; and (c) match individuals to other datasets (for example, against watchlists or fingerprint collections) to establish their suitability to be granted a visa or other immigration document.”

32. Mr Burt discusses the cohort of people that are either exempt from providing biometrics or partially exempted. They include those who are unable to provide biometrics because they are physically incapable of doing so for medical reasons. They are exempted by exercising the discretion not to require biometrics in Regulation 3 of the Immigration (Provision of Physical Data) Regulations 2006 and Regulation 5 of the Immigration (Biometric Registration) Regulations 2008. Mr Burt states:

“12. In other cases, since the taking of and use of biometrics is critical to protecting the UK and its residents, the threshold for waiving or deferring the requirement to provide biometrics is commensurately high. The discretion to waive or defer would

therefore only be exercised where there are circumstances that are so compelling as to make them exceptional. We need to have a reasonable degree of certainty about the identity of the applicant to enable us to conduct accurate biographical checks on the person.

...

15.I set out below some reasons why taking biometrics prior to travel to the UK is so important:

- a. An applicant may be linked to a previous immigration record, either in the same or different biographical information, which would enable us to check their previous immigration history and help to detect attempts to use false identification documents and identity information;
- b. An applicant may be linked to terrorist activities or serious organised crime or have previous immigration breaches. We often have no readily verifiable information about the people who are applying, who may also lack adequate documentary evidence to enable the Home Office to conduct identity checks.

16. When enrolling fingerprints of foreign nationals, we have encountered individuals whose fingerprints have matched against fingerprints and latent prints (scenes of crime) on both UK and international fingerprint databases. For example, individuals who have applied under the ARAP scheme have been matched to databases, which has enabled further enquiries where required.

17. Were we to allow the Applicants to defer enrolling their biometric information until on or after their arrival in the UK, we would only be able to determine their identity and suitability to a strong level of assurance after they have arrived in the country. If their application would have normally failed on non-conducive grounds or other suitability grounds, while we could seek to revoke their leave in the UK given there are no enforced returns to Ethiopia, the Applicants claimed nationality, at present, they would remain in the UK unless they chose to return on a voluntary basis."

33. Ms Hill also refers to the statement of Mr Burt setting out the difficulty with 'in-principle' decisions and the difficulties such a decision can cause. He states:

"40. The Home Office would, in general, prefer not to provide 'in principle' decisions for several reasons. First, even a relatively limited deferral of biometrics of the kind sought would undermine the public interest in "fixing" an applicant's identity at the time of application. Second, making "in principle" decisions without biometrics would create a risk that recipients of negative "in principle" decisions would be able to make further applications under different identities, which is why we would need to be satisfied to a reasonable degree of certainty about the identity of the applicants. Those considerations are relevant to the applicants' circumstances in this case because they do not have a passport which means we would have a lower level of confidence as to the applicants' identities and, without having recorded biometrics, would

make it very difficult to identify them again if they were to make a repeat application using different biographical information.

41. In addition, the legal status of such an “in principle” decision, without confirmation from the applicants that they are aware of the risks of getting an adverse decision after they enrol their biometrics, may give rise to uncertainty.

42. The Secretary of State needs to first be satisfied that the applicant’s identity has been established to a reasonable degree of certainty. We must have a reasonable degree of certainty about the biographical information (the identity) provided before considering whether to make an ‘in principle decision’ because the Home Office will use those details to conduct identity and suitability checks. Conducting those checks without credible evidence of identity would significantly decrease the level of confidence we could have in the results of those checks.

43. The Applicants hold a UNHCR asylum seeker certificate; however, we have seen no evidence of what was actually provided to UNHCR about their identities to confirm whether the details on the UNHCR certificates are accurate.

...

47. Even if the Secretary of State did agree, which she has not, to predetermine their application(s) and she was minded to grant them Entry Clearance, they would still need to travel to a VAC outside of the UK to enrol their biometric information to complete their application(s) before travelling to the UK. They would be responsible for making arrangements to get to a VAC, which may include crossing any international borders.”

34. Of the various alternatives canvassed before us, Ms Knorr did not suggest that the applicants should be permitted to defer enrolling their biometric information until on or after their arrival in the UK.
35. We do not accept the applicants’ biometrics could be obtained in Libya using mobile equipment as has happened in the past. As Mr Burt explains in his witness statement, in the previous case of SGW the respondent was able to exceptionally arrange with the FCDO and the UNHCR the enrolment of the of the individual’s biometrics (along with a small number of other individuals who were being looked after by the UNHCR as they were considered to be vulnerable) in Libya, because the FCDO were due to meet with UNHCR officials in Tripoli and the respondent still had mobile biometric enrolment equipment. We are told that equipment has now been decommissioned and in any event, the arrangement required FCDO officials to travel to the UNHCR office using additional security details to protect the officials and the equipment. We accept the opportunity that presented itself at the time of a pre-arranged meeting with UNHCR officials in Tripoli was wholly exceptional, and is no longer possible.

36. The only realistic alternative to the applicants' remaining where they are without any foreseeable prospect of being reunited with KHM and HH is the possibility of a decision in principle so that the UNHCR can transfer the applicants to an ETM in Niger or elsewhere for the applicants' biometrics to be provided before any onward travel to the UK.
37. On 3 May 2023, the respondent published guidance setting out the policy on dealing with individuals who are applying to come to the UK who claim they are unable to travel to a Visa Application Centre safely: *Unable to travel to a Visa Application Centre to enrol biometrics (overseas applications)*, version 1.0. Four criteria are identified.
1. Individuals must satisfy a decision maker about their identity to a reasonable degree of certainty before coming to the UK.
 2. They must provide evidence they need to make an urgent journey to a VAC that would be particularly unsafe for them based on the current situation within the area they are located and along the route where they would need to travel to reach a VAC to enrol their biometrics, and they cannot delay their journey until later or use alternative routes.
 3. They must demonstrate their circumstances are so compelling as to make them exceptional. which go beyond simply joining relatives who are living in the UK, for example, their UK based sponsor requires full-time care and there are no other viable alternatives to meet the sponsor's or their young children's needs.
 4. They must confirm they are able to travel to any VAC if they want their application to be predetermined, or where they are requesting decision makers to excuse them from the requirement to attend a VAC to enrol their biometrics, they need to explain why they cannot attend any VAC, but are able to travel to the UK.
38. Neither party invited us to consider the respondent's published guidance, although Ms Hill did submit that it is open to the applicants to make a further application to the respondent that will be considered in accordance with the respondent's published policy. That with respect, is an unattractive submission. The respondent has already concluded that the applicants are unable to demonstrate their circumstances are so compelling as to make them exceptional. There is nothing said by the respondent that causes us to believe the respondent might take a different view upon a further application.
39. The published guidance highlights that decision makers must be able to satisfy themselves about the identity of individuals who are making an application to come to the UK to a reasonable degree of certainty before they travel to the UK. The guidance also highlights that the onus lies on the individual to provide evidence of their identity that on balance is likely to establish their name,

age and nationality so that background biographical checks can be made. Identity checks can be completed at the Visa Application Centre, if decision makers agree to predetermine their application, to confirm, validate and lock-in their identity. This is to enable decision makers to have a reasonable degree of certainty about the individual's identity.

40. We accept the evidence of Mr Burt and for the reasons that he has set out, there is clearly a very powerful public interest in ensuring that biometrics are enrolled prior to the substantive consideration of a family reunion application. The public interest must be weighed against the particular circumstances the applicants find themselves in and the findings we have made regarding the familial relationships and the identity of the applicants.
41. The applicants are now 17 and 15 years old. We have before us a report dated 22nd September 2022 prepared by Jane Bartlett, an Independent Social Worker. Her report is based upon an interview with the applicants by video link during a face-to-face visit at the home of KHM. She has also visited and spoken to HH. During the video link interview of the applicants, Ms Bartlett was given a tour of the accommodation the applicants have been provided. She states:

“4.9 It is my professional view that [THM] and [NHM]’s current circumstances place them at enormous risk of further physical and emotional harm. In terms of their most basic needs, they are sleeping on soiled mattresses on the floor of what appears to be unsanitary and insecure accommodation. There were others hovering in their vicinity, showing no intention to respect privacy and appearing to take an interest in the children’s situation (which I found disturbing on their behalf). I could see only a small sack of rice beside the camping gas ring and I know that they are restricted in the type of food they can afford. The children’s diet is also restricted by the fact they are fearful of leaving their ‘compound’ and of being picked up and detained once more by the authorities. They consequently rely upon the land owner, for specific food being brought to them, to avoid going out. There are loose wires across the children’s living area, although it is unclear when the wires might be ‘live’, as the electricity is reported to be switched off or is disconnected. The washing facilities are totally inadequate as they consist of a rusty pipe beside the toilet and washing up area. It is not private in any way, and these rudimentary facilities are shared with the numbers of others who reside in hiding with [THM] and [NHM].

4.10 From the information provided, including the video images of the children’s living environment, and my interviews with all four of them, it is my view that [THM] and [NHM] require urgent reunification with their family members in the UK, where they have appropriate and secure accommodation available and where they are loved. [KHM] and [HH] have strived to locate sources of support in their attempt to bring their siblings to safety and have not

stopped. They have followed their legal advisor's guidance and are compelling [THM] and [NHM] to remain patient whilst the legal processes take effect. They are very concerned that their siblings will again take flight because they are in such fear where they are staying right now, and so they make every attempt to reassure them that a positive outcome will happen. The children also urgently require reunification with their bothers, [KHM] and [HH] in London, in order for them to emotionally stabilise to a point at which they will feel strong enough to accept therapeutic assessment and intervention. Should their treatment requirements go unassessed and unsupported, [THM] and [NHM]'s adolescent and future adult mental health, could be placed at increasing risk. "

42. Ms Bartlett acknowledges that she is not an expert on country conditions in Libya but she has read the background material she has been provided with and states that if that material depicts a fair presentation of the current situation of refugees and irregular migrants in Libya, then it is likely that the applicants will continue to experience exclusion from that society. She states the applicants are destitute and isolated children who are likely to remain extra vulnerable to attack because they have no safe place to stay.
43. In its BID assessment, the UNHCR has concluded there is no foreseeable prospect that the applicants will be able to return to Ethiopia in safety and dignity in the foreseeable future. The UNHCR noted the applicants remain alone in Libya, with no means of protection nor a proper living arrangement, thus exposing them to heightened risk of harm, abuse and exploitation. The UNHCR said:

"In the absence of a national asylum framework, UNHCR conducts individual refugee status determination (RSD) under its mandate, and issues registration certificates to asylum seekers and refugees to assist them with access to health care, public education, and some freedom of movement. However, UNHCR certificates do not provide a basis for legal stay in Libya under national law, and do not afford asylum seekers and refugees reliable legal protection. In this regard, there is no foreseeable prospect that the child will be able to achieve meaningful and effective integration in Libya.

...

Third Country Solution:

The children remain unaccompanied and alone in Libya without any family members or caregiver. With no prospects in the foreseeable for the children's return to Ethiopia or local integration prospects in Libya, it is recommended that the children be considered for solutions outside of Libya as swiftly as possible. Following further assessment and taking into consideration the children's views, reunification of the children with their brother and half-brother in the UK is the most appropriate durable solution in the present case, as this will maintain and strengthen the integrity of family unity. With

limited access to basic needs, no educational opportunities or means to ensure their safety and well-being and considering the children's siblings are willing and able to care for them in the UK, reunification with their siblings is determined to be in the children's best interest. It will ensure the children's continued well-being and care in a nurturing and caring family environment. In this regard, family reunification represents an international tool aiming at protecting the children effectively and sustainably against various protection risks and against serious human rights violations in the country of asylum. By reuniting with their family in the UK, the children will first and foremost access physical safety and enjoy much needed emotional support from their siblings but will also have the chance to obtain proper legal status and access psychological assistance and counselling services if needed.

It has been, therefore, determined that reunify with their relatives in UK as the most viable option in the children's best interest."

44. It is entirely understandable that the respondent would, in general, prefer not to provide 'in principle' decisions for the reasons that are identified by Mr Burt. There is clearly a strong public interest in 'fixing' an applicant's identity at the time of the application. On the evidence before us, we have found the applicants are who they claim to be. We are satisfied as to their identity. They have each been issued with a 'UNHCR Asylum Seeker Certificate' that has their name, date of birth and nationality endorsed upon it. The certificates also have a photograph of the applicants so that there is at least some way of linking that certificate to the relevant individual. In his witness statement, Mr Burt states that the respondent has seen no evidence of what was actually provided to the UNHCR about the identity of the applicants to confirm whether the details on the UNHCR certificates are accurate.
45. In her witness statement dated 13 April 2023 Sonal Ghelani provides an update of the steps taken to explore options for the applicants to enrol their biometrics including her discussions with UNHCR (Libya). She confirms that on 26 March 2023, Zartasha Bajwa, the Associate Resettlement & Complimentary Pathways Officer at UNHCR, explained to her that the biometrics given by THM and NHM involve providing 10 fingerprints and a digital image to UNHCR. She also explained that UNHCR's practice is to carry out standard biometric checks which are the same as those biometric checks conducted for refugees in Libya accepted for resettlement or as mandate refugees by the UK. Therefore, if there had been duplicate identities for THM and NHM in UNHCR's databases these would have come to light when they went through the registration process and would have been recorded in the BID.
46. Ms Ghelani also confirms Ms Bajwa has said the possibility of UNHCR evacuating THM and NHM to Niger to provide biometrics if

the VAC in Ghana was able to provide the 'apply anywhere' service in Niger is a possibility but only if:

“(i) There was an in-principle decision that THM and NHM will be issued with entry clearance as long as they subsequently enrol their biometrics and the checks conducted as a result of that do not reveal any information that would prevent visas being issued (i.e. that they have a positive in principle decision, subject to satisfactory biometric checks); and

(ii) There was confirmation of the appointment to enrol biometrics in Niger.”

47. Ms Ghelani goes on to say:

“[Ms Bajwa] said that these conditions would be necessary because there are limited spots available at the UNHCR ETM, Niger is a transit country, and children cannot remain there for any length of time because it is not safe....Even if decision were positive, but biometrics failed, at that stage she explained that UNCHR would be able to re-settle the children so UNHCR would have options to assist them to move on from the ETM in the unlikely event that the biometrics led to a reversal of the in principle decision.”

48. Here, an 'in principle decision' would do nothing more than open the door for the UNHCR evacuating THM and NHM to Niger (as one option) to provide biometrics. Mr Burt refers to the 'uncertainty' that an 'in principle' decision can create but as the UNHCR accepts, in the event that the 'in principle' decision is reversed because of anything that comes to light when the biometrics are provided, the UNHCR would have options to assist the applicants move on from the Emergency Transit Mechanism. That would be a matter entirely for the UNHCR under whose custodianship the applicants, as children, would remain throughout the process. The applicants through KHM, HH and their legal advisors are aware of the potential risk. In her witness statement, Ms Ghelani confirms Ms Bajwa has said that in the unlikely possibility that visas may not be issued to THM and NHM following enrolment of biometrics UNHCR would then commence the process of putting the children forward for re-settlement from Niger, as the option suggested, since they would have a final refusal from the UK

49. Finally, we acknowledge the concern expressed by Mr Burt of the possibility that recipients of a negative 'in principle' decision would be able to make further applications under different identities. That is always a possibility but here the risk is minimised because the identity of the applicants has been fixed to the individuals identified in the 'UNHCR Asylum Seeker Certificate', by reference to information provided, the photographs and the 10 fingerprints and digital image provided to UNHCR.

50. Having considered the evidence before us and the submissions made, we find that the decision of the respondent to refuse to

provide an ‘in principle’ decision is disproportionate to the legitimate aim in the particular circumstances of this case where, as well as the individual factors relating to the present and future prospects for the appellants if they are not able to leave Libya, we have found that Article 8 is engaged, and have concluded from our own findings, taken together with the evidence collected by the UNHCR, that the name, date of birth, nationality, photographs and fingerprints are fixed for each of the two applicants.

- 51. We had informed the parties at the end of the hearing before us of our decision and that our reasons would be set out in a written judgment to be handed down. The parties provided us with a draft order that we approved on 17 May 2023.

The Vice President, Mr C M G Ockelton

- 52. I agree.

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