IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos.: UI-2024-005295; UI-2024-005297; UI-2024-005301; UI-2024-005302; UI-2024-005309; UI-2024-005311

FtT No.s: HU/56497/2024 LH/04477/2024
HU/56503/2024 LH/04479/2024
HU/56505/2024 LH/04480/2024
HU/56506/2024 LH/04481/2024
HU/56516/2024 LH/04482/2024
HU/56518/2024 LH/04483/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 13 January 2025

Before
UPPER TRIBUNAL JUDGE NORTON-TAYLOR
UPPER TRIBUNAL JUDGE RUDDICK

Between
IA (FIRST APPELLANT)
RE (SECOND APPELLANT)
KA (THIRD APPELLANT)
SA (FOURTH APPELLANT)
HA (FIFTH APPELLANT)
AA (SIXTH APPELLANT)
(ANONYMITY ORDER MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellants: Mr D Chirico, KC, Counsel, instructed by Bindmans LLP

For the respondent: Mr C Thomann, KC, Counsel, instructed by the Government Legal Department

Heard at Field House on 19 December 2024 and 6 January 2025

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellants and any member of their family are granted anonymity.
No-one shall publish or reveal any information, including the name or address of the appellants, likely to lead members of the public to identify the appellants or any member of their family. Failure to comply with this order could amount to a contempt of court.

ERROR OF LAW DECISION AND REASONS

Introduction

1. The appellants appeal with permission on all grounds against the decision of First-tier Tribunal Judge Seelhoff ("the judge"), promulgated on 19 September 2024 following a hearing on 11 September 2024. By that decision, the judge dismissed the appellants' appeals against the respondent's refusal of their collective human rights claim ("the claim"), a claim made through an application for entry clearance to join the first appellant's British citizen brother ("the sponsor") in this country.

2. At the outset we express our gratitude to Leading Counsel and the legal teams behind them for the expeditious and focused preparation of these appeals.

Background

3. The following matters are not in dispute. The appellants are Palestinian and were at the time of the hearing before the judge residing in the al-Mawasi "humanitarian zone" in Gaza (they have subsequently moved to the Nuseirat refugee camp). The first and second appellants are husband and wife and have resided in Gaza since the summer of 1994. They are the parents of the remaining four appellants who were, at the time of the

judge's decision, aged 18, 17, 8, and 7. The sponsor left Gaza and came to United Kingdom in the summer of 2007 and has resided here ever since. He is now a British citizen.

4. Following the attacks of 7 October 2023 and during the ensuing conflict, the appellants' home was destroyed by an airstrike and they were displaced. On 25 January 2024, the appellants submitted the collective application for entry clearance (said to constitute the claim), accompanied by representations. The applications were made using the Ukraine Family Scheme form, although the representations acknowledged that they could not qualify under this route, or any other provisions of the Immigration Rules ("the Rules"), but had chosen this form in accordance with the respondent's policy with regard to applications for entry clearance outside the Rules. Detailed submissions were made in relation to the appellants' particular circumstances, together with a request for predetermination of the claim, with the enrolment of biometrics to take place thereafter.

5. Following a good deal of correspondence between the parties to which we need not refer now, the respondent refused the claim in a decision dated 30 May 2024. The respondent concluded (unsurprisingly) that the requirements of the Ukraine Family Scheme were not met. Further, the respondent was not satisfied that there were compelling, compassionate circumstances justifying granting leave outside of the Rules. The decision noted the absence of any resettlement route for Palestinians and ultimately concluded that refusal of the application was not disproportionate. The decision purported to deny a right of appeal to the appellants on the basis that there had been no human rights claim.

6. The appellants nonetheless lodged appeals with the First-tier Tribunal and, by a decision dated 25 July 2024, First-tier Tribunal Judge Oxlade concluded that the respondent's decision constituted the refusal of a human rights claim to which a right of appeal was attached. The respondent has not challenged that decision and there is no jurisdictional issue before us.

The judge's decision

7. The judge acknowledged the "considerable volume of evidence" and the detailed submissions received from Mr Chirico, KC, and Mr Thomann, KC.

8. By way of background, at [8] the judge recorded the acceptance that the sponsor had provided a truthful account and that the appellants were trapped in Gaza, living in a "dire situation" and were facing a humanitarian crisis which had arisen "as a consequence of the Israeli government's indiscriminate attempts to eliminate Hamas".

9. The principal controversial issues recorded at [12] were as follows:

   (a) Whether there was family life under Article 8(1) between the sponsor and the appellants;

   (b) Whether the respondent's decision interfered with any family life and/or any private life enjoyed by the sponsor;

   (c) Whether any such interference was disproportionate.

10. It is worthy of note that, as confirmed by Mr Chirico before us and not disputed by Mr Thomann, the main focus of the parties' submissions was on the Article 8(1) issue and that very little had been said at the hearing about proportionality under Article 8(2).

11. The judge recorded that the sponsor had given oral evidence, adopting two witness statements and then being asked questions by Counsel: [13]. What are described as "lengthy submissions" were received from Counsel, details of which are not set out (presumably in order to achieve conciseness): [14]. The summary of the relevant legal framework at [15] is unremarkable.

12. The judge's findings begin with the question of family life under Article 8(1). He found that there was family life between the sponsor and the appellants, basing this on the following considerations:

(a) When considering relationships between adult siblings, there was no presumption for or against the existence of family life: [18];

(b) The existence of family life was a factual matter: [19];

(c) The truthfulness of the sponsor's evidence had not been challenged in cross-examination and despite gaps in the documentary evidence, his account was credible: [20];

(d) Although the sponsor had not seen the first appellant for 17 years, they were "close" and the former had a "close relationship" with the second appellant: [21];

(e) It was important to bear in mind the "unitary nature" of family life (reference is made to Al Hassan and Others (Article 8; entry clearance; KF(Syria)) [2024] UKUT 00234 (IAC)): [22] and [26];

(f) It was clear that the nature of the relationship between the sponsor and the appellants had "changed" since the escalation of the conflict in Gaza. Prior to that, the judge would not have been satisfied as to the existence of family life: [23] and [24];

(g) The appellants were living in a "profoundly dangerous" situation in Gaza and the sponsor had "clearly provided genuine, effective and committed support" to them: [24] and [25].

13. In concluding that the respondent's decision interfered with the family life of the sponsor and the appellants, the judge had regard to what he described as the "incredibly dangerous" situation for Palestinians residing in Gaza and that the appellants faced a "high risk of death": [28].

14. The judge then turned to the balancing exercise under Article 8(2). In summary, the judge took the following considerations into account as weighing in the respondent's favour:

    (a) The appellants could not satisfy the Rules: [30];

    (b) Parliament and/or the government had chosen not to introduce a resettlement scheme for Palestinians and it was not for the tribunal to institute such a scheme: this was a factor deserving of "considerable weight": [30] and [31];

    (c) There was a "floodgates concern", and it was wider than suggested by the small number of recent entry clearance applications made from Gaza; it "would actually relate to the admission of all those in conflict zones with family in the UK": [31];

    (d) Although not a matter addressed by the parties, the judge considered himself bound by section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") to consider "the question of cost and adequacy of accommodation in the UK." He concluded that it was "obvious" that the sponsor would be unable to accommodate and maintain the appellants in this country: [32];

    (e) There was no evidence of any intention pre-dating the conflict for the sponsor and the appellants to develop further family life ties. This was not a case in which a single family unit had been separated by, for example, a fear of persecution.

Moreover, the sponsor's evidence was that he only intended to live together with the appellants "until they can get on their feet and live independently": [33] and [34];

(f) Any development of family life as result of the appellants' current circumstances would not have been by way of a "normal and natural progression of the relationship between adult siblings and the extended family unit": [37];

(g) The sponsor suffered from PTSD, but it was the conflict which was interfering with his well-being, not the respondent's refusal of the claim: [38].

15. Weighing in the appellants' favour, the judge took account of the following:

(a) The appellants were living in a situation which was "extremely and "unjustifiably" harsh and in which their lives are threatened daily by indiscriminate and lethal attacks…": [40];

(b) It was "clearly" in the children's best interests to escape from Gaza, a place where their lives were "at risk on a daily basis, and where they are living in extremely dangerous and insecure circumstances in a tent…". Leaving Gaza was "plainly a vastly better option for them" than remaining there: [41].

16. Drawing these considerations together, at [42] and [43], the judge concluded as follows:

> "42. Considering all the circumstances in the round I find that the factors raised by the Appellants do not outweigh the public interest because in my view the creation in effect of resettlement policies for conflict zones is for the government and parliament. It has not been

shown that the failure to make such a policy is unlawful, and in that context the public interest is in respecting that public policy decision.

43. Notwithstanding the risk to the Appellants, the weight to be attached to the public interest is not outweighed by the interference in Article 8 rights in this case where there has never been a long term intention for the Appellants to live with the Sponsor, and where it is not envisioned that they would live together beyond the point at which the Appellants are settled enough to make their own home again."

17. Accordingly, the appeals were dismissed.

The grounds of appeal

18. Six grounds of appeal were put forward. *First*, the judge failed to address an important submission made on the appellants' behalf, namely a risk from Hamas because of the family's ties to Fatah. *Second*, there was procedural unfairness in the judge taking the accommodation and maintenance point of his own volition and without giving the appellants the chance to address it. *Third*, the judge erred in his approach to the sponsor's mental health by either failing to consider what the future impact of the respondent's decision would be, or alternatively, failing to properly consider the medical evidence. *Fourth*, the judge erred in his approach to the appropriate weight attributable to the family life by effectively creating a hierarchy based on presumptions about what constitutes "normal" family life. *Fifth*, the judge misdirected himself as to his own jurisdiction when considering proportionality. He was obliged to consider the appellants' case on its own merits and in light of its particular facts. Instead, the judge treated the absence of a resettlement scheme as "foreclosing" the balancing exercise. Alternatively, he had erroneously double-counted the public interest by including both the appellants' inability to satisfy the Rules and the absence of a scheme (within the Rules) covering the resettlement of people in Gaza. *Sixth*, in light of the judge's findings in relation to the appellants' circumstances in Gaza, the conclusion that the respondent's decision was proportionate was perverse.

19. We record here the appellants' contention that the judge was wrong to have found that there was no family life prior to the conflict. However, as the judge found there to be family life as at the date of hearing, the grounds accepted that the alleged error was not material at the error of law stage. The appellants reserved their position on the pre-conflict family life issue in the event that the decision in these appeals were to be re-made.

The grant of permission

20. By a decision dated 21 November 2024, Upper Tribunal Judge Norton-Taylor granted permission on all grounds and expedited the listing of an error of law hearing.

Rule 24 response

21. The respondent provided a rule 24 response, dated 11 December 2024 and drafted by Mr Thomann.

22. In general terms, the response submits that the judge provided legally adequate reasons for the sustainable conclusion that the balancing exercise fell in favour of the respondent.

23. An additional point is raised in respect of the judge's finding that family life existed. In summary, it is said that in light of the temporal and geographical separation of the sponsor from the appellants over a prolonged period, the formation of other relationships, and the territorial jurisdictional limits of the ECHR, the judge "could and should have found" that the appellants had failed to establish the subsistence of family life. We take this to be a contention that we should uphold the decision for reasons other than those given by the judge: rule 24(1B(a)) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The hearing: the materials before us

24. We were provided with a consolidated bundle of all relevant materials, indexed and paginated 1-486. In addition, we had skeleton arguments from

Mr Chirico and Mr Thomann, two agreed authorities bundles, and a note from the appellants on the Article 8(1) authorities.

The hearing: rule 15(2A) application

25. The consolidated bundle contained evidence which was the subject of a rule 15(2A) application made in Mr Chirico's skeleton argument. The application effectively had two aspects to it: *first*, reliance on evidence which went to support one or more of the grounds of appeal (a co her ntemporaneous record taken by the attending solicitor of the sponsor's oral evidence before the judge, materials pertinent to accommodation and maintenance, and figures relating to the number of predetermination requests made by residents of Gaza - the latter two also potentially being relevant to the re-making stage (in the event that it were to occur); *second*, reliance on updating evidence concerning the current circumstances of the appellants and sponsor, together with evidence of the latter's journalistic work relevant to the risk from Hamas.

26. Adopting what we considered to be a sensible and pragmatic position, Mr Thomann did not object to the new evidence being considered.

27. We decided the rule 15(2A) application as a preliminary matter and admitted the new evidence. We were satisfied that aspects of that evidence were potentially relevant to some of the grounds of appeal (at least in respect of the materiality of any errors which might be made out), whilst others would be relevant if we were to set aside the judge's decision and undertake the re-making exercise.

The hearing: the parties' submissions

28. We have previously expressed our gratitude to all of the representatives for their hard work in preparing these appeals within a tight timeframe. Here, we record our appreciation of the concise and well-structured manner in which Mr Chirico and Mr Thomann presented their respective cases. It has made what remains a difficult task for us that much easier.

29. We intend no disrespect in not setting out the oral submissions in detail here. In order to maintain a degree of conciseness and to avoid repetition, we have endeavoured to subsume the core arguments that were made within our discussion of and conclusions on the issues.

30. At the outset, we suggested to Counsel that it might be best to address the Article 8(1) issue first, as the existence of family life was a pre-requisite to the consideration of proportionality. If the judge had gone wrong in his finding on family life, the appellants' challenges to the Article 8(2) conclusion would fall away.

31. In brief summary, Mr Chirico relied on the grounds of appeal, his skeleton argument, and the note on the relevant authorities relating to family life. On the Article 8(1) issue, he submitted that the judge had not committed any errors. He then addressed each of the six grounds of appeal, submitting that the first five were not only made out, but were also material, whether taken alone or cumulatively.

32. Mr Thomann addressed the Article 8(1) issue in four parts: the core value of that provision; the relevant authorities; what the judge had found; and the approach we should take to whether to interfere with the finding on family life. He then addressed each of the appellants' six grounds of appeal in turn, submitting that, on a proper analysis, there were no material errors of law. In short, reading the judge's decision holistically, he had carried out an adequate balancing exercise and the attribution of weight to various factors had been a matter for him.

33. Mr Chirico replied, emphasising the fact-sensitive nature of the Article 8(1) exercise and a number of points relating to the first five grounds. In respect of the final ground (perversity), he confirmed that he was not contending that, if it were made out, we should simply summarily re-make the decision in these appeals by allowing them.

34. At the end of submissions, we rose to consider whether we were in a position to give our decision at that stage, albeit in summary form. We concluded that we were.

35. We informed the parties of our decision that: *first*, the judge had not materially erred when finding that family life existed under Article 8(1); *second*, the judge had materially erred in reaching the conclusion that the respondent's decision was proportionate; and *third*, that, in the circumstances, it was unnecessary for us to determine the sixth ground of appeal.

36. What follows are the reasons for the summary decision just described.

Reasons

37. Over the course of many years, the higher courts have emphasised the importance of the application of appropriate judicial restraint before interfering with a first-instance decision. Examples include: Biogen Inc. v Medeva plc [1996] UKHL 18, at [54]; SSHD v AH (Sudan) [2007] UKHL; [2008] 3 WLR 832, at [30]; Fage UK Ltd. v Chobani UK Ltd. [2014] EWCA Civ 5, at [114] and [115]; UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095, at [19]; MA (Somalia) v SSHD [2020] UKSC, at [45]; Lowe v SSHD [2021] EWCA Civ 62, at [29]; Volpi v Volpi [2022] EWCA Civ 464, at [2]; HA (Iraq) v SSHD [2022] UKSC 22, at [72]; Yalcin v SSHD [2024] EWCA Civ 74, at [50] and [51]; and most recently Gadinala v SSHD [2024] EWCA Civ 1410, at [46] and [47].

38. For present purposes, the essential principles derived from these authorities can be summarised as follows:

    (a) Although "error of law" is widely defined, the Upper Tribunal is not entitled to set aside the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one;

(b) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that the judge was “plainly wrong”;

(c) What matters is whether the decision under appeal is one that no reasonable judge could have reached;

(d) The judge must consider all the relevant evidence relied on by the parties, although it need not all be specifically addressed in the judgment;

(e) The weight attributed to relevant evidence is pre-eminently a matter for the judge;

(f) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable;

(g) The reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract;

(h) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account;

(i) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out.

39. We confirm that we have borne the above in mind when considering all aspects of the appellant's challenge and the point raised in the respondent's rule 24 response.

The rule 24 response: was the judge entitled to find that there was family life?

40. For the reasons set out below, which to an extent reflect our agreement with the submissions made by Mr Chirico in his skeleton argument at [13]-[18] and orally, we conclude that the judge did not err in law when finding that there was family life between the sponsor and the appellants.

41. *First*, in our judgment the judge correctly directed himself to the overarching legal approach applicable to the cases before him. The "core value" identified in Beoku-Betts v SSHD [2008] UKHL 39, at [40] (citing Huang v SSHD [2007] UKHL, at [18]) and referred to by Mr Thomann in submissions is uncontroversial and nothing in the judge's decision suggests an approach contrary to it. At the Article 8(1) stage, the judge was cognisant of the nature of the relationships between these extended family members and whether their particular circumstances engaged the "core value" of recognising that humans are "social animals" who "depend on others". Indeed, [43] of Beoku-Betts v SSHD is consistent with the "unitary" nature of family life under Article 8(1) to which the judge in fact referred.

42. Mr Thomann's reliance on the recent judgments of the Strasbourg Court in Alvarado v The Netherlands (App no. 4470/21) and Kumari v The Netherlands (App no. 44051/20) takes the respondent's case no further. The "General principles" set out at [34]-[37] of Kumari (replicated in Alvarado) reiterate what had gone before and have been recognised and applied in the domestic authorities. They all boil down to the essential point that whether there are "additional elements of dependency" between adult members of a family is to be decided on a case-by-case basis. That much is unremarkable.

43. Mr Thomann relied on the additional observation at [37] of Kumari that a number of examples from the Court's case-law were provided "by way of further clarification" of the general principles. The examples described at [38]-[42] are just that: they are clearly not exhaustive and do not materially alter the "additional elements" test which had been described previously in the judgment. As to the later passages in the judgment to which we were referred, these represented nothing more than an application of the general principles to the facts of the case. It is difficult to see what value these fact-specific conclusions add to the respondent's case before us. If anything, the judgment highlights the fact-sensitive nature of family life cases and the very broad range of scenarios in which family life between adults might exist. This is entirely consistent with high authority in the domestic courts: see for example, EM (Lebanon) v SSHD [2008] UKHL 64, at [37].

44. The same considerations apply to the judgment in Alvarado.

45. *Second*, the judge was right to note the absence of any presumption for or against the existence of family life. He was also right to note that there had to be something more than "normal emotional ties" (i.e. "additional elements"). He expressly referred to the "real, committed, or effective support" test, as set out in Kugathas v SSHD [2003] EWCA Civ 31 (reiterated in numerous cases thereafter, including Rai v ECO [2017] EWCA Civ 320 and Mobeen v SSHD [2021] EWCA Civ 886, and which itself was founded on Strasbourg jurisprudence). There is nothing on the face of the judge's decision which indicates that he had in mind anything other than the "exacting" test in cases concerning adults. That standard is part and parcel of the approach set out in Kugathas and its jurisprudential lineage.

46. *Third*, whilst this appeal may not involve family reunification in what might be described as the paradigm sense (i.e. reuniting a family unit which had resided together abroad), the Article 8(1) jurisprudence does not preclude, *as a matter of law*, a finding of family life in the circumstances considered by the judge. As discussed previously, the concept of the family (and by

extension, family life) is broad; it can take "many forms" and "there is no pre-determined model": Singh v ECO [2005] EWCA Civ 1075, at [63] and EM (Lebanon), *supra*. This underpins the fact-specific nature of the Article 8(1) enquiry and highlights the difficulties facing a challenge to the judge's findings.

47. *Fourth*, and following from the preceding point, it is clear that the judge was well-aware of the fact-specific nature of the exercise with which he was confronted.

48. *Fifth*, the reference at [4] of the rule 24 response and [75] of Mr Thomann's skeleton argument to "the territorial jurisdictional limits" of the ECHR does not disclose any errors on the judge's part. It is plainly the case that family life can exist between persons residing in the United Kingdom and those residing abroad. As noted in Mr Chirico's skeleton argument, that is the basis of every application for entry clearance based on Article 8. We do not understand the respondent to be contending for a dramatic change in the legal landscape of Article 8(1) and there is nothing in the authorities cited before us or principled arguments from the respondent which would even begin to persuade us that a change of direction is justified. In short, the judge approached the family life issue on a conventional basis and was entitled to have done so.

49. *Sixth*, it is clear that the judge's overall approach to the family life issue did involve him answering a mixed question of fact and law: he made findings of fact on the evidence and applied these to the appropriate legal framework.

50. *Seventh*, the judge was entitled to find that the sponsor was a credible witness. The sponsor's evidence had not been challenged and the judge's finding is not the subject of dispute in the rule 24 response. The sponsor's evidence went directly to the issue of family life and the judge was entitled to take it into account.

51. *Eighth*, we reject the contention put forward in the rule 24 response, the skeleton argument, and orally, that the judge "could and should" have found that there was no subsisting family life.

52. Employment of the term "could" is strongly suggestive of nothing more than a disagreement with the judge's factual finding and it does not assist the respondent's case in any way.

53. When pressed as to the import of the term "should" and whether this in fact represented a rationality challenge, Mr Thomann confirmed that it did. In the first instance and in reliance on [35] and [36] of the judge's decision, he submitted that the judge had failed to take account of relevant considerations when undertaking the Article 8(1) exercise, namely the fact that the sponsor and the appellants had not sought to live with or near each other prior to the conflict, that there had only been two attempts by the first appellant to reside outside of Gaza in the 17 years since the sponsor came to the United Kingdom, and that in neither case had he sought to join the sponsor here. If these factors had been taken into account at the appropriate stage, it was submitted, the judge "would" have found that family life did not exist. Secondly, Mr Thomann submitted that, on the facts taken at their highest, the judge had not been entitled to find that family life existed.

54. As to the first point, we have read the judge's decision sensibly and holistically. We note the emphasis placed by both parties on Article 8(1) before the judge and the high quality of representation. We are satisfied that the judge had been presented with a very full picture of what was the principal controversial issue, namely the existence of family life on the particular facts of these cases: see, for example, [17].

55. It is clear enough to us that the judge had all factors relevant to the existence of family life in mind when undertaking the fact-specific exercise. He was plainly aware of the nature of the family relationships over the course of time, including prior to the conflict. At [21], he recognised the

lengthy separation of the sponsor from the appellants. In our view, this consideration is substantially the same as that described in [35]. It cannot properly be said that the judge left it out of account when deciding the Article 8(1) issue. The same applies to [36]. The point made there about the limited attempts made by the first appellant to live away from Gaza is essentially another way of putting the same factors as were considered at [21] and [23]. Indeed, it was these considerations which led the judge to find that there had been no family life prior to the conflict. It is, therefore, very difficult to see how the particular considerations relied on by Mr Thomann had been overlooked as contended. Further, and importantly, it was the change in circumstances brought about by the conflict which underpinned the judge's conclusion on the re-establishment of family life: [24].

56. Turning to the second basis of the rationality challenge, we take account of the elevated threshold which applies: based on the evidence and relevant legal framework, was the judge's finding on family life one which no reasonable decision-maker could have reached? Our answer to this is 'no'. He assessed the evidence, took all relevant considerations into account and left none out, made appropriate findings of fact, and directed himself correctly in law. Whilst another judge may have reached a different conclusion, the one in fact reached was rational.

57. *Ninth*, in so far as the rule 24 response refers to the sponsor's mental health, we consider that the judge was entitled to take this into account at [25] when describing a decline as being "indicative" of the importance the sponsor attached to supporting the appellants through the conflict.

58. Accordingly, the judge's finding that family life existed between the sponsor and the appellants as at the date of hearing stands.

Ground 1: The Hamas issue

59. It is apparent that this particular aspect of the appellant's case is not referred to at all in the judge's decision. We acknowledge that a judge is

not in general required to address each and every aspect of the evidence or submissions made on a party's behalf. We also acknowledge the judge's reference to the detailed submissions made to him, his intention to provide an appropriately concise decision, and the reference to Mr Chirico's skeleton argument at [39].

60. Confronted as he was with detailed submissions, a large number of authorities, and a considerable volume of evidence, it is not entirely implausible that the judge might have overlooked this aspect of the appellants' case. However, we bear in mind the need for appropriate restraint and a presumption that relevant matters were borne in mind. For the purposes of our decision, we are prepared to accept that the judge was aware of the Hamas issue when undertaking the Article 8(2) proportionality exercise.

61. Mr Thomann's position was clear: the Hamas issue was a "wholly subsidiary" submission and was now being given an unjustified level of importance. The appellants had exaggerated the importance of the Hamas issue by creating a "straw man", namely that the judge had dismissed the appeal at least partly on the grounds that the family was no more at risk than any other in Gaza. As he had not, in fact, dismissed the appeal for this reason, whether he had overlooked this allegedly additional risk factor was irrelevant.

62. Contrary to Mr Thomann's submission that the issue was "wholly subsidiary", we are satisfied that the point was put fairly and squarely to the judge as constituting what was described at [31(iii)] of the skeleton argument as a "significant additional" factor above and beyond the risk to life and the dire humanitarian situation. That part of the skeleton argument went to the heart of the appellants' submissions on proportionality, it being the first of four factors relied on (the majority of the document was taken up with submissions on family life, which is consistent with Mr Chirico's description of what had transpired at the hearing before the judge). We note that the judge did address two of the other factors in terms and there

is no reason to suppose that the Hamas issue had featured any less than these in the appellants' case.

63. In our judgment there was sufficient substance in this aspect of the appellant's case to render it capable of attracting material weight (that is not to say significant weight, but that is beside the point). The judge had accepted the sponsor's evidence, which included a degree of detail as to the wider family's anti-Hamas profile and historical problems with that organisation. It is the case that there had been no direct threats made to the appellants themselves, but that of itself would not in our view have rendered the entire issue irrelevant to the proportionality exercise.

64. The difficulty with the judge's decision is threefold: *first*, the absence of any reference to the Hamas issue makes it impossible for the reader to know what the judge made of this aspect of the case; *second*, if the issue was thought to be peripheral in spite of the emphasis placed on it by the appellants, there is no reasoning to that effect ; *third*, given the respondent's submission that the judge's proportionality assessment was based on a variety of factors (and not limited to the "jurisdictional" issue, as to which, see below), it is hard to regard the omission as being immaterial. Indeed, given the weight the judge did place on the risk of opening a route to the UK for "all those in conflict zones with family in the UK" [31], it cannot be said that he would have inevitably resolved the Article 8 assessment against the appellants if he had taken into account a factor that they said significantly distinguished them from many other families in Gaza or, indeed, that the appellants are entirely wrong to suggest that the appeal was dismissed partly due to the perceived lack of any such factor.

65. We conclude that the general proposition that a judge need not address each and every aspect of the evidence and/or submissions is displaced by the clear and focused way in which the appellants' case was put, the underlying evidence, and the need for the judge to have carried out a

careful and reasoned balancing exercise, taking account of relevant considerations resting on both sides of the scales.

66. We conclude that the judge erred in law. We are satisfied that, in the context of this particular case, the error was material: the Hamas issue was capable of attracting weight and it *might* have made a difference to the proportionality exercise: Degorce v HMRC [2017] EWCA Civ 1427, at [95]. Put another way, we are not satisfied that any rational tribunal must have reached the same conclusion on proportionality, notwithstanding the error we have identified: ASO (Iraq) v SSHD [2023] EWCA Civ 1282, at [43].

Ground 2: procedural unfairness

67. Section 117A of the 2002 Act required the judge to "have regard to" the mandatory considerations in section 117B. Section 117B(3) relates to financial independence.

68. Nothing was said about section 117B in the respondent's decision letter. In the respondent's review, there was a reference to section 117B(2) (the ability to speak English), but nothing in respect of financial independence. As noted by the judge at [32] and confirmed before us by Counsel, nothing on section 117B(3) was said at the hearing.

69. In addition to finding that there was no evidence on the appellants' ability to speak English, the judge took the view that it was "obvious" that the sponsor lacked the funds or accommodation necessary to provide for the appellants were they to come to this country. He recorded that the respondent had not suggested that "particular weight" should be attached to these considerations and he attributed weight "accordingly".

70. The Court of Appeal's judgment in Abdi v ECO [2023] EWCA Civ 1455 provides a useful review of the authorities on procedural unfairness and we have taken account of the principles set out at [29]-[33].

71. There is some merit in the point that because the section 117B(3) consideration was mandatory in nature, the appellants could and should have been proactive in addressing it, whether or not it was expressly raised by the respondent or the judge.

72. Against that, the judge was only mandated to "have regard to" the financial independence issue and was not bound to hold it against the appellants. Further, the judge had already accepted the sponsor as a credible witness. Having considered his witness statements, there was evidence to indicate that his income might have been sufficient (or very close to being so) to maintain the appellants and that the prospect of adequate accommodation might also have been realistic. This evidence, and any submissions based thereon, could have been ventilated if the judge had raised the matter at the hearing. In addition, the underlying evidence stood in contrast to the judge's conclusion that the sponsor's inability to accommodate and/or maintain the appellants was "obvious". Combined with the absence of any reference to section 117B(3) in the respondent's decision or review, we conclude that the judge acted with procedural unfairness in failing to provide the appellants with an opportunity to address the issue.

73. Mr Thomann submitted that the judge had not placed any particular weight on the point and thus, even if any error had been made, it was not material, with reference to [37] and [38] of Abdi. The materiality test described in those passages is whether the outcome would have "inevitably" been the same notwithstanding the unfairness.

74. We accept that the judge did not place "particular" weight on the accommodation/maintenance issue. Having said that, we are entitled to assume that he placed some weight on it. In the context of a balancing exercise in which, on the respondent's case, the judge did not place decisive weight on any particular factor, we are satisfied that the error was material, albeit that conclusion has been reached by a relatively narrow margin.

Ground 3: The sponsor's health

75. The weight to be attached to the sponsor's mental health was a matter for the judge. We are cognisant of the danger of disagreements with the attribution of weight being dressed up in the guise of errors of law.

76. Having said that, we are satisfied that the third ground attacks the judge's approach to the sponsor's mental health prior to the attribution of weight (he did not state the degree of weight in terms, but the assessment at [38] must have either not counted in the appellants' favour or weighed against them).

77. On the evidence before him, the judge was entitled to find that the sponsor's day-to-day life had not been significantly affected by mental health difficulties in the past. We are unclear as to what the judge had in mind when he found that the PTSD had not had as great an impact as in "many cases": for example, were these other cases comparators from his own experience, or based on objective evidence? We are, however, prepared to accept that the judge was simply observing that the condition was not preventing the sponsor from working and generally getting by, and that he was entitled to do so.

78. The error, as we find it to be, is to be found in what is said at the end of [38]:

> "It is the conflict that has interfered with the Sponsor's wellbeing, and not the Respondent's decision not to permit the Appellants to settle in the UK."

79. That finding is directly contrary to the unchallenged medical evidence from Dr Turton, contained in two reports, dated 10 May 2024 and 2 September 2024. At 11.8 of the first report and 7.12 of the second, Dr Turton stated that:

> "It is highly likely that [the sponsor's] mental health will significantly deteriorate if his family members come to harm, or if their applications were to be refused."
>
> [Underlining added]

80. We are conscious of the need to avoid an overly forensic analysis of the judge's decision and we recognise that the first limb of Dr Turton's opinion related to the risks emanating from the conflict and could possibly be 'isolated' from the respondent's decision. Yet the second limb was, on its face, directly linked to that decision. On a fair reading of [38], we do not accept that the judge meant to say that the conflict and respondent's decision were interrelated, as suggested by Mr Thomann. We conclude that the judge failed to properly consider the expert evidence, which was clearly capable of lending support to the contention that there had been an impact on the sponsor as a consequence of the respondent's decision to refuse the appellants' human rights claim. In isolation and bearing in mind the threshold set out in ASO (Iraq) v SSHD, we would not be satisfied that the error was material. However, when considered together with one or more of the other errors we have identified, we conclude that it was.

Ground 4: The approach to the significance of family life

81. When considering this ground, it is important to bear in mind that the judge had already found family life to exist. It is also the case that the judge accepted that cohabitation between the sponsor and appellants would permit family life to "develop" in the future.

82. The focus of the parties' arguments on ground 4 centred on what the judge said at [37]. In essence, Mr Chirico submitted that the judge erred in principle by categorising the appellants' family life as being "not a normal and natural progression of the relationship…", whilst Mr Thomann submitted that the "unusual" nature of the application was relevant and that the judge had been entitled to take the surrounding circumstances into account when carrying out the balancing exercise.

83. We reiterate our self-direction as to the need for appropriate restraint and for recognition that the attribution of weight was a matter for the judge, and the importance of reading the decision as a whole. As to the last point, we have considered not only [37], but also what was said at [33]-[36].

84. The judge was entitled to take account of specific considerations relating to the family life as he had found it to be. At the same time, prior to the attribution of weight he was required to direct himself properly as to the nature of family life.

85. The difficulty with the judge's approach under Article 8(2) is contained in [37], where he appears to apply either a hierarchical categorisation of family life, or his own assessment of what was "normal and natural" in terms of the progression of the relationship. The authorities on Article 8(1) to which we have been referred disclose a consistent thread: family relationships are varied and involve fact-sensitive consideration; they cannot be required to fall within a "pre-determined model". Indeed, for reasons set out previously, the judge had adopted that approach when considering Article 8(1).

86. Having carefully considered [37] (in the context of other preceding passages), we find ourselves in agreement with Mr Chirico's submission. There is a significant danger that the judge had in his mind a model of family life, the development of which would have been "normal and natural". As we have said, such an approach is contrary to the authorities and does not sit well with the judge's own (sustainable) finding on Article 8(1). In turn, there is a significant danger that he approached the attribution of weight on the basis that the relationships concerned were inherently less deserving (or that the interference caused by the respondent's decision inevitably required less justification) due to their 'abnormality', as it were.

87. We are satisfied that the erroneous approach identified above undermines the balancing exercise as a whole because the overall conclusion on

proportionality was not inevitably in the respondent's favour, particularly where this error is seen in conjunction with others.

Ground 5: The "jurisdictional" issue

88. We are not convinced that the term "jurisdictional" accurately describes this aspect of the appellants' challenge. It does not go to the statutory jurisdiction of the judge as such. It may be better described as a contention that the judge took account of an irrelevant consideration, namely the absence of a scheme for Palestinians to resettle in the United Kingdom (whether such a scheme was incorporated into the Rules or contained within a free-standing published policy).

89. Mr Chirico put his case on two bases: *first*, once the judge had found family life to exist and that there was an interference with it, he was required to conduct a balancing exercise based on the particular case before him. The existence or otherwise of a specific resettlement scheme was irrelevant; *second*, and possibly in the alternative, the judge had wrongly double-counted the absence of a scheme when assessing the public interest. The upshot of the two errors was that the judge had wrongly required more from the appellants in order to make out their case.

90. Mr Thomann responded by submitting that the judge had been entitled to emphasise what was in effect the purpose of the appellants' application, namely to escape Gaza and resettle in the United Kingdom. The judge had been entitled to take the absence of a resettlement scheme into account in addition to the appellants' inability to satisfy any of the Rules. He emphasised the need to read the judge's decision holistically.

91. For the following reasons, we conclude that the judge materially erred in law.

92. *First*, the judge was plainly entitled to have regard to the inability to meet the Rules which were in place. It is well-established that this is a consideration deserving of "considerable" weight at a general level in the

balancing exercise: see, for example, Agyarko v SSHD [2017] UKSC 11, at [47] and [57]. The Rules reflect the Executive's policy, which in turn is the means by which the public interest is, at least to an extent, represented. In addition, as the Rules are endorsed by Parliament, they have a wider legitimacy.

93. Having said that, none of the authorities to which we have been referred, nor any other materials before us, demonstrate that the *absence* of Rules on a particular matter (or for that matter a free-standing published policy) constitutes a separate public interest consideration which will *separately* count against an individual. We see from Agyarko v SSHD that the Court's exhortation to decision-makers to strike a "fair balance" between competing individual and public interests was predicated on the existence of Rules and the inability of the individual to satisfy them: [47]-[48], [57]-[60]. The judgment provides no support for the judge's approach in factoring in the two distinct considerations of a failure to meet the Rules *and* the absence of a scheme, and that is, in our respectful view, perhaps unsurprising. Aside from the fact that the respondent had not apparently argued the point, it is surely the case that the absence of a statement of policy within the Rules is simply the corollary of the existence of Rules: they are two sides of the same coin and do not amount to separate considerations, each liable to the attribution of considerable weight against an individual's case. The same reasoning applies to the existence or otherwise of a free-standing published policy, albeit that the attributable weight might be less in the absence of parliamentary approval.

94. *Second*, it is common ground that the decision of whether to establish a resettlement scheme is a matter for the Executive and/or Parliament. However, the judge was not considering a "resettlement" scenario in which individuals are seeking international protection; he was concerned with a family life claim under Article 8. If he had thought that the whole case amounted to little more than a contrived attempt to obtain resettlement through the back door, it might have been open to him to find against the appellants under Article 8(1). But he did not. As such, the statutory scheme

under sections 82 and 84 of the 2002 Act, combined with the well-known authorities on the correct approach to the appellate jurisdiction, required him to follow a conventional step-by step route through to the proportionality exercise. Once the gateway of Article 8(1) had been crossed, it was for the appellants to demonstrate exceptional/compelling circumstances or a very strong case and that was the question confronting the judge.

95. In light of what we have said at paragraphs 92-94, above, the absence of a resettlement scheme predicated on humanitarian and/or protection grounds was irrelevant to the task with which the judge was concerned. Another way of describing the error is that the judge should have treated this factor as being of neutral value. Yet another formulation, and one put forward by Mr Chirico, is that the judge erroneously double-counted the public interest against the appellants by taking account of not simply the inability to satisfy the Rules, but, as a separate consideration, the absence of a scheme applicable to their situation. That he did so is, in our judgment, beyond doubt: at [30] he confirms that the latter consideration was taken into account “Beyond” the significance of the former.

96. *Third*, [30], [31], and [42] strongly indicate that the judge was in effect requiring the appellants to show that the absence of a resettlement scheme was in some way unlawful on public law grounds and that their inability to do so weighed heavily against their case. We are satisfied that the appellants had not argued that the absence of the scheme was unlawful and the judge was wrong to have adopted a judicial review approach to a matter which had not been relied on and was in any event irrelevant.

97. *Fourth*, as to the materiality of these errors, [30], [31], and [42] point strongly towards the judge not only regarding the absence of a scheme as being relevant, but as constituting a very significant, or even a decisive, consideration weighing against the appellants.

98. *Fifth* , even if the absence of a resettlement scheme had in theory been relevant to the judge's task and capable of attracting weight, we are satisfied that there was no evidence before him of a deliberate decision by the respondent not to have instituted one for Palestinians in Gaza. We acknowledge that the respondent's decision letter of 30 May 2024 states that, "The Home Office has not considered establishing a separate resettlement route for Palestinians to come to the UK.". However, that is, to say the least, ambiguous ("has not considered…"), and in any event an assertion in the decision letter does not in our view constitute the type of evidence which a tribunal or court would expect in respect of a deliberate policy decision taken by the respondent. The respondent had of the opportunity of adducing such evidence before the judge and first-instance hearings are not dress rehearsals. Therefore, the references at [31] and [42] to the respondent having "chosen" not to establish a scheme and the need to respect such a "public policy decision" had no evidential basis.

99. *Sixth*, and of lesser significance, if the judge was intending to rely on schemes which had been instituted so as to contrast the situation faced by the appellants (i.e. the absence of any scheme), that needed to be on a fair and accurate basis. At [30], and without naming them, he referred to "four schemes" created by the respondent "in recent times". However, none of the four schemes mentioned in the respondent's review had been created in recent years and three of those had closed. In addition, as acknowledged by Mr Thomann, the Ukraine Family Scheme (the only one which had been created relatively recently) was the only scheme which concerned extended family members, a fact to which the judge did not refer. In light of the foregoing, the judge did not approach a contrast between the position of Palestinians with that of other cohorts on an accurate basis.

100. Bringing the above together, we are satisfied that the judge was wrong to have taken the absence of a resettlement scheme into account at all when carrying out the balancing exercise. Alternatively, if it the errors are indeed alternatives, the judge was wrong not to have regarded that

fact as being of neutral value and/or was wrong to have double-counted it against the appellants.

101. We also agree with Mr Chirico's submission that the judge's approach had the effect of requiring of the appellants to show something more simply because they were residing in a conflict zone. In the context of an Article 8 family life case, there was no principled basis for imposing (inadvertently or otherwise) an elevated threshold beyond demonstrating a very strong claim/very compelling or exceptional circumstances.

102. It is obvious that the errors we have identified were material to the proportionality exercise. Use of the term "because" at [42] make that clear enough. Ground 5 is sufficient for the judge's decision to be set aside.

103. We record here a concern relating to the judge's reference to "floodgates" at [31]. It is difficult to see what evidence this was based on, or whether it was a relevant consideration at all. Given the need for the judge to have assessed the cases before him on their particular merits, it is strongly arguable that a point based upon alleged wider implications, but unsupported by evidence, should not have been taken into account. We reach no firm conclusion on the point at this stage because it did not expressly feature in ground 5.

Ground 6: Perversity

104. In view of Mr Chirico's helpful indication in oral submissions, and as we announced to the parties at the end of the hearing, it is unnecessary to address the final ground of appeal because of what we have said about the preceding five.

Disposal

105. The judge's decision is set aside to the extent that the proportionality assessment undertaken was vitiated by errors of law. The judge's finding as to the existence of family life as at the date of hearing is preserved. In addition, there is no reason for us to disturb the judge's findings that the

appellants were, as at September 2024, living in an "incredibly dangerous", "extremely dangerous and insecure" and "extremely and unjustifiably harsh" situation and facing a "high risk of death", and that their lives were "threatened daily by indiscriminate and lethal attacks".

106. There was no suggestion by the parties that these appeals should be remitted to the First-tier Tribunal. We agree. The re-making will be concerned with a proportionality exercise based on facts already found, together with our assessment of updating evidence on the circumstances of the appellants and sponsor. Any additional fact-finding can of course be undertaken following a resumed hearing.

RE-MAKING DECISION AND REASONS

Introduction

107. The resumed hearing was expedited and listed before us 6 January 2025. Once again, we express our gratitude to Leading Counsel and their respective legal teams for the additional hard work put into ensuring that this was effective and that the evidence and arguments were presented in an appropriately efficient manner.

108. In light of our error of law decision, the only live issue for us to determine now is whether the respondent's decision to refuse the appellants' collective human rights claim constitutes a disproportionate interference with the family life found by the judge to exist (these being no dispute as to interference, in accordance with the law, and legitimate aim).

109. Mr Chirico confirmed that the appellants were not seeking to argue that there had been family life with the sponsor during any relevant period before the conflict in Gaza began in October 2023.

The resumed hearing: evidence

110. Without opposition from the respondent, we admitted a supplementary bundle provided by the appellants, indexed and paginated 1-119. This contained an additional witness statement from the sponsor, together with recent news articles relating to the ongoing conflict in Gaza and the respondent's CPIN entitled "Occupied Palestinian Territories: Humanitarian situation in Gaza", version 4.0, published in November 2024.

111. There was no further evidence from the respondent.

112. The sponsor attended the resumed hearing and gave oral evidence. In light of the medical evidence and on Mr Chirico's unopposed application, we treated the sponsor as a vulnerable witness. In the event, no special measures were requested and we were entirely satisfied that the sponsor was able to present his evidence without difficulty.

113. After adopting his four witness statements, the sponsor provided updating evidence on the appellants' current situation. He had spoken to the first appellant two or three days before. The family were living under a summer tent which had been punctured by what appeared to be heavy machine-gun ammunition fired by Israeli forces. Torrential rain had resulted in the tent being flooded.

114. In cross-examination, the sponsor was asked questions about other family members residing in Gaza, finances and accommodation, and his mental health. We shall address relevant aspects of this evidence when setting out our limited findings of fact, below. We record here that there was no challenge to the sponsor's credibility.

The resumed hearing: the parties' submissions

115. As in our error of law decision, we do not intend to set out the submissions in any detail here and intend no disrespect by adopting that course of action. The substance of what both Mr Thomann and Mr Chirico said is subsumed in our findings and proportionality assessment.

116. In summary form only, Mr Thomann asked us to take account of his error of law submissions and addressed five issues: the inability of the appellants to satisfy the Rules and the absence of a resettlement scheme; the nature and quality of the family life; the public interest considerations under section 117B of the 2002 Act; the sponsor's mental health: and the risk to the appellants from Hamas. Taking everything into account, he submitted that the public interest outweighed those of the appellants. He acknowledged the "dire humanitarian situation" in Gaza generally and that pertaining to the appellants in particular.

117. Mr Chirico relied on a speaking note. He responded to Mr Thomann's submissions, urging us in particular to focus on the family life as it is rather than any concept of a "normal" family unit. In light of the particular circumstances of these cases, the refusal to admit the appellants was disproportionate.

Findings of fact

118. The primary findings of fact made by the judge upon which he based his composite finding on the existence of family life have been preserved. So too have his findings on the nature of the circumstances in which the appellants were living as at September 2024.

119. The sponsor was previously found to be a credible witness and there is no reason for us to take a different view of his latest evidence. None of it has been challenged.

120. The judge did not make specific findings on the family's anti-Hamas profile. We accept that such a profile does exist by virtue of number of individuals being members of Fatah and/or having worked for the Palestinian Authority (including the first appellant and sponsor) over the course of time. We accept that two uncles had been arrested by Hamas and that another was killed in November 2016. The unchallenged expert country report by Dr Segal observes that the first appellant's links to the

Palestinian Authority would preclude him from finding employment in Gaza, at least whilst it is controlled by Hamas. We accept that to be the case.

121. There is no evidence that the appellants have been specifically threatened or harmed by Hamas since the conflict began. Nor is it is said that the first appellant has been actively working for the Palestinian Authority in recent years. We find this to be the case on both fronts.

122. The updating evidence before us demonstrates that the security and humanitarian situation in Gaza, including in the Nuseirat camp in which the appellants currently reside, remains exceptionally dangerous. We accept the sponsor's evidence that they are living in a "summer tent" which is wholly unsuited to the weather. We find that the tent has been hit by heavy machine-gun ammunition and that this allowed heavy rain to flood the space. We find that the family has recently had a cooking gas canister stolen from them and that this is indicative of a breakdown in such law and order as there was previously.

123. The recent news articles contained in the supplementary bundle record the death of journalists and others killed in the Nuseirat camp in late December 2024 as result of Israeli airstrikes. The reports also corroborate the sponsor's evidence on the worsening weather conditions. The general humanitarian situation is dire.

124. All of the above is consistent with the respondent's own position, as set out in the Executive Summary of the CPIN:

> "Almost every Gazan - between 97% and 100% - is currently in need of humanitarian aid across the entire Gaza Strip. At least 95% of Gazans are experiencing acute food insecurity, at crisis level or worse, with the severity increasing the more northerly the governate in the Gaza Strip.
>
> Aid arriving in Gaza is insufficient to meet the level of needs and numerous obstacles prevent or delay the aid from being distributed across parts of the Gaza Strip. Furthermore, Hamas, the armed group which took control of the

> Gaza Strip in 2007, sees humanitarian aid and public service being unfairly distributed, to serve the interests of Hamas over the needs of ordinary civilians.
>
> The general humanitarian situation in Gaza is so severe that there are substantial grounds for believing that there is a real risk of serious harm because conditions amount to torture or inhuman or degrading treatment as defined in paragraphs 339C and 339CA(iii) of the Immigration Rules/Article 3 of the European Convention on Human Rights (ECHR)."

125. Although we have not been referred to it and do not therefore expressly take it into account, we simply note that the respondent's CPIN on the security situation in Gaza accepts that there is a serious and individual threat to the lives of civilians by reason of indiscriminate violence: "Occupied Palestinian Territories: Security situation in Gaza", version 1.0, published in November 2024, at 3.1.1.

126. Given the above, it is highly probable that the first appellant is "reaching his limit in terms of enduring this war" and that he is "exhausted and incredibly anxious", as claimed by the sponsor in his latest witness statement.

127. We accept the sponsor's evidence that other family members who had been residing relatively close to the appellants have now moved further south and that the current circumstances have resulted in strained relationships.

128. On the sponsor's credible evidence, we find that the first appellant probably has a degree of English language proficiency which would allow him to get by on a basic level, whilst that of KA (nearly 19) and SA (nearly 18) is considerably better. For the avoidance of any doubt, the sponsor is fluent.

129. Turning to the sponsor's particular circumstances in this country, we find that he has provided truthful and reliable evidence. We find that he is

still employed by a media organisation and that his average monthly income is at least £3700 net (that being the figure on which Mr Thomann based his submissions). The highest figure contained in the payslips is £3736 for August 2024, when the sponsor's annual salary increased to its current level, and we find that to be a more appropriate figure, because the net income only falls thereafter as a result of the sponsor making voluntary pre-tax payments not only to his pension, but also to a Cycle to Work scheme. It is quite possible that he will obtain a promotion at some point in the near future, but we need not reach a finding on that.

130. We find that the sponsor has continued to send money to the appellants in so far as that has been possible. We accept that he no longer sends money to his parents on a regular basis, as they are residing in Egypt.

131. The sponsor has been consistent as regards the first appellant's receipt of 50% of a monthly stipend from the Palestinian Authority. We find that, as of now and in the reasonably foreseeable future, the stipend will amount to approximately £350 a month.

132. We readily accept that the sponsor has an intention to move in order to accommodate the appellants were they to come to this country. We accept that he has made genuine and sensible enquiries as to alternative accommodation outside of London, with evidence to support this contained within the consolidated bundle. It is more likely than not that the sponsor would be able to rent a four bedroom property with a lounge for £1500 a month.

133. The relevant Council Tax figure for such a property was discussed at the hearing. Having consulted the relevant local authority's website, and without objection from the parties, we are satisfied that the monthly figure would be £172.63 (that being £2071.56 per year).

134. It was common ground between the parties that the respondent's current guidance on the objective calculation of adequate maintenance should be applied: the question is whether income net of income tax and National Insurance minus housing costs (defined as rent and Council Tax) exceeds the amount of Income Support an equivalent British family of the same size would receive.

135. The overall target figure provided to us, with which Mr Thomann did not demur, was £4079. This was said to represent the monthly figure to be met in order to adequately maintain (with reference to the Income Support comparator - there being no material difference between this and Universal Credit figures) and accommodate (through rent and Council Tax) the sponsor and all six appellants. Having recalculated the figures when drafting this decision, we arrived at a monthly figure of £4074.03 for the same family unit, but in the overall scheme of things, this makes no material difference.

136. When we add the first appellant's monthly £350 stipend from the Palestinian Authority to the sponsor's average monthly salary of £3700, there is a £24 shortfall. If the higher figure of £3736 for the sponsor's monthly income is taken into account, there is a monthly excess of £12.

137. We find that, contrary to the implication of the judge's observation at [33] and the implication of Mr Thomann's submissions, the sponsor does not hold an expectation that the appellants would only live with him in United Kingdom for a short period of time before moving on. His credible evidence does not support that position. It is clear to us that he is fully committed to the continuing support for the appellants were they to join him, as evidenced in part by his plans to find new accommodation (and all that entails) and what is said in his third witness statement: "…they will need the time and space to recover from what they have been through. I want to be there with them for as long as that takes, helping as much as I can with their needs as they arise. Beyond that, we cannot make plans." In our view, that evidence informs what the sponsor had previously meant

when stating that he would help the appellants until they could "find their feet".

138. Finally, we accept that the sponsor is currently on a waiting list for PTSD treatment. He acknowledges that he has not found it necessary to visit to his GP since the referral was made and that he is not taking any relevant medication. The sponsor continues to work and has shown what he himself has described as "resilience". We do not conflate such resilience with the sponsor being "well", bearing in mind the conclusions of Dr Turton to which we have referred previously. We place significant weight on her evidence and find it to be more likely than not that the sponsor's mental health will "significantly deteriorate" if the appellants come to harm and/or if they are unable to join him in this country. That is not inconsistent with the nature of the relationship prior to the conflict: on Dr Turton's analysis, the PTSD was triggered by the risks to the appellants and the resulting concerns and anxiety were integral to the re-emergence of family life.

The proportionality assessment under Article 8(2)

139. When all is said and done, the exercise to which we now turn is relatively straightforward, albeit that the surrounding circumstances induce great sympathy on a purely human level whatever the outcome of these appeals may be. We adopt a "balance sheet" approach, addressing those considerations which we regard as relevant (including those to which we are required to have regard), leaving relevant matters out of account, and attributing such weight to the various factors as we deem appropriate. Ultimately, the question is whether the respondent's refusal of the appellants' collective human rights claim strikes a "fair balance" between the competing public and individual interests. In doing this, we apply the primary facts, as found by the judge and, to the extent necessary, by us.

140. We direct ourselves that in order to succeed, the appellants are required to make out a very strong claim, or what might otherwise be described as a case disclosing very compelling or exceptional circumstances.

The best interests of the minor children

141. The best interests of the fifth and sixth appellants are a primary consideration and it is appropriate to consider these before turning to the "against" and "for" factors.

142. The fifth and sixth appellants are now aged 7 and 9. They are young children and in our judgment it is reasonable to infer that they have been less able to withstand what has been happening to them since October 2023 than would children approaching adulthood (not that that occurrence establishes some form of emotional and/or psychological "bright line").

143. The two children are at a high risk of death or serious injury on a daily basis. They are living in conditions which are extreme and, on any view, unjustifiably harsh. It is difficult to conceive of a situation more contrary to their best interests than the one they are currently experiencing.

144. We conclude that it is self-evidently and overwhelmingly in the best interests of the two children to be in a safe (or safer) environment, together with their parents and siblings.

145. Additionally, their best interests would to an extent be better served by being in a setting in which a family member (i.e. the sponsor) can provide meaningful support, as opposed to being put under the care of strangers.

146. We remind ourselves that the best interests of the children is not the paramount consideration in the proportionality exercise.

Factors in the respondent's favour: the public interest

147. From the outset, the appellants have acknowledged their inability to satisfy the Rules as they relate to family life scenarios: see, for example, Part 8 of the Rules and Appendices FM and Adult Dependent Relative. It is beyond question that this weighs against them in the proportionality

exercise. We have made reference to Agyarko v SSHD in relation to this issue previously and need not do so again. Suffice it to say that we place considerable weight on this particular consideration because the Rules are a statement of the respondent's policy, which effectively acts as a reflection of the public interest in maintaining effective immigration control and represents, with the approval of Parliament, her view of where the appropriate balance lies between that public interest and the rights of individuals.

148. Mr Thomann submitted that the absence of a resettlement scheme for Palestinians in Gaza was a "significant" consideration, thereby effectively urging us to adopt the judge's approach at first instance. He described the consequence of allowing the appellants' appeals as representing "a leap" in terms of United Kingdom's obligations to admit certain family members in the context of "extraordinary" situations such as the conflict in Gaza.

149. We reject that submission. In our error of law decision, we concluded that the absence of a resettlement scheme was irrelevant, should have been treated as being of neutral value, or should not have been double-counted: paragraphs 92-95, above. We reiterate that conclusion here and it follows that at the re-making stage we regard the absence of the scheme as adding nothing to the respondent's side of the scales.

150. On a belt and braces approach, even if the absence of a scheme for those in the appellants' situation was a relevant consideration and should be taken into account separately from the inability to meet the Rules, we would not place any more than relatively limited weight on it. The respondent has not taken a second opportunity to adduce any satisfactory evidence of a deliberate decision having been taken on the subject and it would be wrong in principle to attach the same weight to an absence of a scheme as to the inability of an individual to satisfy existing Rules or, perhaps, a free-standing published policy (we observe that Mr Thomann did not specifically address us on whether an inability to fall within such a policy could or should carry the same weight as in respect of the Rules).

151. We do not accept that admitting the appellants to the United Kingdom (as a consequence of allowing their appeals) would represent an unprincipled or unjustified "leap" in the context of Article 8. There is a sustainable finding on family life under Article 8(1). The authorities require us to then conduct a proportionality exercise based on the family life and the surrounding facts as found by the judge and, in turn, us. That the facts do not permit the appellants to satisfy the Rules is of course relevant and that is why they must instead meet a very demanding test in order to succeed in their appeals. In our judgment, the scope of the obligations under Article 8 (whether positive or negative) is properly constrained by the high threshold faced by those who cannot satisfy the Rules: it is they who must "leap" over that threshold.

152. Mr Thomann pressed what might crudely be described as a "floodgates" argument, although he put the point more eloquently than that. Relying on figures provided by the appellants, he submitted that an obligation to admit them risked the same outcome applying to those in other conflict zones around the world. For the following reasons, we reject that submission.

153. *First*, we do not regard a "floodgates" argument as constituting a relevant consideration. Our task is to assess these cases on their own particular facts.

154. *Second*, even if it was capable of relevance, the figures simply do not support a contention that applications from Gazans represent what might in principle be described as a "floodgates" scenario. A Ministerial answer given on 2 December 2024 to a question on how many entry clearance applications from Gazan residents had been approved since the conflict began gave figures of 143 pre-determination requests and 5 biometric excusal requests. These were just a little more than those referred to at [31] of the judge's decision. Doing the best we can on what we have, the

figures appear very small in the context of the Gazan population as a whole.

155. *Third*, the respondent has adduced no evidence in support of the "floodgates" argument. She has failed to provide any empirical context to the figures referred to previously.

156. *Fourth*, a suggestion that an unquantifiable (but, by implication, large) number of people from other conflict zones around the world would be able to take advantage of the appellants' appeals being allowed is wholly speculative and misconceived. We emphasise once again the fact-specific nature of these cases and the significance of the judge's finding that family life existed. It is not unreasonable to assume that many individuals with extended family members in this country would not obtain a favourable finding on Article 8(1) and that would preclude admission at the first hurdle.

Factors in the respondent's favour: English language under section 117B(3) of the 2002 Act

157. There is no evidence of any English language tests or qualifications relating to the appellants. That is perhaps unsurprising in the circumstances. Having said that, we have found that the first appellant has at least some grasp of the language, whilst the third and fourth appellants are at a much better level. We are assuming that the second appellant does not speak or understand English at all. We leave out of account the two youngest appellants.

158. We conclude that the inability of the first and second appellants to speak English at a reasonable level weighs against them. That added weight is not significant, however. It is relevant that those appellants would be part of a family unit in which two of their older children speak good English and the sponsor is fluent. It is plain that the family members will assist each other in terms of communication and it is reasonable to suppose that all of the appellants would make every effort to improve their

English, subject to any restraints placed on this by the need to recover from what they have experienced.

Factors in the respondent's favour: financial independence under section 117B(4) of the 2002 Act

159. As previously set out, on a calculation using the sponsor's average net monthly salary (including various voluntary deductions) figure of £3700, there is a shortfall in the ability to maintain and accommodate the appellants, as defined in the respondent's policy. At most, that shortfall is £24 a month if we were to use the sponsor's average net monthly income (which we do not regard as the appropriate measure, for reasons set out previously). We take account of Mr Thomann's fair acknowledgement that this is not a points-based scenario and that we should assess the question of financial independence in a "real world" context. This we do.

160. The sponsor's commitment to the appellants is apparent not only from what he is currently doing, but also from the credible intentions for the future which he has articulated in evidence. We have no doubt that he would do everything possible to ensure proper financial support for the appellants and that in reality any shortfall would be rectified or at least not allowed to increase.

161. We have regard to financial independence as a facet of the wider public interest. On the basis that there could in fact be a small shortfall, we place some weight on this consideration. In all the circumstances, however, that weight is relatively limited.

162. As there is an alternative calculation, we address this issue again later on in the proportionality assessment.

Factors in the appellants' favour: best interests

163. We transpose our previous assessment of the minor children's best interests and place very significant weight on this consideration.

Factors in the appellants' favour: their current circumstances in Gaza

164. Our findings of fact as to the appellants' current circumstances in one sense speak for themselves. They face an overall security and humanitarian situation which is extreme and life threatening.

165. Mr Chirico submitted that this consideration was of itself sufficient for the appellants to succeed in their appeals. We do not base our ultimate conclusion on proportionality on this consideration alone. Rather, we attach significant weight to it as one of a number of relevant considerations.

166. In so doing, we make it clear that this is an Article 8 family life case and we are not treating it as some form of disguised protection claim. The conventional proportionality exercise requires us to take account of all relevant considerations; the appellants' current circumstances are one such consideration because it goes to the core issues of whether the family life can continue, whether that life can develop in the future, and the risk that it will be extinguished by virtue of their death. The nature of these cases also undermines the respondent's reliance on [23] of Sandiford v SSHD [2014] UKSC 44. The appellants are not seeking to require either the respondent or us to institute some form of resettlement scheme or to protect rights which they do not enjoy. This is not a case concerning Articles 2 and/or 3 and the appellants do in fact enjoy a protected right (family life under Article 8(1) with a sponsor who is in the UK). In respect of the second of those features, we bear in mind what the Upper Tribunal recently concluded in Al-Hassan and Others (Article 8; entry clearance; *KF(Syria)*) [2024] UKUT 00234 (IAC), at [20]-[27]: in summary, contrary to the approach adopted in KF and others (entry clearance,) Syria [2019] UKUT 00413 (IAC), once family life between a United Kingdom-based sponsor and individuals abroad is found to exist, a judge should consider it on a unitary basis and not focus exclusively on the sponsor's rights.

Factors in the appellants' favour: the nature and quality of the family life

167. There is sometimes a danger of falling into the trap of assessing cases on their particular facts, whilst at the same time considering whether more or less weight should be attached to the family life in question by comparing them to other models of family units. We have endeavoured to avoid this.

168. Family life has already been found to exist and that exercise involved an intensely fact-specific assessment of the evidence. Our attribution of weight to that life is not predicated on a comparison with what might (erroneously) be labelled as “normal” family relationships. Our approach does not, however, preclude an increase or reduction in weight depending on the particular nature of the family life with which we are concerned.

169. We take account of the following considerations. The sponsor had a close relationship with the first appellant, particularly during the middle period of their childhood. The sponsor’s previous work in Gaza and the success of Hamas in the 2006 elections eventually led him to move to the United Kingdom in 2007. There was ongoing regular and meaningful contact between the sponsor and the appellants, although there has been no face-to-face contact for 17 years. By way of explanation for the lack of direct contact, the sponsor regarded it as too risky for a return to Gaza and we consider that perception to be both genuinely held and reasonable in all the circumstances. In any event, the judge was entitled to find that there was no family life prior to the conflict beginning in October 2023. That finding might have been different for this particular extended family if, for example, the sponsor had been living with the appellants over the course of time and there had been elements of practical interdependency within that unit. It is also relevant that there was no prior intention for the appellants to be reunited with the sponsor in the United Kingdom or indeed anywhere else outside of Gaza. If such a plan had existed, but was defeated by the onset of the conflict, the familial ties might have been stronger. These hypothetical scenarios might have led to a finding of family life prior to the conflict and, more importantly for present purposes, might

in turn have warranted greater weight being attributed to the family life which was found to exist when it comes to the proportionality exercise.

170. We do not regard the existence of other family members residing in various countries and with whom the sponsor has a good relationship as having any material bearing on our task. It is the family life between the sponsor and the appellants with which we are concerned.

171. Focusing back on the family life as it now stands, we agree with Mr Chirico that there are two elements to acknowledge: the actual family life enjoyed now and the potential family life which would be enjoyed if the appellants came to join the sponsor in this country. In respect of the former, it stands to reason that were the risk of death faced by the appellants on a daily basis to materialise, the family life currently enjoyed would be extinguished. That element goes to the seriousness of the interference with family life, rather than to its strength when considering proportionality. However, the second element does bear directly on proportionality and we take it into account. We have found that the sponsor does not regard cohabitation in the United Kingdom as simply a short-term solution. Rather, he is fully committed to supporting the appellants for as long as it takes. Based on this, we are satisfied that the extant family life would develop and is highly likely to strengthen over the course of time. Given the nature of the support which the sponsor has been providing during the conflict and the exceptionally difficult experiences which the appellants will carry with them, we conclude that the development of family life in the future is an important consideration in these appeals.

172. Bringing all of the above together, we place substantial weight on the family life. On a different set of facts relating to this particular extended family, the weight could have been greater, as discussed previously. Yet, it does not of course follow that the absence of certain factual ingredients requires only little weight to be attributed.

Factors in the appellants' favour: the Hamas issue

173. We have found that the family holds an anti-Hamas profile, but there has been no specific threat or targeting of the appellants as result of this. The first appellant is not an active operative on behalf of the Palestinian Authority. To an extent, therefore, we accept Mr Thomann's submission that the Hamas issue does not take the appellants' case much further. It does not demonstrate the existence of a direct threat of death or serious harm at the hands of Hamas which might otherwise constitute a distinct consideration in the proportionality exercise.

174. However, it does carry some weight in relation to other aspects of the appellants' overall circumstances. We have found that the first appellant would not be able to obtain alternative employment in Gaza as result of his connections with the Palestinian Authority. More importantly, given the appellants' current circumstances, the updating evidence in the supplementary bundle indicates that Hamas is confiscating such international aid as gets into Gaza and is prioritising its members/interests over the needs of the general population. In light of this, it is not unreasonable to infer that the appellants' anti-Hamas profile would present an additional obstacle to their ability to obtain aid.

Factors in the appellants' favour: the sponsor's mental health

175. It is accepted that the sponsor suffers from PTSD. We have found that he is on a waiting list for appropriate treatment following a referral by his GP. Through his resilience, he has been able to continue with his employment.

176. Without wishing to diminish the nature of the sponsor's condition and the obvious and understandable anxiety which is being caused by the appellants' circumstances, we agree with Mr Thomann that the sponsor's mental health does not represent a consideration of great significance,

whether in relation to his private life or the family life enjoyed with the appellants.

177. Having said that, we do not overlook the expert evidence from Dr Turton to which we have previously referred and our findings thereon. The risk of death or very serious harm to the appellants is high and there is a causal link between the respondent's decision, the PTSD, and a worsening of that condition were the risk to materialise.

178. All-told, and bearing in mind the unitary nature of the family life, we place only some weight on the sponsor's mental health.

Neutral factors: financial independence under section 117B(4) of the 2002 Act

179. If the sponsor's highest monthly salary were placed into the equation as we have found that it should be, he would be able to adequately maintain and accommodate the appellants by a margin of £12 in excess of the appropriate monthly target figure. That may be a challenge, but we do not accept Mr Thomann's submission that it would be unrealistic. We reiterate our conclusion that the sponsor is fully committed to supporting the appellants and is more likely than not to be able to maintain them beyond the short-term.

180. On this alternative calculation, we have regard to section 117B(4) of the 2002 Act and conclude that the financial independence consideration is of neutral value in these appeals.

Neutral factors: the sponsor's positive contribution to the United Kingdom

181. Mr Chirico submitted that the nature of the sponsor's employment was such that it constituted a material benefit to the United Kingdom and that it should carry some weight in the proportionality exercise, with reference to UE (Nigeria) v SSHD [2010] EWCA Civ 975. Whilst we acknowledge the important work undertaken by sponsor and others like

him, we conclude that his contribution is not capable of bearing material weight in these appeals. The scope of positive contribution arguments is very limited: Thakrar (Cart JR; Art 8: value to community) [2018] UKUT 00336 (IAC), at [112]. Here, it cannot properly be said that the sponsor's contribution is "very significant". In any event, this is not a case in which the sponsor would be expected to leave the United Kingdom and there is no suggestion that he may otherwise choose to do so. This particular consideration is of neutral value.

Proportionality: overall conclusion

182. Having addressed all of the considerations identified by the parties as being relevant to the proportionality exercise and attributing varying degrees of weight to each, we conclude that the respondent's refusal of the collective human rights claim does not, *on the particular facts of these cases*, strike a fair balance between the appellants' interests and those of the public. On a cumulative basis, the weight we attach to the considerations weighing on the appellants' side of the scales demonstrates a very strong claim indeed. Put another way, there are very compelling or exceptional circumstances.

183. We reiterate a point made earlier in our re-making decision. Even if the absence of a resettlement scheme were a relevant consideration, the weight we would have attached to it would have made no material difference to our overall conclusion on the proportionality exercise.

184. Accordingly, the appellants' appeals are allowed.

Anonymity

185. The judge made an anonymity direction on the basis that the appellants would be readily identifiable if named and that there was a potential for them to be harmed by either side in the ongoing conflict.

186. We have considered for ourselves whether to maintain the anonymity direction. Although strictly speaking these are not protection cases,

aspects of the appellants' claim involve specific risk-related issues concerning one party to the conflict (Hamas) and we are satisfied that naming them would create a significant risk of them being identified and, in turn, potentially targeted.

187. In all the circumstances, the important principle of open justice is outweighed in this case and we maintain the anonymity direction.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of errors on a point of law and that decision has been set aside to the extent identified in the error of law decision.

We re-make the decision and allow the appeals on Article 8 ECHR grounds.

H Norton-Taylor
Judge of the Upper Tribunal
Immigration and Asylum Chamber
Dated: 10 January 2025