Neutral Citation Number: [2021] EWCA Civ 1847

Case Nos: C5/2021/0089
C5/2021/0092

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE UPPER TRIBUNAL**
**(IMMIGRATION AND ASYLUM CHAMBER)**
**Upper Tribunal Judge Hanson**
**Appeal Nos HU/02054/2019 & HU/020136/2019**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/12/2021

**Before :**

**SIR GEOFFREY VOS, MASTER OF THE ROLLS**
**LADY JUSTICE KING**
and
**LORD JUSTICE WARBY**

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**Between :**

**(1) AMINAT SALIU**
**(2) HIMAMAT SALIU** — **Appellants**

**- and –**

**THE ENTRY CLEARANCE OFFICER** — **Respondent**

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**Philip Nathan and Jeremy Frost** (instructed by **Sutovic & Hartigan Solicitors**) for the **Appellants**
**William Irwin** (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing date: 14 October 2021

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# Approved Judgment

*Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:00am on Friday 3 December 2021.*

**LORD JUSTICE WARBY:**

## Introduction

1. The appellants, now aged 22 and 25, are citizens of Nigeria, where they have lived all their lives. In 2019, they were refused entry clearance to join their mother, who had come here as a refugee 6 years earlier with the appellants' two younger siblings. The appellants' appeals to the First-tier Tribunal were dismissed, and the Upper Tribunal dismissed appeals against those decisions. On these further appeals, the main issue is whether the Tribunal decisions were wrong because they failed to take any proper account of the time taken to process the mother's claim to refugee status.

## The factual and procedural background

2. In 2012, when the appellants were teenagers, their mother left Nigeria with her two other children, citing long-term domestic abuse by her husband, the appellants' father. The appellants remained in Nigeria, with their father. In October 2012, the mother claimed asylum in Ireland.

3. In April 2013, the mother was interviewed about her claim in the United Kingdom. Her claim was refused by the Secretary of State. But in October 2017, her appeal was allowed by the FtT (Judge Osbourne), on the basis that her account of domestic abuse was credible and she had been trafficked out of Nigeria. The mother was granted refugee status in the UK on 5 December 2017, along with her three dependent children: the two she had brought with her from Nigeria and a third, born in Ireland. The appellants were still living with their father.

4. On 17 May 2018, the appellants applied from Nigeria for entry clearance to join their mother and siblings. By this time, the appellants were both over 18 years old. So they did not meet the requirements of paragraph 352D of the Immigration Rules ("the Rules"), which permits the children of a person who has been granted refugee status to be reunited with their refugee parent. They were still living with their father. They sought leave to enter under the "exceptional circumstances" provisions in the Rules, arguing that their circumstances were such that to refuse them leave to join their mother would represent such a serious interference with their fundamental rights to respect for their family life as to outweigh the legitimate aim of immigration control, and would therefore represent a breach of s 6 of the Human Rights Act 1998. They relied on the respondent's "Family Reunion Guidance" of 2016. Their factual case was that they were children of a refugee, who were not independent, and were at risk of destitution.

5. On 11 January 2019, the Entry Clearance Officer ("ECO") refused the applications, concluding that there was "nothing to suggest" the appellants were in any danger from their father, and they had provided no evidence to suggest that they could not continue to live with him. The appellants exercised their right to bring administrative appeals. These were considered by an Entry Clearance Manager, ("ECM") who was satisfied that the ECO's decision was correct, observing in each case that "no suggestion has been made as to why with the financial assistance from her mother, the appellant cannot continue to reside in Nigeria."

6. Following this decision the appellants moved to live with a Mrs Olasunbo, and appealed to the FtT on the basis that they could demonstrate exceptional circumstances or

compassionate factors which justified the grant of leave. On 15 August 2019, FtT Judge B Lloyd heard the appeals. He heard live evidence, supported by written statements, from (a) the mother and (b) her uncle, Mr Bakare, a British citizen born in Nigeria in 1950 who resides in Yorkshire. Both were subjected to detailed cross-examination. An unsigned joint statement from the appellants was placed before the Judge, as well as a handwritten statement of Mrs Olasunbo. A written witness statement from the appellants' younger brother, Fawas, was admitted unchallenged.

7. The prominent features of the case advanced on behalf of the appellants were, in summary, as follows. The mother, Mrs Saliu, said she had left her husband because of domestic abuse, and gone to live with a friend. She took the two youngest children, but not the older ones because there was not enough room for them all at the friend's house and the younger ones were the most vulnerable. She had left the appellants with their father, her abuser, because she had no choice. She had promised the appellants she would make sure they could join her, but did not imagine the process would take some seven years. She had sent them money from 2016, increasing the sums more recently. She had sent them gifts via her uncle, and he had provided them with money when she could not do so as she was not working. She had always stayed in contact with them by phone. She had heard them speak of abuse they had suffered at home from their father and his family. By 2019 they had told her that they could not stand it any more, so in March of that year it was arranged for them to stay with Mrs Olasunbo while the mother applied for them to join her in the UK.

8. Mr Bakare gave evidence of visiting Nigeria and seeing the appellants, in a hotel in Lagos in 2018 and at Mrs Olasunbo's house in June or July 2019. He said that Mrs Olasunbo, the appellants and the mother had told him that the appellants were both mistreated and neglected by their father and their grandmother who wanted them out of their home. He also suggested that the appellants were in a state of depression and desperation to see their mother. He was not able to recall many details, and was unsure in his recall of quite significant events relevant to the appellants' cases. He gave some ambiguous and inconsistent evidence. He could not remember with any accuracy what gifts he delivered to the appellants from their mother. He was entirely unsure as to whether he had personally sent any money to the appellants. He thought, but was by no means sure, that he might at one stage have given the mother some money to send to the appellants.

9. By a determination promulgated on 21 August 2019, FtT Judge Lloyd comprehensively rejected the appellants' factual and evidential cases. The Judge said:-

> "28. I do not find the evidence given to this tribunal by the Sponsor, her uncle Mr Bakare together with the letter from Mrs Olasunbo to be credible. I believe that a contrived account of acute mistreatment of the Appellants in Nigeria has been advanced as a means of supporting an outside the rules application by the Appellants based on alleged exceptional circumstances.
>
> 29. I do not believe that the Appellants would have been placed in the care of the Sponsor's ex-husband and his family, including his mother. If what the Sponsor says were true the prospect of the mistreatment must have been known to the Sponsor at the

> time. I conclude that the circumstances of her leaving her former husband and fleeing to the UK were such that if she had thought that his abusive treatment would extend to his two daughters she would never have left them in his care; and more especially for so long a time. It is in my view no explanation for the Sponsor to say that she did not think that the process of her securing asylum in the UK would take so long. If the Appellants had been in the dire circumstances which she suggests, or if she had even feared that might happen, she would and could have taken action to make alternative arrangements for them in Nigeria long before her asylum was granted, and the subsequent application was made outside the rules."

10. The Judge went on to give detailed reasons for his rejection of the appellants' case that (a) they were financially and emotionally dependent on their mother; (b) their father had flogged them, and passed money intended for their support to their grandmother; (c) their grandmother had abused them when the father was away; (d) their father had made repeated calls to them, putting them under pressure to return to him; (e) they were in circumstances of destitution and vulnerability in Nigeria, and/or (f) likely to be destitute; and (g) could not safely or reasonably return to the care of their father. He considered the appellants' appeals to be predicated on the false assumption that because the relationship between the mother and her husband had been toxic, so too must their relationship with their father and in turn the grandmother.

11. The Judge found on the balance of probabilities that (1) the appellants' circumstances were not treated with any urgency at all; (2) the fact that their applications were left until they were over 18 and no longer complied with the Rules was indicative of that fact; (3) the husband had been in agreement with the mother that his daughters should join her in this country; (4) there had been "a concerted attempt to present deliberately a picture of pending destitution".

12. As to the law, the Judge concluded:

> "42. … having regard to the evidence at this appeal I do not accept that the refusal of their application in this instance will constitute a disproportionate interference with the Appellants' Article 8 rights, and there is no breach of section 6 Human Rights Act 1998.
>
> …
>
> 45. I have with great care considered the issue of exceptional circumstances and whether Article 8 ECHR is engaged in this case. I am led to the view in the totality of the evidence that this is not a case of exceptional circumstances. The evidence before me in this appeal and the authorities cited do not support in this instance an engagement of Article 8, for the reasons I have set out with some particularity in the preceding paragraphs of this decision."

13. Permission to appeal was initially refused by another Judge of the FtT, but the application was renewed and granted by a Judge of the Upper Tribunal. There were

four grounds of appeal, which can be summarised thus: (1) the Judge failed to have proper regard to the findings of Judge Osbourne on the mother's appeal, including the findings as to her credibility; (2) aspects of the FtT decision were speculative, and insufficiently reasoned; (3) the Judge failed to give anxious scrutiny to factors telling in the applicants' favour; and (4) the finding that Article 8 was not engaged resulted from a misdirection with regard to the findings of Judge Osbourne, that the mother was a refugee who was forced by circumstances to leave her older children behind; the Judge should have held that continued enforced separation from the mother was a disproportionate interference with Article 8.

14. The appeals were heard on 11 August 2020 by UT Judge Hanson, and dismissed by a decision promulgated on 13 August 2020. Judge Hanson observed that the conclusions of FtTJ Lloyd were in line with those of the ECO and ECM: that there was a lack of evidence to support the appellants' claims to have been exposed to violence, and to be destitute or at risk, and they had failed to make out those claims. Addressing the appellants' contention that Judge Lloyd had paid insufficient attention to the evidence of domestic abuse of the mother, Judge Hanson noted that when the appellants made their initial applications they were living with their father. Their application forms made no reference to any incidents of violence or abusive treatment. They had only moved to their current address after the ECO refused their applications. Judge Hanson held that the FtT decision was adequately reasoned, and that the conclusions reached were within the range of findings open to the Judge. The task of the FtTJ was to reach findings on the evidence before the tribunal. The earlier findings of Judge Osbourne were not conclusive as regards these appellants, in respect of whom the Judge had made no findings. Judge Hanson concluded:

> "31. The finding in relation to Article 8 has not been shown to be one not available to the Judge on the evidence either. Whether family life recognised by Article 8 exists is a question of fact. No material legal error arises in the finding there will be no breach of Article 8 ECHR."

## This appeal

15. The appellants now present these further appeals, with permission granted by Laing LJ.

16. There are two grounds of appeal. It is said, in summary, that (1) the FtT erred in law by applying too narrow a test of exceptional circumstances; (2) the Article 8 assessment should have taken into account the delay in determining the mother's claim and, had it done so, would have resulted in a conclusion that the refusal to grant entry clearance to the appellants was a breach of their Article 8 rights.

17. It is conceded that these points were "not at the forefront" of the argument below. It seems to me that both are in substance new grounds, that were not in reality advanced at all before the FtT or the UT. Permission for these second appeals was nevertheless granted on the footing that these are points of law that do not depend on additional facts and are suitable for consideration by this court, applying the principles identified in *Notting Hill FinanceLtd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146.

18. Although the first point features prominently in the Grounds of Appeal it was not expressly mentioned in the decision granting permission to appeal, and Mr Nathan did

not press it in his oral submissions to us. Rightly so, in my opinion. The term "exceptional circumstances" is a convenient shorthand label. What it means has been explained in two cases of high authority: *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11, [2017] 1 WLR 823, and *GM (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1630, [2020] INLR 32. These cases show that the test of exceptional circumstances, properly understood, is lawful and compatible with Article 8. This jurisprudence is clear, and well-known to the specialist Judges of the Immigration and Asylum tribunals. There is nothing in the decision of the FtTJ to support a conclusion that he misunderstood or misapplied the test. The fact that Counsel did not seek to argue any such ground of appeal before the UT reflects this.

19. In reality, these appeals are all about ground (2). The decision granting permission encapsulated the issue in this way: "whether the delay by the Secretary of State in deciding the mother's asylum claim … is relevant to the engagement of Article 8 and should be taken into account in the proportionality balance, and, if not, whether it is otherwise relevant to the question whether there were exceptional circumstances which should lead to a grant of entry clearance outside the Rules." The Judge highlighted the fact that when the mother applied for asylum the appellants would have been eligible to join her, but lost that eligibility during the decision-making period, because they reached the age of 18.

20. The appeals have been argued by Mr Nathan, who did not appear in the tribunals below, leading Mr Frost, who did. The oral and written advocacy of Messrs Nathan and Frost was able, forceful, clear and comprehensive. In the end, however, I am not persuaded that there is merit in ground (2). More detailed reasons follow but, in summary, although I would accept that delay in administrative decision-making may sometimes be relevant to a decision of the kind with which we are concerned, I do not think that these appellants can say that this is such a case. They cannot say that the time it took to determine their mothers' asylum claim enhances their respective cases on Article 8, or that it materially weakens the countervailing public interest in immigration control. There is no other basis on which delay could be relevant here.

## Discussion

<u>The framework of Rules and policy</u>

21. When a person obtains refugee status, their children aged under 18 can obtain leave to enter the UK if they satisfy the requirements of Rule 352D:-

> "352D. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who currently has refugee status are that the applicant:
>
> (i) is the child of a parent who currently has refugee status granted under the Immigration Rules in the United Kingdom; and
>
> (ii) is under the age of 18; and

> (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
>
> (iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of their habitual residence in order to seek asylum; and
>
> (v) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or Article 1F of the Refugee Convention if they were to seek asylum in their own right; and
>
> (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity."

22. It has been common ground at all times that the appellants cannot bring themselves within these provisions. When they were under 18 their mother was not a parent who "currently has refugee status". When she was, and they applied for entry clearance, they were over 18. The Rule itself has never been challenged.[1]

23. The appellants' cases have therefore been founded throughout on the Secretary of State's Family Reunion Guidance referred to above (full title "Family reunion: for refugees and those with humanitarian protection"). It is here that one finds references to the "exceptional circumstances" and "compassionate factors" on which the appellants relied in their application to the ECO, and their appeals to the ECM, the FtT and the UT. In the version that applied at the relevant time, the Guidance stated as follows:

> "Where a family reunion application does not meet the requirements of the Immigration Rules, caseworkers must consider whether there are any exceptional circumstances or compassionate factors which may justify a grant of leave outside the Immigration Rules.
>
> There may be exceptional circumstances raised in the application which make refusal of entry clearance a breach of ECHR Article 8 (the right to respect for family life) because refusal would result in unjustifiably harsh consequences for the applicant or their family. Compassionate factors are, broadly speaking, exceptional circumstances, which might mean that a refusal of leave to remain would result in unjustifiably harsh consequences for the applicant or their family, but not constitute a breach of Article 8.
>
> It is for the applicant to demonstrate as part of their application what the exceptional circumstances or compassionate factors are in their case. Each case must be decided on its individual merits. Entry clearance or a grant of leave outside the Immigration Rules is likely to be appropriate only rarely and consideration should

[1] A belated application for permission to amend the Grounds of Appeal to this Court to add such a challenge was abandoned.

> be given to interviewing both the applicant and sponsor where further information is needed to make an informed decision."

24. The Guidance went on to give "examples [which] may lead to a grant of leave outside the rules". Until their cases reached this Court, the appellants were arguing that they were within the first of those examples:

> "an applicant who cannot qualify to join parents under the rules because they are over 18 but all the following apply:
>
> - their immediate family, including siblings under 18 qualify for family reunion and intend to travel, or have already travelled, to the UK
> - they would be left alone in a conflict zone or dangerous situation
> - they are dependent on immediate family in the country of origin and are not leading an independent life
> - there are no other relatives to turn to and would therefore have no means of support and would likely become destitute on their own"

25. FtT Judge Lloyd found that the appellants' case on the second and fourth of these criteria was "contrived", and involved "a concerted attempt to present deliberately a picture of pending destitution". In the light of these conclusions, and the other findings of fact made by Judge Lloyd and upheld by the UT, the appellants can no longer rely on the example.

26. The case they present to this court is different. It rests on the argument that the Tribunal's decision was wrong in law by reason of a failure to take into account that the appellants would have had a right of entry if their mother's asylum application had been determined before they turned 18. The Tribunal should have held that refusal of entry clearance solely on the basis that the appellants had now "aged out" by a process over which they had no control was (a) an interference with the family life the appellants had with their mother and siblings which (b) could not be described as proportionate to the legitimate aim of immigration control.

27. There is an artificiality about this way of putting it, because the appellants have not asked for these points to be considered as grounds of appeal before now. But the grant of permission to appeal means that is not an answer.

28. Developing this new case in oral argument, Mr Nathan referred us to further policy materials, and in particular the following:

(1) From the Family Reunion Guidance:

> "The policy objective is to deliver a fair and effective family reunion process which supports the principle of family unity by

> - …. providing a means for immediate family members to reunite in the UK
>
> Allowing … children under the age of 18 of those granted refugee status ... to reunite with them in the UK providing they formed part of the family unit before their sponsor fled their country of origin."

(2) From the UNHCR Handbook, references to the principle of family unity, and to the minimum requirement that a spouse and minor children of a refugee should benefit from family unit provisions where family life has been temporarily disrupted due to conflict or persecution.

(3) From the statutory guidance of 2009, "Every Child Matters", the requirement that children should have their applications dealt with in a timely way.

29. These points do not seem to me to take the matter any further. The passages from the Guidance and the Handbook reflect a policy aim of reuniting under 18s (minors) with parents who have refugee status. No application for family reunion was made when these appellants were children. Nor are they complaining of delay in the processing of their own applications, which were plainly dealt with in a timely fashion. None of this material addresses a case in which an adult child is indirectly affected by alleged delay in processing the asylum application of the sponsoring parent.

30. I also remind myself that although policy is relevant, the underlying legal obligation with which we are concerned in this case is the duty imposed on the Secretary of State and ECO by s 6 of the Human Rights Act 1998 ("HRA"), not to act inconsistently with the appellants' rights to respect for their family life, as guaranteed by Article 8(1) of the Convention. As *Agyarko* makes clear, it is this obligation that finds expression in the policy criterion of exceptional circumstances, properly understood. Stated more precisely, the question is whether a refusal of entry clearance would represent an interference with the Article 8(1) right that is not justified pursuant to Article 8(2). This should be the focus of our attention.

The law

***Article 8 and family life***

31. The first point, and in my opinion the crucial one, is that the question of whether refusal of entry clearance would be a breach of Article 8(1) and hence s 6 HRA will ordinarily turn on the facts as they stood at the time of the relevant decision. It is at that time that the first question must be asked and answered, namely: does the applicant for clearance enjoy a relevant family life within the meaning of Article 8? It is only if the answer to that question is yes that one gets on to the further questions of whether refusal would represent an interference and, if so, whether it is necessary in a democratic society in pursuit of a legitimate aim.

32. In this case, the relevant decision is that of the FtT, dated 21 August 2019. By that time, the appellants were young adults and more than 6 years had passed since they had lived as a family with their mother and siblings. Judge Lloyd, having heard the witnesses and examined the evidence before him, found on the facts that the appellants

did not at that time enjoy a family life with their mother for the purposes of Article 8. An appeal alleging that conclusion was wrong in law was dismissed. The principles are well-established, and set out in the leading cases of *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31, [2003] INLR 170, *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630, and *PT (Sri Lanka) v Entry Clearance Officer, Chennai* [2016] EWCA Civ 612. Key points are that, when it comes to adult family members, there is no legal or factual presumption as to the existence or absence of family life, for the purposes of Article 8. It is not enough that there is love and affection between the family members. There has to be something more. The irreducible minimum is real, committed or effective support. A careful examination of the facts is called for. There is no suggestion before us that these principles were ignored or misunderstood by the UT.

33. This brings me to the first of the two sub-issues in these appeals: whether and if so how the time taken to process the mother's application might have strengthened the appellants' case that their Article 8 rights were engaged, had this factor been taken into account. At first blush, it is not easy to understand how it could. The natural conclusion would be the opposite: a prolonged period of separation will tend to weaken family ties, not bolster them. There is nothing in the facts of this case to point in the opposite direction. On the contrary. Judge Lloyd found, for instance, that there was no evidence of the mother providing the appellants with any financial support before they made their applications for entry clearance. The process of seeking asylum was something that involved the mother and the Secretary of State. The appellants were not participants, or otherwise involved. It was not, to put it bluntly, a family activity.

***"Delay"***

34. The relevance of delay in the context of an Article 8 assessment has been considered in a number of cases, of which four were mentioned in the argument before us: *Strbac v Secretary of State for the Home Department* [2005] EWCA Civ 848, *Akaeke v Secretary of State for the Home Department* [2005] EWCA Civ 947, [2005] INLR 575, *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, [2009] 1 AC 1159 and *R (Chandran) v Secretary of State for the Home Department* [2020] EWCA Civ 634. These cases show that though delay is never decisive it can be relevant to the determination of a human rights claim of the present kind. But the cases offer no support for an argument that delay can enhance or strengthen a claim to enjoy an Article 8 family life in circumstances such as those of the present case.

35. In *EB (Kosovo)* the applicant challenged the Secretary of State's refusal of his claim for asylum, made when he was 13. By the time of the decision he was 18. The respondent admitted unreasonable delay. A timely decision would probably have resulted in the grant of exceptional leave to remain, on the basis that he was an unaccompanied minor. The House of Lords held that delay was not decisive, but could be relevant. The majority adopted the analysis of Lord Bingham, at [14-16], where he held that delay may, depending on the facts, be relevant in any one of three ways. The first is that the claim under Article 8 may be strengthened, to the extent that the applicant may during the period of any delay "develop closer personal and social ties and establish deeper roots than he could have shown earlier". This was the way in which the applicant put his case in *Chandran*: see [13-14]. That is the converse of the present case.

36. The second way in which the House considered that delay might be relevant is, in summary, that the passage of time without a decision will tend to erode the sense of precariousness that is a normal characteristic of the situation of an immigrant who is present in the UK but lacks leave to enter or remain. That is a factor that, seemingly, could count in favour of an applicant or appellant when deciding on the existence and weight of any Article 8 rights and/or when considering the weight to be attached to the countervailing public interest: see Lord Reed in *Agyarko* at [52]. But this cannot help these appellants, who were at all times outside the jurisdiction.

37. The third way in which delay could be relevant was described by Lord Bingham as follows:

> "Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes."

*Akaeke* is an illustration of this category. The delay in dealing with the application in that case was described by the UT as a "public disgrace". The Secretary of State did not venture to disagree with that assessment when the case reached this court. The Court of Appeal held that the system had "broken down", and that the Tribunal was entitled to conclude that in those circumstances the applicant's removal would not enhance confidence in the system of immigration control, and was not "necessary" for that purpose.

38. In the light of these authorities, it seems to me that the appellants' argument faces a number of obstacles. The first is that, assuming everything else in their favour, they cannot rely on delay as a factor that tilts the balance on the issue of whether Article 8 was engaged. To put it shortly, delay cannot be said to have done anything to improve the quality of the family life enjoyed by the appellants, their mother and siblings. If "delay" were to feature at all in this case it could only be at a later stage of the Article 8 analysis. So these appeals fall to be dismissed on the straightforward footing that there is no basis for dissenting from the concurrent findings of the FtT and UT that Article 8 was not engaged.

***The public interest in immigration control***

39. The appellants' case would fail at the second stage, in any event. If the appellants' Article 8 family life rights were engaged, the refusal of entry clearance would represent an interference with those rights. But the refusal of entry clearance to a person who has no legal right to enter the UK pursues the legitimate aim of maintaining a strong immigration system. So the issue at the second stage of the analysis would be whether the interference was necessary and proportionate to that aim.

40. In *Agyarko* the Supreme Court spoke of striking a "fair balance". The test is one of proportionality; in general, the public interest in removing or denying a right to remain to a person with no legal rights to be here is a strong one; the term "exceptional" in the Secretary of State's policy reflects the fact that, in striking this balance, the scales are heavily weighted in favour of that public interest; and a strong or compelling claim is required to outweigh it: see ibid. [56-57]. All of this reasoning is applicable here. Of

course, these general points must be considered and applied to the facts of the individual case before the decision-maker. But that does not assist the appellants.

41. The appellants cannot and do not say that this is a case in Lord Bingham's third category. Indeed they are unable, in my judgment, to make good their description of the time taken to process their mother's asylum claim as a period of "delay". The word "delay" refers to more than just the passage of time. It has connotations of unreasonable or unjustified behaviour. It certainly took some time for the Secretary of State to reach her decision. But all decisions take some time to arrive at. The more complex they are the longer they are liable to take. Other factors can slow things down, such as the way in which the applicant for asylum presents his or her case. I do not mean to say that the mother in this case is to blame for the time it took to resolve her claim, merely to point out that the mere fact that a process took some time cannot be enough to justify an accusation of "delay" on the part of the Secretary of State.

42. In this case, we have been presented with a chronology of the decision-making. This shows that the process was complex. The time taken is not alleged to be unlawful or even unreasonable. No such allegation is contained in the Grounds of Appeal. When this point was raised with him in argument Mr Nathan did suggest that the delay *might* be unlawful. But he did not seek to amend his grounds, or to develop the argument. The respondent denies unlawful or unreasonable delay, and I would accept the submission of Mr Irwin for the respondent, that – even assuming that an appellant can in principle rely on delay in making a decision on another person's case – there is no arguable case of systemic or otherwise unlawful delay.

43. I would not rule out the possibility that in an appropriate case the fact that a decision-making process is protracted, albeit lawful, could have a bearing on an Article 8 assessment. The analysis in *EB (Kosovo)* may not be exhaustive. But I am unable to identify any basis on which the mere passage of time could assist the appellants in this case.

***The Family Union Directive (2003/86/EC)***

44. The appellants' case is not advanced by reliance on this Directive and the CJEU's decision in *A & S v Netherlands,* Case C-550/16. The purpose of the Directive is to regulate the conditions for the exercise of "the right to family reunification of third country nationals residing lawfully in the territory of the Member States" (Article 1). Article 2 defines the terms employed in the Directive, including "(f) unaccompanied minor". In *A&S* the CJEU gave a definitive interpretation of that term. The UK is not a party to the Directive. The Directive, and the case of *A & S,* are thus concerned with the implementation of a specific and carefully defined substantive legal right conferred on third country nationals who are already in the EU, which forms no part of English law. Neither purports to represent an implementation of Article 8.

45. Nor do I consider the Directive or the CJEU decision are persuasive or helpful by way of analogy. *A&S* was concerned with a specific category of third country national or stateless person: a person under 18 who arrives on the territory of a Member State unaccompanied by an adult, and remains unaccompanied by an adult thereafter. For obvious reasons, this category of person is given special protection and special rights. The CJEU held that in deciding whether an individual qualifies as an "unaccompanied minor" for the purposes of the Directive the decisive date is the one on which they

entered the Member State concerned, and not the date on which the application for family reunification was submitted. These appellants were never unaccompanied minors in this or any other sense, nor did they at any stage have analogous status. Neither the decision nor the reasoning that led to it seem to me to be helpful for present purposes.

## Post-hearing submissions

46. These appeals were heard remotely. Mr Nathan had tested positive for Covid-19, but decided he was fit enough to present his clients' case at the remote hearing. After the hearing, he felt he had not done justice to the case, and supplemental written submissions were lodged. These were prepared by Mr Frost, and approved by Mr Nathan. Although their admission was opposed by the respondent we decided that we would consider these further submissions. It is exceptional to allow a party a second bite of the cherry in this way. Whatever Mr Nathan may have felt in the aftermath of the hearing, I did not consider that his presentation of the appellants' cases had suffered on account of his illness. But in the highly unusual circumstances of this case it was not unfair to the respondent, nor prejudicial to the administration of justice, to admit the written argument, and afford Counsel and their clients the reassurance that their case has been fully argued.

47. We did of course allow Counsel for the respondent a chance to reply. Mr Irwin complained that the post-hearing arguments amounted in substance to a belated application for permission to argue a new and distinct ground of appeal, raising issues that were not canvassed before the tribunals below, and which are not properly arguable. I am inclined to agree with all of that. But I think there is a shorter answer. The submissions were all directed at dissuading the court from taking the view that some blame attached to the mother for not pressing her claim to refugee status with sufficient urgency, and that her "perceived failings" should be determinative of the appeals. As I have explained, that forms no part of my reasoning. So the further argument is immaterial in any event.

## Disposal

48. For these reasons I would dismiss the appeal.

**Lady Justice King:-**

49. I agree

**Sir Geoffrey Vos, Master of the Rolls:-**

50. I also agree.