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Appeal No: CA-2025-000713
Case Nos: UI-2024-005295, UI-2024-005297, UI-2024-005301, UI-2024-005302, UI-2024-005309, and UI-2024-005311

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judges Norton-Taylor and Ruddick

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/11/2025

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE DINGEMANS, SENIOR PRESIDENT OF TRIBUNALS
and
LADY JUSTICE ELISABETH LAING

Between:

(1) IA (2) RE (3) KA (4) SA (5) HA (6) AA	**Respondents Appellants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant Respondent**

Sir James Eadie KC, Colin Thomann KC, Shane Sibbel, Tom Leary and **Natasha Simonsen** (instructed by **Government Legal Department**) for **the Appellant/Respondent** (the SSHD)

Raza Husain KC, David Chirico KC, Ben Bundock, Eleanor Mitchell, George Molyneux and Rayan Fakhoury (instructed by **Bindmans LLP**) for **the Respondents/Appellants** (the family)

Hearing dates: 4 and 5 November 2025

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Approved Judgment

This judgment was handed down remotely at 10.00am on 26 November 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

SIR GEOFFREY VOS, MASTER OF THE ROLLS, LORD JUSTICE DINGEMANS, SENIOR PRESIDENT OF TRIBUNALS, and LADY JUSTICE ELISABETH LAING:

Introduction

1. This case concerns the proper meaning of article 8 of the European Convention on Human Rights (the ECHR) (article 8).

2. A family of 6 persons resident in Gaza (father, mother and four children aged 18, 17, 8 and 7 in September 2024) (together the family) applied to enter the United Kingdom to join their sponsor, who is the younger brother of the father (the sponsor). The sponsor has lived and worked in the UK since 2007, and is now a British citizen. It is common ground that the family could not have successfully applied to enter the UK under the applicable Immigration Rules (the Rules).

3. The family's applications for entry clearance were refused in May 2024. Their appeals to the First-tier Tribunal (Immigration and Asylum Chamber) (the FTT) were dismissed. The FTT decided that family life, within the meaning of article 8(1), had existed between the sponsor and the family since the start of the Gaza conflict in late 2023, but that the refusal of entry clearance was not a disproportionate interference with that family life under article 8(2).

4. The Upper Tribunal (Immigration and Asylum Chamber) (the UT) allowed the family's appeal from the FTT. The UT upheld the FTT's decision as to the existence of family life, but held that the FTT had made material errors of law in applying article 8(2). The UT decided to re-make the decision. Its conclusion was that the decision to refuse the family entry to the UK was an interference with their family life infringing article 8.

5. The Secretary of State for the Home Department (the SSHD) is appealing the UT's decisions as to the existence of family life and its conclusions on the proportionality balance under article 8(2). The SSHD contended that: (a) on a proper understanding of the law as to the meaning of "family life", the family and the sponsor did **not** enjoy family life under article 8(1), (b) even if such family life did exist, the UT was wrong at [166] to consider the free-standing article 8 rights of the family, rather than just those of the sponsor, in undertaking the proportionality balance required by article 8(2), and (c) the UT gave the wrong weight to the risks to the lives of the family and their dire situation in the Gaza warzone, and gave the wrong weight to the importance of UK immigration control and the short-lived family life that had existed in this case.

6. The family supported the decisions of the FTT and the UT as to the meaning of family life, and the decision of the UT as to the proportionality balance under article 8(2).

7. It is important to set out immediately the full terms of article 8 as follows:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

8. The words that are particularly important for this case are that: "[e]veryone has the right to respect for his … family life", and "[t]here shall be no interference by a public authority with the exercise of [the right to family life] except such as is in accordance with the law and is necessary in a democratic society in the interests of … the economic well-being of the country … or for the protection of the rights and freedoms of others". We emphasise the words of article 8 at the outset because it is apparent that, in some of the cases, the terms of the rights protected by article 8 are not given sufficient prominence.

9. We have decided that the SSHD's appeal should be allowed on grounds 1 and 3 and in part on ground 2. Our reasons can be summarised briefly here.

10. First, the consistent jurisprudence of the European Court of Human Rights (the ECtHR) has been that "family life for the purpose of Article 8 … is normally limited to the core family and that there will be no family life between parents and adult children or adult siblings unless they can demonstrate "additional elements of dependence, involving more than the normal emotional ties"" (see *Kumari v. The Netherlands* 44051/20, 10 December 2024 (*Kumari*) at [35], and *Beoku-Betts v. SSHD* [2008] UKHL 39, [2009] 1 AC 115 (*Beoku-Betts*) at [39]). The FTT did not apply that test, but instead asked itself whether the sponsor had provided "real, effective or committed support" to his brother and the family (see [18] and [25] of the FTT decision). The real, effective or committed support test is lower than the additional elements of dependence test. Applying the proper test, neither the brother nor his family had shown that they had family life with the sponsor for the purposes of article 8(1).

11. Secondly, if there had been family life between the sponsor and his family (as found by the FTT), it would have been appropriate to have regard to the unitary nature of that family life (see *Beoku-Betts* at [4], [20] and [41]-[43]). We accept, however, that, in undertaking the proportionality balance under article 8(2), the court is looking primarily at the article 8 rights of those persons within the jurisdiction of article 1 of the ECtHR (in this case, the sponsor).

12. Thirdly, we have concluded that the UT made several errors in undertaking the proportionality balance under article 8(2). Even if, contrary to what we have decided, family life had existed between the sponsor and the family, the balance should not have been determined in favour of granting the family entry clearance. Very exceptional or compelling circumstances had not been shown. The UT was wrong to pay so little regard to the immigration control policies of the SSHD and the UK Government, as reflected in the Rules, as expressing what was necessary in the interests of the economic well-being of the UK and for the protection of the rights of the citizens of the UK. The UT wrongly over-stated the importance of the family's short-lived family life with the sponsor (had it existed at all), the best interests of the children of the family and the admittedly serious risks faced by the family in Gaza.

13. With that introduction, we will deal with the issues under the following headings: (i) the relevant facts, (ii) the FTT's decision, (iii) the UT's decision, (iv) chronological treatments of each of the ECtHR and the domestic authorities that are relevant to the existence of article 8(1) family life between adult siblings, (v) a chronological treatment of the authorities showing how the rights of persons outside the jurisdiction of the ECHR are to be treated in weighing the proportionality balance under article 8(2), (vi) a chronological treatment of the authorities relevant to the weighing of that balance,

(vii) whether the tribunals were right about the existence of family life, (viii) whether the UT was right to accord weight to the article 8 rights of the family in addition to the sponsor, (ix) whether the UT was right to hold that the decision to refuse the family entry to the UK was an interference with their family life infringing article 8, and (x) conclusions.

The relevant facts

14. Most of the following facts are taken from [21]-[24] of the FTT decision, and [3]-[5] and [118]-[138] of the UT decision. The UT said at [106] and [118] that it was re-making the proportionality decision on the basis of facts already found by the FTT (which were preserved) "together with our assessment of updating evidence on the circumstances of the [family] and sponsor". Reference should be made to the decisions of both the FTT and the UT for the full details.

15. The family is Palestinian and has lived in Gaza since 1994. The father speaks basic English, and the two elder children of the family speak English to a higher standard. As we have said, the sponsor left Gaza in 2007 to live and work in the UK. Prior to that, the sponsor had a close relationship with his brother and his brother's wife (who is a cousin he has known since childhood) and with his brother's elder children (the two youngest children were born after the sponsor left Gaza). During the conflict between Israel and Hamas, following the 7 October 2023 attacks, the family was displaced when their home was destroyed by an airstrike.

16. On 25 January 2024, the family applied for entry clearance to the UK. They filled in a Ukraine Family Scheme form, although their representations acknowledged that they could not qualify either under that scheme or under the Rules. They used the Ukraine Family Scheme Form because the SSHD's guidance entitled "Leave outside the Rules" tells applicants to use the application form "for the route which most closely matches [your] circumstances". The family was refused entry clearance in a decision dated 30 May 2024 (the decision). The decision said that the SSHD was not satisfied that there were compelling, compassionate circumstances justifying granting leave outside of the Rules. The decision said that there was no resettlement route for Palestinians and concluded that refusal of the application was not disproportionate. The decision suggested that, as no human rights claim had been made, the family had no right of appeal. On 25 July 2024, an FTT judge decided that the SSHD had determined the family's application on human rights grounds, so that they did have the right to appeal.

17. At the time of the FTT hearing in September 2024, the family were living in the al-Mawasi humanitarian zone in Gaza. Later, they moved to the Nuseirat refugee camp, living in an unsuitable summer tent, which has been damaged by gunfire. Their position remains extremely dangerous. Law and order have broken down in Gaza, and there is a dire humanitarian situation. It was highly probable that the father was "reaching his limit in terms of enduring this war" and was "exhausted and incredibly anxious".

18. The family had an anti-Hamas profile, because the sponsor and the father had historically either been members of Fatah or worked for the Palestinian Authority. Two uncles had been arrested by Hamas, and another was killed in November 2016. The father's links to the Palestinian Authority precluded him from finding employment in Gaza at the moment.

19. The sponsor was employed by a media organisation in the UK, but suffered from PTSD, triggered by the risks to the family. The UT found that it was likely that the sponsor's mental health would deteriorate significantly if the family came to harm or were unable to enter the UK.

20. The sponsor's average monthly income was at least £3,700 net. He continued, when possible, to send money to the family. The UT accepted that the father received a monthly stipend of some £350 from the Palestinian Authority. The sponsor intended to move home to accommodate the family in the UK. The UT found that he should be able to rent a large enough property for £1,500 per month. Using the applicable guidance to calculate the required maintenance available for the sponsor and the family, there was either a £24 per month shortfall or a £12 per month surplus as compared with their income. The sponsor was committed to accommodating and supporting the family beyond the short term.

The FTT's decision

21. On family life, the FTT held correctly at [18] that there was no presumption that family life existed between adult siblings. It applied the *dictum* of Sedley LJ at [17] in *Kugathas v. SSHD* [2003] EWCA Civ 31, [2003] INLR 170 (*Kugathas*) to the effect that real, committed or effective support was required in addition to normal emotional ties. The FTT said that the required threshold was lower than dependency.

22. The FTT concluded on family life at [25]-[26] that: (i) the sponsor had provided genuine, effective and committed support to the family since the start of the conflict, (ii) that was short of the family being dependent on the sponsor, but dependency was not necessary to establish family life, (iii) the family were not dependent on the sponsor, (iv) the sponsor's worries about the family had caused the decline in his mental health and was indicative of his commitment to support the family through the conflict, and (v) family life existed from the start of the Gaza conflict both between the sponsor and the father and between the sponsor and the other members of the family, having regard to the "guidance on the unitary nature of family life".

23. At [28], the FTT held that the dangerous situation for Palestinians in Gaza and the high risk of death to the family meant that the refusal of entry to the family would interfere with that family life.

24. At [29]-[43], the FTT adopted a "balance sheet approach" to the proportionality exercise under article 8(2).

25. The FTT took the following negative matters into account: (i) the family did not meet the requirements of the Rules, (ii) the Government had decided not to introduce a resettlement scheme for Palestinians, (iii) there was no intention before the conflict to develop the relevant family life, the sponsor having moved away 17 years ago, (iv) the further development of the family life would not be a normal progression of the relationship between adult siblings, and (v) despite his PTSD, the sponsor had a fully functioning life in the UK.

26. The FTT took the following positive matters into account: (i) the family were living in a region gripped by a humanitarian crisis, (ii) the family were threatened daily by

indiscriminate and lethal attacks, and (iii) it was in the best interests of the children of the family to escape Gaza, but not necessarily to come to the UK in particular.

27. The FTT concluded at [42] that the positive factors did not outweigh the public interest because "the creation in effect of resettlement policies for conflict zones is for the government and parliament". The public interest was to respect the policy decision not to create a resettlement scheme. The weight to be attached to that public interest was not outweighed by the interference with the family life, when there had never previously been an intention for the family to live with the sponsor, and it was not envisaged they would live together beyond the time when they were settled enough to make their own home.

The UT's decision

28. At [40]-[58], the UT decided that the FTT had made no error of law in deciding that family life existed. The UT referred at [42]-[43] to the general principles at [34]-[37] in *Kumari* that had been substantially repeated in *Alvarado v. The Netherlands* 4470/21, 10 December 2024 (*Alvarado*), which had reiterated "what had gone before and have been recognised and applied in the domestic authorities". Those principles "[boiled] 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". The examples given at [38]-[42] of *Kumari* were not exhaustive and did not "materially alter the "additional elements" test". The UT commented that there was "nothing on the face of the [FTT's] decision which [indicated] that he had in mind anything other than the "exacting" test in cases concerning adults". None of the fact specific challenges to the FTT's decision on family life succeeded.

29. At [59]-[106], the UT decided that the FTT's proportionality assessment under article 8(2) was vitiated by errors of law and should be set aside with the findings of fact being largely preserved. Those errors included: (i) the failure to give weight or to make any reference to the family's anti-Hamas profile, (ii) procedural unfairness in failing to allow the family the opportunity to deal with the sponsor's supposed inability to accommodate or maintain the family in the UK, (iii) the FTT's finding that it was the conflict, rather than the refusal of the family's entrance application, that had caused the sponsor's mental health problems, (iv) an erroneous suggestion that the family life concerned here was not normal or natural, and (v) the fact that the FTT thought wrongly that the absence of a resettlement policy was a separate public interest consideration weighing against the family and gave it decisive weight.

30. At [139]-[183], the UT remade the proportionality decision, also adopting the balance sheet approach, and concluding that the weight to be attached to the considerations weighing on the family's side of the scales demonstrated "a very strong claim indeed", and that there were "very compelling or exceptional circumstances" in favour of upholding the family's claim that there had been an interference in family life.

31. In weighing the balance, the UT took into consideration, against the family, the family's inability to satisfy the Rules, which were a statement of the SSHD's policy. The UT held that the absence of a resettlement scheme and the floodgates argument were irrelevant or minor considerations, and the suggestion that a large number of people from other conflict zones around the world would be able to take advantage of a decision in favour of the family was "speculative and misconceived". The UT also held

that the father and mother's inability to speak good or any English (respectively) and the small financial shortfall in ability to maintain and accommodate the family weighed slightly against the family.

32. In favour of the family, the UT put the following factors in the proportionality balance. First, the UT placed very significant weight on the best interests of the minor children, whilst acknowledging that it was not a paramount consideration. The UT said that their extreme and unjustifiably harsh living conditions and risk of death made it hard to conceive of any situation more contrary to their interests. It was overwhelmingly in their best interests to be in a safe environment with their parents and siblings.

33. Secondly, the UT attached significant weight to the family's extreme and life-threatening circumstances, acknowledging that theirs was not a claim under articles 2 or 3 of the ECHR. The UT nonetheless held that it went 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".

34. Thirdly, the UT placed substantial weight on the family life and the development of that life in the future.

35. Fourthly, the UT placed some weight on the anti-Hamas profile of the family as preventing the father gaining employment in Gaza and hindering the family's access to humanitarian aid.

36. Fifthly, the UT placed some weight on the sponsor's mental health having been caused by and likely to worsen as a result of the family's situation.

37. The financial independence of the sponsor supporting the family and the sponsor's contribution to society in the UK were, according to the UT, neutral features.

The ECtHR and domestic authorities relevant to the existence of article 8(1) family life between adult siblings

38. The proper approach to determining whether family life exists between adult siblings was fully argued before us. The SSHD seemed at first to contend that it was necessary to establish dependency, in the sense of one person being compelled to rely on the other in their daily life. This was submitted to be a higher test than a requirement for "real, committed or effective support" adumbrated by Sedley LJ in *Kugathas*. Ultimately, the SSHD seems to have accepted, correctly in our opinion, that, to establish family life under article 8(1), adult siblings must demonstrate "additional elements of dependence, involving more than the normal emotional ties". This formulation is, however, to be contrasted with the test contended for by the family, which was simply that adult siblings needed to show, in the circumstances of a case like this, that the sponsor had provided real, committed or effective support to his brother and to his brother's family.

39. It is to be noted at the outset that the concept of "dependence" looks at the matter, again on the facts of our case, from the point of view of the brother and his family, and asks whether they are, in the necessary sense, dependent on the sponsor. Conversely, the concept of support looks at the matter through the other end of the telescope and asks whether the sponsor is, in the necessary sense, supporting the family. We accept that

these may be two sides of the same coin, but it is nonetheless important not to confuse the angles of observation.

40. With that introduction, we will deal in chronological order with the most important ECtHR decisions and then with the most important domestic decisions. We have kept in mind the thrust of the submission that House of Lords and Supreme Court authority, culminating in *Regina (AB) v. Ministry of Justice* [2021] UKSC 28, [2022] AC 487 at [53]-[60], requires our domestic courts to go no further than they can be fully confident that the ECtHR would go, because public authorities have no right to apply to that court.

41. It is worth reiterating at the outset that, in our view, the ECtHR has clearly and consistently endorsed the "additional elements of dependence" test. The ECtHR cases are, however, very numerous and it is important to distinguish between those that consider the principles and those that do not. The domestic authorities are also numerous and often decided purely on their facts. We have tried to keep this judgment appropriately limited in length, but we have, in fact, considered the entire gamut of authority.

The ECtHR cases on family life between adult siblings

S&S v. United Kingdom 10375/83 10 December 1984 (*S v. UK*)

42. *S v. UK* is an admissibility decision. In other words, the question was whether the claim was arguable. In *S v. UK*, a widowed Indian mother had been granted permission to join her adult son in England. A year later, they both returned to India for the son's marriage, where the mother remained for three years before applying again to rejoin her son in the UK. The mother had originally been financially dependent on the son, but had sold the family home and become financially independent in India on her return. She was denied re-entry on the grounds that she was not wholly or mainly dependent on the son. Medical evidence demonstrated that the mother was suffering from mental health problems caused by the separation. The Commission nonetheless found that family life under article 8 had not been established, because the mother was not financially or otherwise materially dependent on the son. The Commission found the application inadmissible. The Commission held that:

> Generally, the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33-year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal, emotional ties.

El Boujaïdi v. France 123/1996/742/941 26 September 1997 (*El Boujaïdi*)

43. In *El Boujaïdi*, the ECtHR found that an exclusion order based on the applicant's criminal convictions interfered with his right to respect for his private and family life. The applicant was a 30-year old Moroccan. His parents and four siblings lived in France. He had been with them since he was aged 7, when he had arrived with them in France. He had been to school in France. He had also remained in contact with them. No test of private and family life was adumbrated, and the proportionality balance was

determined against him, so that the interference with private and family life was justifiable.

A W Khan v. United Kingdom 47486/06, 12 January 2010 (A W Khan)

44. In *A W Khan*, the applicant and his family moved to the UK when he was three, in 1978. He was convicted of theft and drug offences. He was sentenced to 7 years' imprisonment for his involvement in the importation of Class A drugs. His appeal against the SSHD's decision to deport him failed. He had a relationship with a girlfriend, who had recently had a baby. The ECtHR accepted that that relationship constituted "de facto family ties". He also claimed a "relationship of dependency" with his mother and brothers, having lived with them, save when in prison. Each of the mother and brothers suffered ill-health. The ECtHR accepted that those ties amounted to private life.

45. The ECtHR did not, however, accept that those ties amounted to family life. It said this at [32]:

> The Court does not accept that the fact that the applicant was living with his mother and brothers, or the fact that the entire family suffered from different health complaints, constitutes a sufficient degree of dependence to result in the existence of family life. In particular, the Court notes that in addition to his two brothers, the applicant also has three married sisters who live in the United Kingdom. It does not, therefore, accept that the applicant is necessarily the sole carer for his mother and brothers. Moreover, while his mother and brothers undoubtedly suffer from health complaints, there is no evidence before the Court which would suggest that these conditions are so severe as to entirely incapacitate them.

Savran v. Denmark 57467/15, 7 December 2021 (*Savran*)

46. In *Savran*, the applicant was 24. He was a paranoid schizophrenic adult, who claimed family life in Denmark with his mother and siblings, with whom he had lived before being hospitalised, although it was "clear that from his early years" he had not been "living full-time with his family" [177]. The Grand Chamber rejected that part of his claim applying the additional elements of dependence test as follows at [178]:

> The Court is further not convinced that the applicant's mental illness, albeit serious, can in itself be regarded as sufficient evidence of his dependence on his family members to bring the relationship between them within the sphere of "family life" under Article 8 of the Convention. In particular, it has not been demonstrated that the applicant's health condition incapacitated him to the extent that he was compelled to rely on their care and support in his daily life … Moreover, it has not been argued that the applicant was dependent on any of his relatives financially … Moreover, there is no indication that there were any further elements of dependence between the applicant and his family members. In these circumstances, whilst the Court sees no reason to doubt that the applicant's relationship with his mother and siblings involved normal ties of affection, it considers that it would be appropriate to focus its review on the "private life" rather than the "family life" aspect under Article 8.

Bierski v. Poland 46342/19 (2023) 77 E.H.R.R. 15 (*Bierski*)

47. In *Bierski*, a father applied to the ECtHR claiming access to his adult son who had Down syndrome. The son's mother was his appointed guardian and was refusing the father contact, and the Polish court had refused to intervene. At [39]-[40], the ECtHR reiterated that the existence of family life was "essentially a question of fact depending upon the existence of close personal ties" and "the principle that relationships between parents and adult children do not fall within the protective scope of Article 8 unless "additional factors of dependence, other than normal emotional ties, are shown to exist"".

48. At [47] in *Bierski*, the ECtHR reasoned that the father had a father-son relationship with the son and had had regular contact with him before the guardianship order. The son was part of the father's core family even after he reached 18. The son was fully incapacitated and did not communicate with those not known to him. The ECtHR found that "additional factors of dependence", and therefore family life, existed between father and son, as the applicant was one of the close persons who could communicate with him.

Kumari

49. In *Kumari*, family life was claimed for an elderly widowed mother in India (without other local family there) and her eldest adult son resident in the Netherlands, so that the mother could live with that son in the Netherlands. The mother and son made regular visits to each other in both countries. It was argued that her presence was necessary in the Netherlands for the son's mental recovery in coping with the death of a prematurely born daughter.

50. The ECtHR set out the general principles of law that were to be applied at [34]-[43] as follows. The lengthy citation is necessary to reinforce the fact that the ECtHR was indeed attempting to summarise a long line of consistent decisions:

> 34. As regards the question of the existence or non-existence of "family life", the Court has held that this is essentially a question of fact depending upon the existence of close personal ties. The notion of "family" in Article 8 may also encompass de facto "family ties" …
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> 35. The Court has held that family life for the purpose of Article 8 of the Convention is normally limited to the core family (see *Slivenko v. Latvia* [GC], no. 48321/99, §§ 94 and 97, ECHR 2003-X) and that there will be no family life between parents and adult children or adult siblings unless they can demonstrate "additional elements of dependence, involving more than the normal emotional ties" …
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> 36. This interpretation originates from the context of family reunification (see [*S v. UK*]) and has been followed in other contexts. In the context of the expulsion of settled migrants, the Court has made an exception for young adults who are still living with their parents and have not yet started a family of their own … In that particular situation, "dependency" is assumed (see *Maslov v. Austria* [GC], no. 1638/03, § 62, ECHR 2008, and [*Savran* at [174]]).

> 37. It follows from the Court's case-law that the question whether "additional elements of dependency" exist is to be decided on a case-by-case basis. The finding of the existence of "family life" based on "additional elements of dependency other than normal, emotional ties" will often be the result of a combination of elements. Several case-law examples are provided below by way of further clarification.
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> 38. In cases where adults had a physical or mental disability or illness of sufficient seriousness and were in need of constant care and support from other family members, the Court has accepted such dependency (see, for instance, [*Emonet v. Switzerland* 39051/03, 13 December 2017 at [37]], in which an adult child became paraplegic after a serious illness; [*Bierski* at [47]], in which an adult child suffered from Down syndrome and was fully incapacitated …].
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> 39. Conversely, in cases concerning the following medical conditions the Court refused to accept that the state of health of the applicants or their relatives was serious enough or, even if sufficiently serious, was sufficient in itself to warrant a finding of the existence of dependency and thus of "family life" within the meaning of Article 8 of the Convention: diabetes, an (undefined) heart condition and chronic obstructive pulmonary disease, and ulcerative colitis requiring treatment, none of which conditions were entirely incapacitating (see [A W *Khan*]); asthma (see *Konstatinov v. the Netherlands*, no. 16351/03, 26 April 2007); and paranoid schizophrenia which, while very serious, did not incapacitate the applicant to the extent that he was compelled to rely on his family's care and support in his daily life (see [*Savran*]).
>
> 40. Financial dependency also played a role in the Court's analysis of "additional elements of dependency" …
>
> 41. Depending on the circumstances of the case, the Court has found that financial support could be provided from a distance (see, for instance, *Berisha v. Switzerland*, no. 948/12, § 60, 30 July 2013, and *Senchishak*, cited above, § 57). … Financial dependency on its own has never been considered sufficient to constitute additional ties of dependency, and accordingly family life between adult family members.
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> 42. Other elements that played a role in the Court's analysis of "additional elements of dependency" in a migration context include, for example, the fact that the person with whom ties were claimed was the only surviving relation …, or the fact that substantial links with the country of origin continued to exist … The presence of family members who can provide care – or other viable alternatives – in the country of origin or where the person requiring care and support lives, may also be such an element …
>
> 43. It thus follows from the Court's case-law that the assessment of whether additional elements of dependency, other than normal emotional ties, have been shown to exist, requires an individualised review of the relationship at issue, and other relevant circumstances of the case. …

51. On the facts of *Kumari*, the ECtHR considered both the dependence of the son on the mother and of the mother on the son. At [45]-[54], it found, by a majority, that no family life existed between mother and son within the autonomous meaning of that term in

article 8(1). There was no evidence that the son's grief or PTSD "was so severe as to entirely incapacitate him" and he appeared "able to function in his everyday life" in the absence of the mother. The mother was apparently able to get by with the medical care in India and other forms of care, support and assistance as provided by her housekeeper, neighbours and friends. The mother had "not demonstrated that she was suffering from a physical or mental disability or illness of sufficient seriousness or that she was in need of constant care and support from [the son] in order to cope with her everyday life". Financial assistance provided by the son to the mother had "never been considered sufficient to constitute additional ties of dependency".

Alvarado

52. The ECtHR found at [50], in *Alvarado*, that a Peruvian adult with the cognitive level of an 8-year old had family life with his sisters who lived in the Netherlands. He had lived with his parents in Peru until they died, and then in January 2015 had come over to the Netherlands to stay with a sister on a 90-day permit. His brother in Peru was unable to look after him as he travelled often for his work.

53. The ECtHR once again set out the law on family life between adult siblings at [35]-[45] in very similar terms to the passages recited at [50] above from *Kumari*.

54. The ECtHR noted at [47]-[48] that it was not disputed that the applicant was fully dependent in his daily life on the care of others, and that such care had always been provided by close family members. He lived with one sister and she and his other three sisters cared for him full-time. Three were Dutch citizens and the fourth had been a legal resident since 2009.

55. The SSHD relied on [49] in the ECtHR's decision in *Alvarado* for her original argument that the kind of dependency needed for family life between siblings was that one person was compelled to rely on the other in their daily life. The ECtHR said at [49] that: (i) the Court noted from certain Dutch decisions that, in a family reunification context, the presence of family members who could provide care – or other viable alternatives – in the country of origin, might also be relevant to the assessment; (ii) because the existence of family life had to be assessed on a case-by-case basis, the weight to be accorded to that element was relative and depended on the other facts and specific circumstances of the case; and (iii) thus, it could not be derived from those Dutch decisions, as the Dutch immigration authorities seemed to assume, that "exclusive dependency" was always required in order to find that family life exists.

56. Properly understood, this paragraph [49] in *Alvarado* was not casting doubt on the "additional elements of dependence" test. It was just making clear (albeit somewhat elliptically) that, in this case, the fact that his brother could provide care for the applicant in Peru was not fatal to the existence of family life between the applicant and his sisters in the Netherlands, contrary to the view of the Dutch authorities.

57. The decision in *Alvarado* on family life was at [50]-[51] to the effect that family life existed between the applicant and the sisters because there were, in that case, "additional elements of dependency other than normal emotional ties".

Demirci v. Hungary 48302/21, 6 May 2025 (*Demirci*)

58. In *Demirci*, the ECtHR decided that a father did not have family life under article 8(1) with either his adult daughter (with whom he cohabited) or his wife (with whom he did not). The principles enunciated in *Kumari* and *Alvarado* were reiterated at [70] by the third section of the ECtHR in *Demirci*; both *Kumari* and *Alvarado* were decisions by the second section of the ECtHR. It was said at [71] that: "[a]s a rule, cohabitation is a requirement for a relationship amounting to family life. Exceptionally, other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto "family ties"". At [72]-[73], the ECtHR once again applied the "additional elements of dependence" test.

59. We conclude our summary of the relevant ECtHR cases by mentioning Morritt LJ's well-known *dictum* at [44] in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v. Wallbank* [2001] EWCA Civ 713, [2002] Ch 51, where he said:

> Our task is not to cast around in the European Human Rights Reports like blackletter lawyers seeking clues. In the light of section 2(1) of the Human Rights Act 1998 it is to draw out the broad principles which animate the [ECHR].

60. It is clear, in our judgment, from this review that the consistent jurisprudence of the ECtHR from *S v. UK* onwards has been that family life, within the autonomous meaning of article 8(1), is only to be found between adult siblings where "additional elements of dependence involving more than the normal emotional ties" are demonstrated.

The domestic cases on family life between adult siblings

61. All the domestic cases referred to by the parties came after *S v. UK*. In those circumstances, if we are right that the ECtHR has established a consistent jurisprudence, and if, as we think also, the domestic courts have been consistently attempting to follow that ECtHR jurisprudence, the twists and turns of the domestic expositions may turn out to be of little more than academic interest. For that reason, we will take most of the domestic authorities briefly.

Kugathas

62. In *Kugathas*, a Sri Lankan asylum-seeker had spent about 15 years living in Germany before coming to the UK in 1999. He claimed to have family life in Germany with his mother, brother and sister's family (with whom there were regular telephone calls). The sister's family had also visited him in the UK for a 3-week period. The Secretary of State refused his asylum and human rights claims. The adjudicator dismissed the asylum appeal but allowed the human rights appeal on the basis that removal from the UK would interfere with the appellant's family life with his relatives in Germany. The Immigration Appeal Tribunal held that the appellant had not established a family life in the UK, and the Court of Appeal dismissed the appeal on the facts, considering what was meant by "family life" in article 8(1) in this context. It held also that article 8(1) did **not** require the appellant to establish that the family life was in the UK.

63. At [14], Sedley LJ described the passage from *S v. UK* that we have set out at [42] above as "the proper approach", whilst "not black-letter law".

64. Having considered the possible differences between entry and removal cases at [5], Sedley LJ said this at [16]-[18] in a passage heavily relied upon by the family:

> 16. Nevertheless, there are repeated dicta which point to the continuing relevance of the passage which I have quoted from [*S v. UK*]. In *Marckx v Belgium* [1979] 2 EHRR 330, a decision of the full Court, at paragraph 31 the adjectives "real" and "normal" were used to characterise family life if it was to come within Article 8. In *Abdulaziz, Cabales and Balkandali v United Kingdom* [1985] 7 EHRR 471 [*Abdulaziz*] paragraph 63, again a decision of the Court, the phrase "committed relationship" was used. In *Beldjoudi v France* [1992] 14 EHRR 801, a decision of the Commission which went on to be upheld by the Court, at paragraph 55 the phrase "real and effective family ties" was used.
>
> 17. Mr Gill says that none of this amounts to an absolute requirement of dependency. That is clearly right in the economic sense. But if dependency is read down as meaning "support", in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents in my view the irreducible minimum of what family life implies. It may be that, for a time in Germany, that minimum was reached, as between the appellant and his family there; but that time has gone.
>
> 18. I would add, for completeness, that it is probable that the natural tie between parent and infant is a special case which may in some cases supersede any need for a demonstrable measure of support: see *Boughanemi v France* [1996] 22 EHRR 228 at paragraph 35.

65. Sedley LJ then said at [19] that "neither blood ties nor the concern and affection that ordinarily go with them are, by themselves or together, … enough to constitute family life".

66. Arden LJ's judgment did not expressly endorse Sedley LJ's formulation of the principles. Instead, she made the following, in our judgment, rather more orthodox observations as follows:

> 24. There is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise the relevant factors. …
>
> 25. Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties: see *S v United Kingdom* (1984) 40 DR 196 and [*Abdulaziz*]. **Such ties might exist if the appellant were dependent on his family or vice versa**. It is not, however, essential that the members of the family should be in the same country. … [Emphasis added.]

67. Simon Brown LJ gave a third judgment agreeing only in the result, without commenting on the principles adumbrated by Sedley and Arden LJJ.

68. Accordingly, it seems to us that Sedley LJ's *dicta* at [17] were at best *obiter*. As will appear, we do not think that he was right to think that the need for additional elements of dependency should be read down to an irreducible minimum of real, committed or effective support. Real support, for example, might amount in some cases to a very low hurdle indeed.

Beoku-Betts

69. We shall return to *Beoku-Betts* in the context of ground 2 (the question of whose article 8 rights are engaged). But, for present purposes, Lord Brown (with whom Lords Hope, Scott and Bingham and Baroness Hale agreed) said at [39] that "the dependency between the appellant and his mother [clearly engaged] article 8". He continued by endorsing what ECtHR had said in *Mokrani v. France* (2003) 40 EHRR 123 at [33] to the effect that: "relationships between adults do not necessarily benefit from protection under article 8 of the [ECHR] unless the existence of additional elements of dependence, other than normal emotional ties, can be proven". It appears that *Kugathas* was not cited in *Beoku-Betts*.

70. The family rely on the facts of *Beoku-Betts* as demonstrating that it was not necessary, as the SSHD submitted, for there to be dependency caused specifically by incapacity, or any particular level of incapacity, to establish family life between adults. We shall return to this point.

ZB (Pakistan) v. SSHD [2010] INLR 195 (*ZB (Pakistan)*)

71. *ZB (Pakistan)* was a removal case, in which Aikens LJ surveyed the authorities on family life at [27]-[39], including *S v. UK* and *Kugathas.* The case adds little to what we have already said. At [42], Aikens LJ, when applying the law to the facts, seems to have applied the "additional elements of dependency" test (see also [33] and [38]).

Patel v. Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17.

72. The facts of *Patel* are accepted by the family to be far removed from this case. Nonetheless, they rely upon it for what Sedley LJ said at [14] about family life. He said that "what may constitute an extant family life [between parents and adult children] falls well short of what constitutes dependency". We do not think that this *dictum* sought to alter in any way the long-established jurisprudence.

PT (Sri Lanka) v. Entry Clearance Officer (Chennai) [2016] EWCA Civ 612 (*PT (Sri Lanka)*)

73. In *PT (Sri Lanka)*, a 20-year old sought to gain entry to the UK to join his father and older brother on the grounds of their family life. He failed. Underhill LJ (with whom Beatson and Cranston LJJ agreed) reviewed the authorities at length at [22]-[26]. He concluded at [26] by saying that Sedley LJ's statement of the applicable principles in *Kugathas* had "not been in any sense disapproved – unsurprisingly, since it requires a fact-sensitive approach". He thought it needed to be read in the light of subsequent case-law summarised by the Tribunal in *Ghising v. SSHD* [2012] UKUT 00160 (IAT) (*Ghising*). *Ghising* had been approved by Dyson MR in *R (Gurung) v. SSHD* [2013] EWCA Civ 8, [2013] 1 WLR 2546 at [46]. Both *Ghising* and *Gurung* emphasised the need for a fact-sensitive approach, which we would comment was obviously correct.

74. In Underhill LJ's lengthy analysis, he set out the "additional elements of dependency" test without departing from Sedley LJ's formulation in *Kugathas*.

Rai v. Entry Clearance Officer, New Delhi [2017] EWCA Civ 320 (*Rai*)

75. In *Rai*, Lindblom LJ (with whom Beatson and Henderson LJJ agreed) remitted the question of whether a 26-year old Nepalese man, who had applied to join his parents in the UK, had family life with them. At [17]-[20], Lindblom LJ again reviewed the domestic (but not the ECtHR) authorities, many of which we have mentioned.

76. At [36]-[37], Lindblom LJ upheld Rai's submissions that: (i) a decision-maker would generally need to pay attention to whether the support provided is real, committed or effective, (ii) it was too exacting and inappropriate to require an extraordinary or exceptional feature in the appellant's dependence upon his parents as a necessary determinant of the existence of his family life with them, and (iii) requiring "some compelling or exceptional circumstances inherent within [an applicant's] own case" elevated the threshold of real, committed or effective support too high. This accorded with *Kugathas*, as reviewed in *Ghising* and *Gurung*.

77. It is worth pointing out that, in our judgment, this approach lost sight of the ECtHR authorities we have mentioned (prior to *Rai* – such as *S v.* UK and *A W Khan* - see [42]-[45] above), and of *Beoku-Betts* at [39], that made clear that the test was "additional elements of dependency", rather than "real, committed or effective support".

Uddin v. SSHD [2020] EWCA Civ 338, [2020] 1 WLR 1562 (*Uddin*)

78. *Uddin* was another case where the facts are a long way from the facts of this case. There, an 18-year old Bangladeshi sought to establish family life with his foster parents in the UK. Ryder LJ (with whom King and Bean LJJ agreed) sought to distil principles from the now familiar domestic and ECtHR authorities that he had cited at [26]-[39]. Ryder LJ's first principle was that "the test for the establishment of article 8 family life in the *Kugathas* sense is one of effective, real or committed support. There is no requirement to prove exceptional dependency". Mr Raza Husain KC, for the family, accepted that the second principle enunciated by Ryder LJ concerning test for family life in a foster care context was wrong.

79. Ryder LJ had cited *S v. UK* (unlike Lindblom LJ in *Rai*) but nonetheless seems to have lost sight of the additional elements of dependency test (see *Beoku-Betts* at [39]).

Mobeen v. SSHD [2021] EWCA Civ 886

80. In *Mobeen*, a 66-year old Pakistani widow applied to be allowed to remain in the UK with her adult son (and 2 other adult children). Carr LJ (with whom Baker and Underhill LJJ agreed) held that she was dependent on the children and, therefore, had family life with them. Carr LJ referred at [44] to the relevant principles relating to family life having been explored in a line of well-known (domestic) authorities including *Kugathas*, *Singh v. ECO New Delhi* [2004] EWCA Civ 1075 (*Singh 1*), *ZB (Pakistan), Singh v. SSHD* [2015] EWCA Civ 630 and *Uddin*.

81. Carr LJ then concluded as follows at [46]-[47]:

> 46. However, the case law establishes clearly that love and affection between family members are not of themselves sufficient. There has to be something more. **Normal emotional ties will not usually be enough; further elements of emotional and/or financial dependency are necessary, albeit that there is no requirement to prove exceptional dependency**. The formal relationship(s)

> between the relevant parties will be relevant, although ultimately it is the substance and not the form of the relationship(s) that matters. The existence of effective, real or committed support is an indicator of family life. Co-habitation is generally a strong pointer towards the existence of family life. The extent and nature of any support from other family members will be relevant, as will the existence of any relevant cultural or social traditions. Indeed, in a case where the focus is on the parent, the issue is the extent of the dependency of the older relative on the younger ones in the UK and whether or not that dependency creates something more than the normal emotional ties.
>
> 47. The ultimate question **has been described as being whether or not this is a case of "effective, real or committed support"** [see Uddin at [40]] or whether there is "the real existence in practice of close personal ties" (see Singh 1 at [20]). [Emphasis added].

82. In our judgment, these formulations reflect the cases that Carr LJ cited and the "additional elements of dependency" test. At no point did Carr LJ say that that test should actually be supplanted by the test of "real, committed or effective support".

Saliu v. Entry Clearance Officer [2021] EWCA Civ 1847, [2022] Imm AR 418 (*Saliu*)

83. In *Saliu*, two adults applied to enter the UK from Nigeria to join their mother and two younger sisters. Warby LJ (with whom Sir Geoffrey Vos MR and King LJ agreed) held that article 8 was not engaged. At [32], Warby LJ said that the principles were set out in *Kugathas* and other domestic cases. He said that key points were that: (i) 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, and (ii) there had to be something more than love and affection between the family members, and (iii) the irreducible minimum was real, committed or effective support.

84. Warby LJ in *Saliu* did not mention the then recent decision in *Mobeen*. It seems to us, however, that sight was also lost of the additional elements of dependency test from *Beoku-Betts* at [39] and of the ECtHR cases (none of which was referred to by Warby LJ).

85. We will return to deal with these authorities under ground 1 below.

<u>The authorities on how the rights of persons outside the jurisdiction of the ECHR are to be treated in weighing the proportionality balance</u>

86. This section deals with the authorities relevant to ground 2 of the SSHD's appeal. The SSHD contends that the UT was wrong to weigh in the proportionality balance the article 8 rights of the family, because the ECHR is territorial and article 1 provides only that the UK "shall secure to everyone within their jurisdiction the rights and freedoms defined …". The family were not within the jurisdiction of the UK. The SSHD submits that the UT made this error at [141]-[146], [163] and [166] where it considered the article 8 rights of the children and the family. Conversely, the family contend that family life is unitary. Once family life has been established, the rights of all the members of that family fall to be considered.

Beoku-Betts

87. *Beoku-Betts* concerned the proper meaning of section 65 of the Immigration and Asylum Act 1999 in the context of the removal of one member of a family living together in the UK. The House of Lords decided that, in considering whether the appellant's article 8 rights were being infringed, it was necessary to have regard to the article 8 rights of the other members of his family (see Lord Brown at [41]-[43]). Baroness Hale said at [4] that "the right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed".

88. *Beoku-Betts* does not seem to us to say anything about the article 8 rights of a family member, who resides **outside** the jurisdiction, and has never lived in or even visited the jurisdiction.

AS (Somalia) v. SSHD [2009] UKHL 32, [2009] 1 WLR 1385 (*AS (Somalia)*)

89. In *AS (Somalia)*, two orphaned Somali children were refused leave to enter the UK to join their cousin who was resident here. They appealed and in the period between the refusal and the hearing of the appeal their situation greatly deteriorated. Section 85(5) of the Nationality, Immigration and Asylum Act 2002 provided that, on such an appeal, only the circumstances at the time of the decision to refuse could be considered. The appellants argued that this provision should be read down to give effect to their article 8 rights. Lord Phillips (with whom the other judges agreed) held that section 85(5) was not incompatible with the appellants' article 8 rights. Lord Hope (with whom Lord Hoffmann and Lord Brown agreed) said *obiter* at [16] that there might be many entry clearance cases which engage the applicant's right to respect for family life under article 8. He endorsed what Baroness Hale had said at [4] in *Beoku-Betts* (see [87] above, and what Baroness Hale herself said in her concurring judgment in *AS (Somalia)* at [26]-[27]).

90. The question of whether the Somali national children (who were in fact resident in Ethiopia) had, as a matter of jurisdiction, their **own** article 8 rights to a family life under the ECHR was not specifically argued in *AS (Somalia)*. But the majority undoubtedly thought that the family life of the cousin in the UK encompassed the right to respect for the family life of those with whom it was enjoyed, which in that case was assumed to include the applicants who were physically located outside the jurisdiction of the ECHR.

Al Skeini v. United Kingdom 55721/07, 7 July 2011, (2011) 53 EHRR 18 (*Al Skeini*)

91. *Al Skeini* did not concern family life. It is nonetheless relevant because the Grand Chamber of the ECtHR at [130]-[139] explained the territorial principles of the ECHR.

92. At [131]-[133], the Grand Chamber said that acts of contracting states "performed, or producing effects, outside their territories can constitute an exercise of jurisdiction only in exceptional cases", which must be determined by reference to the facts. An exception to the principle of territoriality was that a contracting state's jurisdiction under article 1 may extend to acts of its authorities which produce effects outside its own territory.

93. At [137], the Grand Chamber said that "whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation under [article 1] to secure to that individual the rights and freedoms

under s.1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored"".

R (Quila) v. SSHD [2011] UKSC 45, [2012] 1 AC 621 *(Quila)*

94. In *Quila*, the SSHD's refusal to allow foreign spouses of British citizens to enter or remain in the UK was held by the majority of the Supreme Court to be an unjustified interference with the family life of both spouses.

Abbas v. SSHD [2017] EWCA Civ 1393, [2018] 1 WLR 533 (*Abbas*)

95. In *Abbas*, Burnett LJ (with whom Gloster and Ryder LJ agreed) held *obiter* at [16] that the jurisprudence of the ECtHR supported the proposition that a person outside the territory of an ECHR state could rely on the family life aspect of article 8, albeit in limited circumstances, to secure entry to an ECHR state.

96. At [19] in *Abbas*, Burnett LJ referred (also *obiter*) to [27] in *Khan v. United Kingdom* (2014) 58 EHRR SE15 (*Khan*) as recognising the "unitary nature of a family for article 8 purposes with the consequence that the interference with the family life of one is an interference with the rights of all those within the ambit of the family whose rights are engaged". That, said Burnett LJ, was a "feature of family life recognised, for example, in [*Beoku-Betts* at [4] and [20]]".

97. The explanation of the position, referred to by Burnett LJ, at [27] of *Khan* is valuable:

> There is support in the [ECtHR's] case law for the proposition that the contracting state's obligation under article 8 may, in certain circumstances, require family members to be reunited with their relatives living in the contracting state. However, that positive obligation rests, in large part, on the fact that one of the family members/applicants is already in that contracting state and is being prevented from enjoying his or her family life with their relative because that relative has been denied entry to the contracting state . . . The transposition of that limited article 8 obligation to article 3 would, in effect, create an unlimited obligation on contracting states to allow entry to an individual who might be at real risk of ill-treatment contrary to article 3, regardless of where in the world that individual might find himself. …

MN v. Belgium 3599/18, 5 May 2020 (*MN v. Belgium*)

98. *MN v. Belgium* was another Grand Chamber case in which the extra-territorial jurisdiction under the ECHR was recognised. The applicants were Syrians who applied at the Belgium embassy in Lebanon for humanitarian visas to enter Belgium.

99. At [109], the Grand Chamber said this about cases where the facts contained an international element, but which did not involve extraterritoriality for the purposes of article 1:

> [that] was the situation with regard to cases under Article 8 concerning decisions taken with regard to individuals, irrespective of whether they were nationals, who were outside the territory of the respondent State but in which the question of that

> State's jurisdiction had not arisen, given that **a jurisdictional link resulted from a pre-existing family or private life that that State had a duty to protect** [see *Nessa v. Finland* 31862/02, 6 May 2003; *Orlandi v. Italy* 26431/12, 14 December 2017; and *Schembri v. Malta* 66297/13, 19 September 2017)]. [Emphasis added.]

100. It seems to us that all these cases point in the same direction. Whilst persons seeking to enter an ECHR state from outside the jurisdiction of the ECHR will not have their own rights under article 8, if they have pre-existing family life with a person within the territory of the ECtHR, article 8 may impose a positive obligation on a state to admit those people, if they have family life with a person within the territory. That is what is meant by family life being unitary (see [141] under ground 2 below). The concept of unitary family life does not, however, mean that the state is under a positive obligation to admit every member of the wider family of the person within the territory of the UK.

The authorities relevant to the weighing of the proportionality balance

101. The parties cited a number of authorities under this heading, but we only repeat here those that deal with the relevance of the best interests of children, family life developed whilst immigration status is precarious and immigration controls.

Jeunesse v. The Netherlands, (GC) 12738/10, 3 October 2014, (2015) 60 EHRR 17 (*Jeunesse*)

102. In *Jeunesse*, the ECtHR held, exceptionally, that authorities had not struck a fair balance between the article 8 rights of an illegal immigrant from Suriname and the public interest in controlling immigration. The applicant had established family life in the Netherlands with her husband (who also came from Suriname) and their three children between March 1997 and the date of the proceedings.

103. The Grand Chamber in *Jeunesse* said at [108] that, in the article 8(2) balance, it was important to consider "whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious". It was well-established by the ECtHR case law that, in such circumstances it was "likely only to be in exceptional circumstances that the removal of the non-national family member" would constitute a violation of article 8.

104. At [109] the Grand Chamber in *Jeunesse* said that whilst the interests of any children involved were paramount and must be taken into account, they could not be decisive alone. This latter point was endorsed (i) in *IAA & Ors v. United Kingdom* 25960/13, 8 March 2016 (*IAA*) at [46] which said that: "while the Court has held that the best interests of the child is a "paramount" consideration, it cannot be a "trump card" which requires the admission of all children who would be better off living in a Contracting State", and (ii) in *El Ghatet v. Switzerland* 56971/10, 8 November 2016 (*El Ghatet*) at [26].

El Ghatet

105. In *El Ghatet*, the ECtHR held that an Egyptian father, who was settled in Switzerland, and his 15-year old son should have been granted permission to be reunited in Switzerland on the grounds of their article 8 family life.

106. The ECtHR set out the principles relevant to an assessment of proportionality in the context of family reunification cases involving article 8 at [25]:

> In this context it must be borne in mind that cases like the present one do not only concern immigration, but also family life, and that it involves aliens who already had a family life which they left behind in another country until they achieved settled status in the host country (contrast [*Abdulaziz* at [68]]**). In such cases, it must determine whether, in refusing to issue residence permits for the applicants, the Government can be said to have struck a fair balance between their interest in developing a family life in the respondent State on the one hand and the State's own interest in controlling immigration on the other**. In conducting this assessment, the Court has first asked whether the parents irrevocably decided to leave their children in the country of origin, and thereby abandoned any idea of a future family reunion (see, for example, *Şen*, cited above, § 40). Secondly, it has asked whether allowing the children to enter the Contracting State would be the most adequate means for them to develop their family life with the parents settled in that State. In answering this question, it has had regard to the existence of any "insurmountable obstacles" or "major impediments" to the parents' return to the country of origin (see [*Tuquabo-Tekle and Others* 60665/00, 1 December 2005, [2005] 12 WLUK 59, [2006] 1 FLR 798.at [48]]. [Emphasis added.]

R (Agyarko) v. SSHD [2017] UKSC 11, [2017] 1 WLR 823 (*Agyarko*)

107. A 7-judge Supreme Court in *Agyarko* unanimously explained the weight that is to be given to the Rules in the context of an article 8(2) proportionality analysis.

108. *Agyarko* concerned applications for leave to remain made by Ghanaian and Nigerian nationals each residing unlawfully in the UK and seeking leave to remain as partners of British citizens.

109. At [46], Lord Reed explained that the Rules are "statements of the practice to be followed, which are approved by Parliament, and are based on the Secretary of State's policy as to how individual rights under article 8 should be balanced against the competing public interests". He went on to say that "[i]mmigration control is an intensely political issue, on which differing views are held within the contracting states, and as between those states". The authorities responsible for determining policy in relation to immigration, within the limits of the national margin of appreciation, are the Secretary of State and Parliament.

110. At [47] in *Agyarko*, Lord Reed reminded us that the courts "have to bear in mind the Secretary of State's constitutional responsibility for policy in this area, and the endorsement of the Rules by Parliament", and that, in considering how the balance is struck in individual cases, "they have to take the Secretary of State's policy into account and to attach considerable weight to it at a general level, as well as considering all the factors which are relevant to the particular case" [as explained in *Ali v. SSHD* [2016] 1 WLR 4799 at [44–46], [50] and [53]]".

111. Lord Reed held at [48] that, bearing this in mind, the fact that the thresholds set by the rules and instructions were not strictly concordant with Strasbourg case law did not render them incompatible with article 8.

112. At [54]–[60], Lord Reed held that the requirement for "exceptional circumstances" for leave to remain to be granted outside the rules was not inconsistent with either ECtHR or domestic authorities.

Ground 1: were the tribunals right about the existence of family life?

113. Bearing in mind the large number of family life cases cited to us, it is ironic that it was not disputed that the appropriate test be applied in a case of adult siblings is that to be found in *Kumari* at [35]. It will be recalled, as we have now said twice at [10] and [50] above, that "family life for the purpose of Article 8 … is normally limited to the core family and that there will be no family life between parents and adult children or adult siblings unless they can demonstrate "additional elements of dependence, involving more than the normal emotional ties"".

114. Instead, the family submitted that: (i) the existence of additional elements of dependency was the other side of the coin of the existence of real, committed or effective support, (ii) Sedley LJ's formulation in [17] of *Kugathas* was a restatement of the test established by the ECtHR, (iii) the FTT's reasoning that "dependency is not necessary to establish family life" (see [22] above) articulated the correct position that full or complete dependency is not necessary to establish family life, (iv) if there were an error at the FTT level, it was not material because the UT correctly directed itself as to an exacting "additional elements of dependency" test (see [42] and [45] of the UT's decision and [28] above). Even if the decision on family life were wrong, the family submitted that this court should not remake it because it was hugely fact-sensitive and evidence-sensitive. They said that adopting the tribunals' findings of fact was insufficient. As Lord Hoffmann had explained in *Biogen Inc v. Medeva Plc* [1997] RPC 1 at page 45, any findings of fact are "always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation".

115. We shall deal with the issues raised by this ground as follows: (i) the correct test to apply to determine if there is family life between adult siblings under article 8(1), (ii) whether the FTT and the UT applied the correct test, and (iii) what should be done if they did not.

The correct test to apply to determine if there is family life between adult siblings under article 8(1)

116. We are clearly of the view that the correct test is the one enunciated by the ECtHR in *Kumari* at [35] and by the House of Lords in *Beoku-Betts* at [39]. Bearing in mind the huge amount of authority cited and summarised at [42]-[84] above, we should perhaps, despite the common ground between the parties, explain that conclusion in a little further detail.

117. First, this is an area in which the domestic courts have universally demonstrated their willingness to follow the consistent jurisprudence of the ECtHR. Even if some of the

domestic decisions may have provided divergent interpretations of the additional elements of dependency test, none has suggested that they wanted to depart from ECtHR jurisprudence.

118. Secondly, many of the cases, both ECtHR and domestic, actually concern family life between parents and adult children, rather than between adult siblings. No case has suggested that the legal test is different in the two types of case.

119. Thirdly, all the cases make clear that the exercise of deciding whether there are the necessary additional elements of dependence involving more than the normal emotional ties is a fact-sensitive exercise that is to be decided on a case-by-case basis.

120. Fourthly, financial dependency and dependency created by physical or mental disability both play a part in the evaluation. It is not, however, necessary to show that one sibling is completely reliant on their care and support in their daily life. In other words, none of the cases go so far as to require exclusive or complete dependency.

121. All these points are, in our judgment, pretty well self-explanatory from our summary of the cases at [42]-[84] above. But there are two points that merit a little more explanation: (a) the meaning and function of what we have described as the "real, committed or effective support" test taken from Sedley LJ's judgment in *Kugathas* at [17], and (b) why exclusive or complete dependency is not required.

122. The real, committed or effective support test is, in our judgment, as we have already intimated at [68], on a proper analysis different from the additional elements of dependency test. Dependency may in one sense be the other side of the support coin. But "real support" may be provided without any serious dependency. Even "effective support" might be provided without there being meaningful dependency. As Sedley LJ himself acknowledged in *Kugathas*, the real, committed and effective support test was a reading down of the additional elements of dependency test. The FTT said the same at [25] where it acknowledged that the sponsor's real, committed and effective support of family was short of the family being dependent on the sponsor.

123. In our judgment, it would be going too far to say that it is wrong to test whether there are additional elements of dependency by reference to the real, committed or effective support provided. But real, committed and effective support is **not** the test itself, because the level of real support, for example, may be minor or insignificant, whereas the word "dependency" denotes a significant relationship. This is not a semantic point. The ECtHR used the word "dependence" in *S v. UK* in the context of "cohabiting dependents", which were its starting point (see [42] above).

124. The domestic cases (e.g. *PT Sri Lanka* at [30]) were not wrong, for example, to point out that a cohabiting child would not necessarily lose their family life with its parents or even their siblings on their 18th birthday. But that is because the relationship of dependence would subsist at that point.

125. In our judgment, it is undesirable to lay down hard and fast rules as to how the additional elements of dependency test should be applied. It obviously requires some dependence, and dependence is more than the existence of support, even if that support is qualified by the adjectives real, committed or effective. *Kumari* makes clear that it is harder for adults to demonstrate the necessary dependency because family life is normally limited

to the core cohabiting family. The examples in *Kumari* at [38]-[39] (see [50] above) make clear the kinds of physical or mental dependency that might qualify. They are not exhaustive, and dependency may take many forms, as *Kumari* at [37] and [41]-[43] also reminds us. So far as exclusive dependency is concerned, on the particular facts of that case, *Alvarado* made clear that it was not always required to establish family life. Moreover, whilst one person being completely dependent on another might normally satisfy the additional elements of dependency test, it is not the only way that the test can be satisfied as the cases we have cited demonstrate.

Did the FTT and the UT apply the correct test?

126. The answer to this question is, in our view, clearly not. The FTT stated expressly at [18] and [25] that it was applying the real, committed or effective support test taken from *Kugathas*, which, it also stated, was a lower test than that of dependency. The lower test was applied at [26].

127. The UT decided at [40]-[58] that the FTT had made no error of law in deciding that family life existed. It correctly referred to the principles enunciated in *Kumari* and *Alvarado*. It also correctly said that those principles boiled down to the essential point that whether there are "additional elements of dependency" between adult members of a family was to be decided on a case-by-case basis. We agree also with the UT when it said that the examples given in *Kumari* were not exhaustive and did not materially alter the additional elements test.

128. The UT's error was in [45] where it referred to the "real, committed or effective support test" mentioned in *Kugathas*, *Rai* and *Mobeen* concluding that there was "nothing on the face of the [FTT's] decision which indicates that he had in mind anything other than the "exacting" test in cases concerning adults". In fact, it was clear on the face of the FTT's decision at [18] and [25] that it was applying a less than exacting standard. The FTT had said expressly that the support test was a lower one than the dependence test and that there was no need to establish dependency. As we have explained, dependency is different from support. Establishing real, committed or effective support by itself may or may not be sufficient to establish additional elements of dependency for the existence of family life between adult siblings.

129. Accordingly, the UT was wrong to uphold the FTT's finding of family life between the sponsor and the family, and that finding cannot stand.

What decision should now be made as to the existence of family life between the sponsor and the family?

130. Under this heading, we must now decide whether to remake the decision on family life under article 8(1) or, as the family urge, to remit the case for that decision to be made in the UT or the FTT. We are entirely conscious that the fact-finding tribunal that has heard oral evidence is in a different and stronger position than an appellate court. But in the unusual circumstances of this case, we do not think that that is a sufficient reason to remit this issue. First, we have the clear findings of fact made by both the FTT and the UT on the matters that are relevant to the existence of family life. Secondly, we are familiar with the vast array of judicial authority on the process to be adopted in deciding

on the existence of family life. Thirdly, we think that, once the test is clear, as we have explained it, the decision in this case is not a finely balanced one.

131. Accordingly, we intend to proceed to remake the decision on whether the family and the sponsor enjoyed family life together within the autonomous meaning of article 8(1).

132. We have set out the basic facts as found by the FTT and the UT at [2] and [14]-[21] above. We have read the evidence that was placed before the tribunals and before us. Family life requires close personal ties. It is normally limited to core cohabiting family, but can be extended to adult siblings if they can demonstrate additional elements of dependency involving more than the normal emotional ties. The existence of real, committed or effective support is relevant, but not conclusive. The evaluation of whether family life exists is a fact-sensitive exercise where many factors may be relevant including financial support, physical and psychological health and a combination of other factors.

133. The focus of the evaluation of whether family life exists should be on the relationship between the adult siblings, namely the sponsor and his elder brother in Gaza. They have not seen one another for some 17 years and were not in really frequent contact until the war began at the end of 2023. Since then, however, the brothers have been in contact regularly by telephone and the sponsor has become very concerned about him, to the extent that his concern has made him ill. He now suffers from PTSD, which will get worse if the family is not admitted to the UK. The sponsor has made arrangements to move house to accommodate the family in the UK and he intends to provide for them on their arrival in the short to medium term. His income is broadly sufficient to enable him to do that. He has already been providing financial support for the family by sending money to Gaza to assist them.

134. The family has an anti-Hamas profile. The brother has worked for the Palestinian Authority, and this means that he may face additional dangers. Even without that profile, the family has been displaced by the conflict and was, at the time of the UT hearing, living in a wholly unsuitable summer tent in the Nuseirat refugee camp. The dangers they face cannot be under-estimated. There is a dire humanitarian situation in Gaza, and the family have faced the genuine risk of death or injury. The father is naturally suffering extreme anxiety.

135. It seems to us that close personal and emotional ties between the father (and the family) and the sponsor have been restored since the start of the Gaza war. The question is, however, whether sufficient additional elements of dependency have been demonstrated, or more properly, actually exist between the father and the sponsor. The brother naturally wants to leave Gaza to live with the sponsor to avoid the dangers that he and his family face there, but that does not, in itself, mean that there exist such elements of dependency as are envisaged by the autonomous meaning of family life in article 8(1). The father and his family can continue to live in Gaza. They managed to live in Gaza without any long-term support from the sponsor for 17 years before the war. They do not totally depend on him now. He sends money as and when he can. There is a level of emotional support provided by the sponsor to the brother and his family in their calls. No doubt their psychological wellbeing would be improved if the family could leave Gaza. We note the finding that there will be deterioration in the sponsor's PTSD if they cannot.

136. In our judgment, however, none of this amounts to the level of dependence needed to establish family life between adult siblings under article 8(1). The family life envisaged by article 8(1) is primarily that of the core family, normally cohabiting together. The brother and the sponsor have not cohabited for years. They would like to do so, but that is a different thing. The UT referred to an exacting standard which had to be met, but we do not think either it or the FTT applied one. In our judgment, no sufficient family life exists between either the sponsor and the brother or between the sponsor and the family.

Ground 2: was the UT right to accord weight to the article 8 rights of the family in addition to those of the sponsor?

137. In the light of our conclusion on ground 1, ground 2 is academic. We deal with it, because it is important and it was fully argued.

138. The UT held at [169] that the FTT had been entitled to find that there was no family life prior to the conflict beginning in October 2023. At [170] the UT held that it was the family life between the sponsor and the family with which it was concerned. It is on that basis that we consider this ground.

139. In the following passage at [166], the UT explained that it was concerned with the article 8 rights of the family as well as the sponsor as follows:

> This is not a case concerning Articles 2 and/or 3 and the [family] 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.

140. As we have said, the SSHD argued that, even if such family life had existed, the UT was wrong at [166] to consider the free-standing article 8 rights of the family, rather than just those of the sponsor, in undertaking the proportionality balance required by article 8(2). The family argued that, in the words of Baroness Hale at [4] in *Beoku-Betts*: "the right to respect for the family life of one necessarily encompasses the right to respect for the family life of others … with whom that family life is enjoyed". The family submitted that, even where the family was outside the UK, once family life existed with someone in the UK, the article 8 rights of the family outside the UK were themselves engaged. Alternatively, the family said that, in this case, the difference amounted to a distinction without a difference.

141. The SSHD was partly right to say that, even if family life existed between the sponsor and the brother or the sponsor and family, the article 8 rights of the family were not directly engaged. The true position is rather more nuanced, as the authorities we have cited at [87]-[97] demonstrate. Once family life is held to exist, it is indeed unitary (see *Beoku-Betts* and *Abbas*, for example). But the family life in question is between the sponsor and the brother (or between the sponsor and the family, if that had been found to exist).

142. Moreover, even if family life had existed between the sponsor and the brother or between the sponsor and the family, that would not have meant that the article 8 rights of the brother or the family outside the UK were the main focus of the proportionality exercise under article 8(2). The main focus of that exercise would have been the family life of the person within the jurisdiction of article 1 (here, the sponsor), but that family life had to be considered as being a unitary family life **with** his brother or the family outside the UK. The unitary family life of the brother with his own family outside the UK is also not the focus of the proportionality exercise.

143. This is not, as the family submitted, a distinction without a difference. As we have explained at [100] above, the UK as an ECHR state is **not** under a positive obligation to admit every member of the wider family of the person within the territory of the UK. The positive obligation could only extend, even if such family life existed, to those who have family life (for the purposes of article 8(1)) with that person, in this case the brother (or, as the family argued, the family). Moreover, the person who has "the right to respect for his … family life" under article 8(1) is the sponsor, who is within the jurisdiction of article 8, and the requirement that "[t]here shall be no interference by a public authority with the exercise of [the sponsor's right to family life]" under article 8(2) encompasses the brother or the family (as the persons outside the UK) because interference with the family life of the sponsor (which he shares with the brother or with the family) necessarily interferes with the sponsor's family life with him.

144. Ultimately, therefore, if we had found family life to exist between the sponsor and the brother or between the sponsor and the family, we would have partially upheld this ground of appeal. The UT relied unhelpfully on a series of UT authorities (e.g. *KF (Syria)* and *Al Hassan*) rather than on *MN v. Belgium*, *Beoku-Betts* and *Abbas*. Its erroneous reliance on the article 8 rights of the entire family was relevant to its determination in respect of the best interests of the children, as we shall mention under ground 3.

Ground 3: was the UT right to hold that the decision to refuse the family entry to the UK was an interference with their family life infringing article 8?

145. Once again, in the light of our conclusion on ground 1, ground 3 is academic. We deal with it, as we did with ground 2, because it raises important issues and it was fully argued. We start by observing that this is not a case in which the SSHD has interfered with the family life of the sponsor. Rather, it is a case in which it is argued that the SSHD has a positive obligation to grant entry clearance to the sponsor's relatives who live in Gaza. We assume, for the purposes of this part of our judgment, contrary to our primary finding, that there is family life for the purposes of article 8(1) between the sponsor and the family.

146. Both the FTT at [29] and the UT at [139] adopted a balance sheet approach to the proportionality exercise under article 8(2). The UT at [101], [140] and [182] directed itself that, in order to succeed outside the Rules, the family were required to make out a very strong claim or "very compelling or exceptional circumstances". It seems to us that these important requirements became rather lost in translation when the UT came to apply its balance sheet approach.

147. We have already summarised the UT's decision-making on the proportionality balance at [29]-[37] above. Its approach was challenged by the SSHD in four main areas. We

shall deal with them in the following order. First, it is submitted that, even if the family life alleged did exist, the UT failed to attribute the correct weight to the tenuous nature of that family life. Secondly, in considering the best interests of the children of the family, the UT failed to apply the authorities, beginning with *Jeunesse* (see [102]-[106] above), which make clear that those interests are not a trump card. Thirdly, the UT attributed too much, and therefore the wrong, weight to the family's risk of death in Gaza. Fourthly, it is said that the UT failed to take appropriate account of effective immigration control as part of the public interest.

The allegedly tenuous nature of the family life

148. At [167]-[172], the UT gave substantial weight to the nature and quality of the sponsor's family life with the family and regarded the development of that family life in the future as an important consideration.

149. The SSHD contends that the family life found was, by its nature, recent, contingent and precarious. The family and the sponsor had never cohabited. Refusing entry clearance would have no effect on the core family, which had lived together in Gaza for years. The relationship between the family and the sponsor had been re-formed and continued in the knowledge that the family had no right to enter the UK, and that if their applications failed, the sponsor would not be joining them in Gaza. *Jeunesse* at [108], referred to at [103] above, explained the importance of those circumstances, which were given inadequate weight by the UT (see also *Abdulaziz* at [68]).

150. The family submits that the UT adopted an orthodox and correct approach to the type of family life concerned. They pointed to the UT's indications at [168] that (i) the weight of family life was not dependent on whether the family relationship was normal, and (ii) there could still be an increase or reduction in weight depending on the particular nature of the family life. That was consistent with Lord Bingham's observation in *EM (Lebanon)* [2009] 1 AC 1198 that there was "no pre-determined model of a family or family life to which Article 8 must be applied" and that article 8 "requires respect to be shown for the right to such family life as may be enjoyed" by those before the court.

151. This point is now academic in the light of our finding that there was no family life between either the sponsor and the brother or between the sponsor and the family. Had such family life existed, the tribunals would have been entitled to consider, in determining how much weight to accord to it in the article 8(2) balance, the circumstances in which it had come into existence, the type of family life that was concerned, the length of time it had existed and its likely future development. It was relevant that the sponsor and the family had not cohabited after the Gaza conflict began and that the core family would continue to live together even if entry clearance were refused. It was also relevant that the relationship had been rekindled in the knowledge that the family had no right to enter the UK, and that if their applications failed, the sponsor would not be joining them in Gaza (see [103] and [106] above). This is the approach of the ECtHR; the strength of family ties is relevant to proportionality: see [32] of *AW Khan* (at [44]-[45] above).

152. We think that, in all the circumstances, the weight which the UT gave to the sponsor's family life with the family and the development of that family life in the future was wrong. We accept the submission of the SSHD that the UT's decision on article 8(2)

was driven by its view about the best interests of the children and the risks they faced in a war zone. It is, therefore, to those considerations that we now turn.

Were the best interests of the children and the family's risk of death given the wrong weight?

153. The UT explained at [141]-[146] that the best interests of the children of the family (then aged 7 and 9) were a primary consideration, reminding itself only at the end of that section that their best interests were not paramount in this context. It inferred they were less able than others to withstand the effects of the war. Its view is probably best expressed in the following passage at [143]-[144]:

> 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. … 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.

154. At [164]-[166], the UT attached significant weight to the fact that the family faced an "overall security and humanitarian situation which is extreme and life threatening". Whilst acknowledging at [166] that this was not a case concerning the family's rights under article 2 (right to life) and article 3 (prohibition of inhuman and degrading treatment), the risks to the family were weighed heavily in the balance as threatening the family life with the sponsor and the lives of the children and family.

155. The SSHD submitted that the UT's approach was fundamentally mistaken, because the UK, as a contracting party to the ECHR, is simply not responsible for the risks faced by persons in a foreign war zone. Put bluntly, the SSHD argued that the UK has no duty to protect the lives of foreign nationals in a foreign country, just because they enjoy some family life with someone lawfully in the UK. It is in this context that the SSHD submits that the best interests of these children of the family cannot be a trump card that requires the admission of children who would be better off living in a Contracting State rather than in a war zone. It is also in this context that the UT's misunderstanding of the unitary nature of family life became relevant (see [141]-[143] above).

156. In their turn, the family described these submissions as "fundamentally misconceived". The family's current circumstances were, as the UT said at [166], one 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" (see also the UT at [177]). The family submitted that the SSHD was making an unprincipled attempt to exclude consideration of these matters from the article 8(2) balance.

157. Ultimately, we agree with the SSHD's submission that the children's best interests were wrongly treated by the UT as paramount (in other words, as a trump card). They were an issue, and we accept that the UT expressly directed itself that the children's best interests were not paramount at [146], but we do not think that the UT actually gave that direction proper effect. The UT's decision is replete with references to the dire

situation faced by the family and the children as a result of the war in Gaza. The SSHD was right to submit that focusing so closely on the effects of the war distorted the balance that had to be undertaken under article 8(2) and was the wrong approach.

158. It is necessary, in this as in other connections, to consider closely the actual wording of article 8(2) itself. As we pointed out at [8] above, article 8(2) prohibits interference by a public authority with the exercise of the right to family life, **except** "such as is in accordance with the law and is necessary in a democratic society in the interests of … the economic well-being of the country … or for the protection of the rights and freedoms of others". As Lord Reed made clear in *Agyarko* (see [109]-[112] above), in considering how the balance is struck in individual cases, the courts "have to take the [SSHD's] policy into account and to attach considerable weight to it at a general level, as well as considering all the factors which are relevant to the particular case". The requirement for "exceptional circumstances" for leave to remain (and therefore also entry clearance) to be granted outside the rules was not inconsistent with either the ECtHR or domestic authorities, and section 117B(1) of the Nationality, Immigration & Asylum Act 2002 required consideration to be given to the maintenance of effective immigration controls.

159. The SSHD's point is that it is not her policy (as represented by the Rules) to admit all persons who share family life with a person lawfully settled in the UK. That is not a question of floodgates or numbers likely to apply from war zones across the world. It is a question of respect for the UK's laws and democratic process, and for what the Government determines is necessary in that society to protect the economic well-being of the UK and the rights of citizens of the UK. The courts must always, as Lord Reed said, attach considerable weight to the SSHD's immigration policies at a general level, alongside considering all the factors which are relevant to the particular case.

160. It is in these respects that we think the UT fell into error. It is not that the family life of the sponsor had no weight in the balance. His family life with his brother and the family can be continued by online contacts as at present. The personal circumstances of the brother and his family applying outside the Rules to come to the UK for the first time had to be balanced against the SSHD's policies, reflected in the Rules, which did not allow them to do so on the grounds of the risks they faced in a warzone. That is the relevance of the absence of a resettlement policy concerning Gaza. Had there been one, the policies of the SSHD might have favoured the family and allowed the balance to be struck differently.

161. To conclude, under this heading, we think that the UT was wrong to accord the weight it did to the risks that the family faced in Gaza and to the best interests of the children of the family. The UT paid only lip-service to the exceptional circumstances that needed to be demonstrated in order for permission to be granted outside the Rules, and to the fact that the best interests of the children were not, in a case such as this, paramount. This last and important point can be seen again in the way that the UT treated immigration control as part of public interest, to which we now turn.

Immigration control as part of the public interest

162. The UT dealt with the public interest at [147]-[156] of its decision. It said, in essence at [147], that the family's inability to satisfy the Rules weighed against them in the proportionality exercise. It said that it was placing considerable weight on that

consideration, the Rules were a statement of the SSHD's policy reflecting the public interest in maintaining effective immigration control, and the Rules represented, with the approval of Parliament, the SSHD's view of where the appropriate balance lay between the public interest and the rights of individuals. The UT rejected at [148]-[149] the suggestion that the absence of a Palestinian resettlement scheme was a significant further consideration; it was neutral. The FTT had effectively double-counted the fact that the applications were outside the Rules and the absence of resettlement scheme (see [95] of the UT decision). Even if the UT had been taking the absence of a resettlement scheme into account, it said at [150] that it would have had "relatively limited weight". At [152]-[156], the UT rejected the floodgates argument to the effect that "an obligation to admit [the family] risked the same outcome applying to those in other conflict zones around the world".

163. The SSHD's argument was that the UT "discounted and paid no attention to the extent of the potential damage to immigration control", and failed properly to analyse and take into account this critical public interest part of the article 8(2) balance. The driving feature of the UT's reasoning was simply that the family included children in a war zone. The logic of the UT's reasoning would in effect require resettlement if there were children in the war zone and some family connection to the UK.

164. The family, on the other hand, supported the UT's approach, and pointed to the inadequacy of the most recent evidence adduced by the SSHD (from Mr Ramsbotham) on numbers of Gazan immigrants likely to apply to join family members in the UK if this appeal did not succeed.

165. We have essentially already dealt with these arguments at [157]-[161] above in the context of the weight given to the children's best interests and the risks faced by the family in Gaza.

166. In our judgment, the UT, despite saying at [147] that it was placing considerable weight on the fact that the Rules were a statement of the SSHD's policy reflecting the public interest in maintaining effective immigration control, failed to do so. In this area too, the UT's close focus on the effect that the war was having on the family wrongly distorted the article 8(2) balance in the family's favour. Again, the words of article 8(2) were not given their proper effect. As we have said, article 8(2) does **not** prohibit interference by a public authority with the exercise of the right to family life, if that interference is "in accordance with the law and is necessary in a democratic society in the interests of … the economic well-being of the country … or for the protection of the rights and freedoms of others". Immigration control is to be assumed in this respect, and in the view of the SSHD, to be in the public interest and protective of the economic well-being of the country. The UT gave the wrong weight to the SSHD's policies as reflected in the Rules, which did not allow families from this war zone to join family members settled in the UK.

167. The SSHD's policy is a matter for her and for the UK Government. It is, as we have also already said, not a question of floodgates or numbers likely to apply from war zones across the world. It is a question of respect for the UK's laws and democratic process. The decision as to what is necessary in UK society to protect the economic well-being of the UK and the rights of citizens of the UK is the business of the SSHD and the Government. The courts must, as Lord Reed said in *Agyarko*, and we would respectfully endorse, attach considerable weight to the SSHD's immigration policies at

a general level, alongside considering all the factors which are relevant to the particular case.

168. Again, under this heading, the UT fell into error. It may, understandably, have been driven by its quite natural human reaction to the evidence of what the family were enduring in Gaza. But that reaction should not, in our judgment, have prevented the UT from giving effect to the Government's immigration policies (which are not, as Lord Reed also said in *Agyarko*, in general, inconsistent with the ECHR). The UT could only, in effect, override those policies in very exceptional or compelling circumstances, which we do not believe existed here as we shall now explain. Those policies, as we have also said, did not include a resettlement policy concerning Gaza. Had they done so, as we have also said, the balance might have been struck differently.

The proportionality balance under article 8(2)

169. For the reasons we have explained, the UT was wrong to attach the weight it did to: (i) the sponsor's family life with the family and the development of that family life in the future, and to (ii) the best interests of the children and the risks they faced in a war zone. Most importantly, however, the UT wrongly failed to attach appropriate weight to the immigration policies of the SSHD as reflected in the Rules. It is the responsibility of the SSHD and the Government to make policy decisions as to what is necessary to protect the economic well-being of the UK and the rights of citizens of the UK. The courts and tribunals must respect those policy decisions and not seek to get around them save in very exceptional or compelling circumstances.

170. In these circumstances, had we decided that family life existed between the sponsor and his brother or the family under article 8(1), we would have set aside the UT's decision as to the proportionality balance under article 8(2). For the reasons we gave in relation to the remaking of the article 8(1) decision, we would have remade the article 8(2) decision too.

171. We can deal with how we would have struck the proportionality balance, had the alleged family life existed, shortly.

172. In favour of the sponsor's brother and the family, we would have attached some, but not great, weight to the past (from the start of the Gaza conflict) and future family life (had it existed), since it was recently established, had not involved cohabitation, and had been recently revived and developed in the knowledge that it was contingent on the frankly unlikely event of obtaining entry clearance outside the Rules. We would have attached weight to the interests of the family in wanting to leave Gaza and to abate the risks and the humanitarian crisis that the family face there. We attach weight, but not paramount weight, to the best interests of those children of the family who are not adults. We would have attached some weight to the difficulties faced by the brother in Gaza, including his anti-Hamas profile and to the risks to his safety and the humanitarian position there. We would have attached some, but not great, weight to the anxiety and PTSD of the sponsor, and the plans he had made to accommodate the family.

173. All those factors relating to the family's individual case had to be balanced against the SSHD's policies as reflected in the Rules, to which considerable weight had to be attached at a general level. As we have said, very exceptional or compelling

circumstances had to be shown for entry clearance to be granted outside the Rules. There were, to put the matter starkly, no exceptional or compelling circumstances here. The family life with the sponsor, recently revived, was short-lived and must have been developed in the knowledge that entry clearance might not be obtained. As we have now said repeatedly, this is not a question of floodgates or numbers likely to apply from war zones across the world. It is a question of respect for the UK's laws and democratic process, and for the SSHD's decisions as to what is necessary to protect the economic well-being of the UK and the rights of citizens of the UK. As a matter of fact, the policies of the SSHD did not include a Gaza resettlement scheme. Had it done so, the balance might, as we have said, been very different.

174. In our judgment, the proper balance we have described would have come down heavily in favour of refusing entry clearance and upholding the original decisions of the entry clearance officer and the FTT under article 8(2).

175. In this connection, we would agree in broad terms with the approach adopted by the FTT, as we have described it at [27] above. In particular, as the FTT correctly said, the positive factors "did not outweigh the public interest because "the creation in effect of resettlement policies for conflict zones is for the government and parliament"" and the "public interest was to respect the policy decision not to create a resettlement scheme".

Conclusions

176. For the reasons we have given, we allow the appeal on grounds 1 and 3 and in part on ground 2.

177. We have remade the decision of the FTT (which was upheld by the UT) as to the existence of family life within the autonomous meaning in article 8(1). We have decided that no family life, within that meaning, existed between the sponsor, his brother, and his brother's family in Gaza.

178. Had we held that that family life existed between the sponsor and the family in Gaza (as the FTT and UT held), we would have undertaken the proportionality balance under article 8(2) and would have determined that there were no very exceptional or compelling circumstances justifying the grant of entry clearance to the family outside the Rules. To put the matter another way, we would have determined that refusal of entry clearance was not a disproportionate interference with the family life, had it existed.

179. Permission to appeal was granted to the SSHD notwithstanding that she had already agreed, subject to certain conditions, to provide entry clearance to the family. That was because of the points of general importance raised by the grounds of appeal and because the SSHD had agreed to pay the family's costs of the appeal in any event. Accordingly, allowing the appeal will not have any effect on the family's situation.