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

Appeal Numbers: HU/03905/2018
HU/03909/2018
HU/03911/2018

**THE IMMIGRATION ACTS**

| **Heard at Glasgow** | **Determination & Reasons Promulgated** |
|---|---|
| **On 5 July 2019** | **On 23 August 2019** |

**Before**

**MR C M G OCKELTON, VICE PRESIDENT**
**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**DB**
**SB**
**AB**
**(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**THE ENTRY CLEARANCE OFFICER, PRETORIA**

Respondent

**Representation:**
For the Appellants: Ms Loughran of Loughran & Co. Solicitors.
For the Respondent: Mr Govan, Senior Home Office Presenting Officer.

**DETERMINATION AND REASONS**

1. The appellants are siblings, nationals of Eritrea. They are the brothers and sister of an Eritrean national who fled from Eritrea in 2014, claimed asylum on arrival in the United Kingdom and was granted leave to remain as a refugee for five years from 21

October 2015. We shall call him "the sponsor". The appellants applied for entry clearance for family union of a refugee's family under paragraph 352D of the Statement of Changes in Immigration Rules, HC 395 (as amended). The basis for the application was that the appellants claimed to be the adopted children of the sponsor. The application was refused because the respondent did not accept that they were related to the sponsor as claimed, nor that they formed part of his family unit when he fled to seek asylum. The respondent initially doubted that they were the sponsor's siblings; but that doubt has been resolved by DNA evidence. The appellants appealed against the refusal. The appeal was heard by Judge Doyle in the First-tier Tribunal and dismissed. The appellants now appeal, with permission, to this Tribunal.

2. Judge Doyle considered the appellants' appeal on three separate bases. First, he considered the application as actually made, that is to say by reference to paragraph to 352D. Secondly, because he was asked to do so, he considered the matter under paragraph 319X of the Rules. Finally, he considered whether the appellants should be admitted without establishing any entitlement under the Rules.

3. As we have said, the application, under paragraph 352D, was based on a claim that the appellants had been adopted by the sponsor. After considering the oral and documentary evidence, the judge rejected the claim that the sponsor is the appellants' adoptive father. As Ms Loughran confirmed before us, the appellants do not seek to challenge that decision. It follows that the relationship between the appellants and the sponsor is that of siblings. It follows that the refusal under paragraph 352D was correct. We need say no more about it.

4. Paragraph 319X is as follows:

> **"Requirements for leave to enter or remain in the United Kingdom as the child of a relative with limited leave to enter or remain in the United Kingdom as a refugee or beneficiary of humanitarian protection.**
>
> **319X.** The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the child of a relative with limited leave to remain as a refugee or beneficiary of humanitarian protection in the United Kingdom are that:
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> (i) the applicant is seeking leave to enter or remain to join a relative with limited leave to enter or remain as a refugee or person with humanitarian protection; and
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> (ii) the relative has limited leave in the United Kingdom as a refugee or beneficiary of humanitarian protection and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and
>
> (iii) the relative is not the parent of the child who is seeking leave to enter or remain in the United Kingdom; and

(iv) the applicant is under the age of 18; and

(v) the applicant is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(vi) the applicant can, and will, be accommodated adequately by the relative the child is seeking to join without recourse to public funds in accommodation which the relative in the United Kingdom owns or occupies exclusively; and

(vii) the applicant can, and will, be maintained adequately by the relative in the United Kingdom without recourse to public funds; and

(viii) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity or, if seeking leave to remain, holds valid leave to remain in this or another capacity."

5. On the basis of the evidence before him, the judge said this in relation to that paragraph:

> "11. …
>
> (k) There is a dearth of reliable evidence about an adequacy of maintenance and accommodation without recourse to public funds. The sponsor's oral evidence is that he earns £500 per week as a delivery driver. I have no reliable evidence about his accommodation costs. His own evidence is that he lives in a two-bedroom property. That property cannot offer sufficient accommodation for four siblings. There is no reliable evidence of compelling compassionate circumstances which makes the appellants' exclusion undesirable. The appellants cannot meet the requirements of 319X (vi) and (vii).
>
> (l) I have no doubt that the sponsor and the appellants are siblings. I have no doubt that the sponsor is concerned about his siblings and wants to live with them in the UK. I have no doubt that the sponsor sends money to support his siblings in Addis Ababa. Despite that certainty, the appellants cannot meet the requirements of the immigration rules."

6. The judge's consideration of article 8 outside the Rules took into account s 117B of the Nationality, Immigration and Asylum Act 2002. He noted that the lack of evidence that the appellants could speak English or had sufficient financial resources for their maintenance would count against them. He then said this:

> "17. If article 8 family life does exist between the appellant[s] and the sponsor, the respondent's decision is not a disproportionate breach of the right to respect for family life because it has been exercised at a distance since 2014. The respondent's decision preserves the manner in which family life has been exercised.
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> …
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> 19. Section 117B of the 2002 Act tells me that immigration control is in the public interest. There is insufficient reliable evidence before me of factors weighing against the public interest. Insofar as there may be article 8 family life between the sponsor and the appellants, I must give greater weight to the public

> interest in immigration control. Having done so, I find that the decision is not a disproportionate breach of the right to respect for family life."

7. The grounds of appeal raise the following issues. First, since the sponsor's parting from the appellants resulted from his fleeing as a refugee, the period of separation ought not to count against the appellants' ability to establish a right to family life with him. Secondly, the judge erred in law by failing to give proper notice to the appellants of whether he had decided that (article 8 family life) existed between the sponsor and the appellants. Thirdly, if the judge found that there was no article 8 relationship between the appellants and the sponsor, he erred because he should have concluded that such a right rose from the general circumstances in Eritrea and the family circumstances of the appellants, neither of their parents being available to care for them. Fourthly, the judge was in error in considering that the appellants' ability to speak English was relevant, because their application had been made under paragraph 352D, which contains no such requirement. Fifthly, the judge erred in his interpretation of the evidence relating to the appellants' mother: the evidence was that she was "detained and released many times over her life" and that the appellants lost contact with her completely after her arrest in 2014; but the judge said that the appellants lived with the sponsor and their mother until 2014. This ground is avowedly connected to the judge's finding on the claim that the sponsor had adopted the appellants, which, as we have said, Ms Loughran confirmed was not challenged before us. Further, Ms Loughran withdrew ground 4 before us: it is obviously without merit, because the appellants' ability to speak English is relevant to the matter the judge was considering at the time he made that observation, which was the applicability of the factors in section 117B.

8. It is inherent in the arrangement of Ms Loughran's grounds and her oral submissions that her position is that, the appellants having failed in their claim under paragraph 352D, the next stage in the consideration of their case should be investigation of whether it would be right to allow them entry clearance outside the Rules. That, however, is not, and cannot be, correct. Every investigation of a claim under article 8 demands a consideration of proportionality, and proportionality involves the balancing of the public interest against the claims of the individual. Any decision-maker, judicial or not, needs, for these purposes, some concept of the public interest as it applies to cases of these sort in questions. The Immigration Rules, as they stand today, are calculated to show how the balance between the public interest and the case of an individual are to be struck in a wide variety of situations.

9. In the present case, as the judge noted, given that the appellants cannot show that they are the sponsor's adopted children, their claim, if any, falls within paragraph 319X. That paragraph is designed precisely for children who seek to enter the United Kingdom as the family member of the person other than a parent, who has been granted limited leave as a refugee. The paragraph requires that the applicants demonstrate that there are serious and compelling family or other considerations which make their exclusion undesirable and that suitable arrangements had been made for their care; and that they will be accommodated and maintained adequately

without recourse to public funds. It is the provisions of that paragraph that need to be the central consideration in determining whether individuals such as the appellants can establish a right to enter the United Kingdom for settlement. It is quite wrong to treat the failure to meet the requirements of another paragraph as an opportunity for bypassing the requirements of the Rules that are directly relevant to the facts.

10. As the judge pointed out, no evidence has been adduced on a number of the factors covered by paragraph 319X. We should make it clear that we do not necessarily agree with all the conclusions that he reached about that paragraph; we say this despite the fact that Ms Loughran did not actually seek to challenge them. It may well be that there are serious and compelling reasons making the exclusion of the appellants undesirable: that, at least, appeared to be the tenor of Ms Loughran's submissions, albeit directed to a more inchoate claim outside the Rules. It may be that arrangements have been made for the appellants' care in the United Kingdom: there is no evidence about that. It may be that the sponsor's two-bedroomed accommodation would be sufficient to accommodate the appellants with him without statutory overcrowding: we would not draw the contrary conclusion as swiftly as the judge did. But, as the judge indicated, the evidence going to maintenance is obviously wholly insufficient.

11. It is only once the appellants' ability to comply with paragraph 319X has been assessed that the possibility of admission outside the Rules can be considered. There are two reasons for that. The first is that it may be that they can meet the requirements of paragraph 319X, in which case admission outside the Rules will not be in question. The other reason is that the question of admission outside the Rules cannot be considered at all until it is shown that the appellants cannot meet the requirements of any of the Rules, not merely one paragraph of the Rules which they happened, inappropriately as it turns out, to have selected. If the appellants cannot meet the requirements of paragraph 319X, the consideration of their case will have to be based on the extent to which it is disproportionate to refuse them admission in the circumstances that are highlighted by paragraph 319X's analysis of the balance normally to be struck in such cases. For example, the question may arise whether it would be right to admit them in circumstances in which they will not be adequately maintained, or in circumstances in which no adequate arrangements have been made for their care. This proportionality assessment cannot be undertaken in the absence of detailed evidence provided by the appellants.

12. For these reasons it appears to us that Ms Loughran's grounds of appeal simply fail to bite. They are grounds based on the third stage of the judge's consideration of the appellants' case: but the third stage was not an issue because the appellants have failed to present their case as the Rules require. Only when there has been a proper examination of a claim within the Rules does the claim outside the Rules fall to be considered. And, for the avoidance of doubt, we do not regard it as remotely arguable that it is disproportionate to require the claimants to base an article 8 claim on the provisions of the Rules that appear to be appropriate to them.

13. We should emphasise that we are very far from lacking in sympathy for these appellants. Sympathy cannot, however, be an alternative to applying the law to a case such as this. The appellants are still all under 18, and there is ample opportunity for them to make an application under paragraph 319X (that now being the obviously appropriate route), in which they will be able to show whether they can meet the requirements of that paragraph or, if not, precisely what their circumstances would be if they were admitted to the United Kingdom. That assessment, whether in the end made within or outside the Immigration Rules, is capable of being a rational and properly structured determination of the proportionality of their admission, which the present appeal is not.

14. For the foregoing reasons we find no error in the First-tier Tribunal's decision on this case, and this appeal is therefore dismissed.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 21 August 2019

**DIRECTION**

Pursuant to rule 14(1)(b) we direct that no person shall publish or disclose any matter likely to lead members of the public to identify the appellants.