



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

Appeal Numbers: UI-2021-001757  
UI-2021-001759  
(HU/08211/2020 & HU/08212/2020)

**THE IMMIGRATION ACTS**

**At: Bradford  
On: 15<sup>th</sup> September 2022**

**Decision & Reasons Promulgated  
On: 28<sup>th</sup> October 2022**

**Before**

**UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Entry Clearance Officer, Addis Ababa**

Appellant

**And**

**FNT**

**LNT**

**(anonymity direction made)**

Respondents

**For the Appellant: Mr Diwnycz, Senior Home Office Presenting Officer  
For the Respondents: Mr Reza, Global Migration Solutions**

**DECISION AND REASONS**

1. The Respondents are sisters, both minors at the date that they applied for entry clearance under paragraph 391X of the Immigration Rules. They are both nationals of Eritrea, currently residing in Ethiopia where they have been recognised as refugees. They seek permission to enter the United Kingdom to settle here with their sponsor and maternal uncle, Mr RT. Mr RT was recognised as a refugee in the UK in 2015.

2. The Respondents' linked appeals against the refusal to grant them entry clearance were allowed by First-tier Tribunal Judge Mills on the 28<sup>th</sup> October 2021. The Entry Clearance Officer subsequently sought, and on the 8<sup>th</sup> December 2021 was granted, permission to appeal to this Tribunal.

### **Background and the Decision of the First-tier Tribunal**

3. As to the factual background of this matter, and the matters placed in issue by the ECO, I can do no better than to adopt the summary set out by the First-tier Tribunal:

3. At the time [the sponsor] left [Eritrea], the appellants were living with him and his wife in Eritrea, as their parents had passed away in 2008 (father) and 2011 (mother). When the uncle left he fled directly from his place of military service, leaving his wife, children, and nieces behind, with the intention that they would follow on later.

4. The sponsor's wife attempted to leave Eritrea, illegally, in 2016, taking all of the children with her. However, they were discovered by soldiers as they tried to cross the border on foot, and she became separated from the appellants. While she and the sponsor's own children managed to escape, their nieces did not make it across and ended up trapped in Eritrea. They eventually managed to leave the country in April 2019, making their way to a refugee camp in Ethiopia from where they were assisted in contacting the sponsor in the UK.

5. The current applications for entry clearance to join the sponsor in the UK as his dependents, under paragraph 319X of the immigration rules, were made on October 4<sup>th</sup> 2019. The applications were refused by an entry clearance officer (ECO) in identical decisions dated September 1st 2020, some 11 months later.

6. Three issues are raised in the decisions. The first two are related, and concerned the sponsor's ability to maintain and accommodate the appellants. The decisions contain calculations which conclude that the sponsor's income is below the income support level applicable to a couple with 6 children (their four which already live with them, plus the two appellants were they to be allowed to come to the UK). The decisions also calculate that the sponsor's current 3-bed property would be statutorily overcrowded were the appellants added to the household.

7. The ECO then goes on to consider the applications on a broader human rights basis, but concluded that Article 8 of the ECHR is not engaged, for the following reasons:

*You claim that your sponsor is your carer and guardian as your parents are deceased, however you have not provided any form of evidence to support this claim. You have submitted a guardianship letter however under the The Adoption (Designation of Overseas Adoptions) Order 1973 and The Adoption (Designation of Overseas Adoptions)*

*(Variation) Order 1993 the UK does not recognise Eritrean documents of adoption or guardianship.*

*Further, you have submitted money transfer documents dated only from 2019. Considering that your sponsor was granted leave in the UK in July 2015 it is not accepted that you have continuously been supported by your sponsor. Additionally, you have submitted limited text messages from November 2018 until present. Again, as your sponsor was granted leave in July 2015 I consider you have not sufficiently demonstrated that you are dependent on your sponsor.*

*I have considered your rights under Article 8 of ECHR. Article 8 of the ECHR is a qualified right, proportionate with the need to maintain an effective immigration and border control and decisions under the Immigration Rules are deemed to be compliant with human rights legislation. Given the concerns raised above regarding the relationship, I am not satisfied that you have a family life with the sponsor. As this is the case, Article 8(1) does not apply to you. However, if you do have a family life with the sponsor, I am satisfied the decision is proportionate under Article 8(2). I am therefore satisfied the decision is justified by the need to maintain an effective immigration and border control.*

4. Directing himself to those issues Judge Mills found as follows:

- i) The Respondents could not meet the requirements of the relevant immigration rule. Paragraph 319X(vii) requires that  
*“the applicant can, and will, be maintained adequately by the relative in the United Kingdom without recourse to public funds”*

It was the “tacit” acceptance of Mr Afzal, who appeared for the appellants below, that this part of the rule could not be satisfied on the facts. The rule was not prescriptive about an amount that had to be earned, but it was common ground that the term “adequately” had to be interpreted by reference to the income support (now employment support) threshold enjoyed by a similarly situated family: KA & Ors (Adequacy of Maintenance) Pakistan [2006] UKAIT 00065. The Sponsor’s family income fell short of that threshold by £42 per week.

- ii) The remaining requirements of paragraph 319X were met. The only other point placed in issue in the refusal, whether the Respondents could be adequately accommodated in the UK, was determined in their favour;
- iii) Since the rules could not be met, the Respondents could only succeed on Article 8 grounds, which even weighing the public interest in the balance, they plainly did. They have regarded the Sponsor and his wife as their parents for more than half their lives, they have continued to be financially

and emotionally dependent upon them since their family life was ruptured by persecution, and in those circumstances it would strongly be in the best interests of these children to reunite this family: “the alternative is that they remain, as a household of two teenage young women, living in a refugee camp in Ethiopia without any other family support. This is quite plainly a harsh outcome”.

5. On this basis the appeals were allowed.
6. The ECO now appeals against those findings on the following grounds:

*Ground one: Failing to take into account and/or resolve conflicts of fact or opinion on a material matter.*

1. The refusal notice clearly states that the ECO does not accept that the appellants have demonstrated that the sponsor is their carer and guardian and that their parents are deceased. “You claim that your sponsor is your carer and guardian as your parents are deceased, however you have not provided any form of evidence to support this claim. You have submitted a guardianship letter however under the The Adoption (Designation of Overseas Adoptions) Order 1973 and The Adoption (Designation of Overseas Adoptions) (Variation) Order 1993 the UK does not recognise Eritrean documents of adoption or guardianship”.

2. It is therefore submitted that the FTTJ errs in accepting that the sponsor is the appellants’ guardian. Furthermore, the sponsor has a brother in Ethiopia as stated on his SEF (Q.15), the FTTJ has failed to consider that the appellants may be dependent on their uncle.

*Ground two: Making a material error of law*

3. At [46] the FTTJ finds that the sponsor will be able to accommodate the appellants without his house becoming overcrowded. The FTTJ undertakes a calculation which concludes that overcrowding would not result. However, the FTTJ’s calculate does not specify whether the room standard or the space standard of the Housing Act 1985 is being applied. The sponsor has a three bedroomed property, therefore the space standard allows for a total of 5 people. The sponsor’s four children are aged under 10 and therefore count as a total of two people. The sponsor and his wife count as a further two. The arrival of the appellants would result in a total of six and the property would therefore become overcrowded as a result. It is therefore submitted that the FTTJ errs in finding that the appellants’ presence in the UK will not result in recourse to additional public funds.

## Discussion and Findings

7. It will be observed that the reasons for refusal given by the ECO in the twin decisions dated the 1<sup>st</sup> September 2020, set out by Judge Mills at his paragraph 7 (and my §3 above), do not in any way reflect the requirements of the relevant rule.

8. The rule reads 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:

- (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
- (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.

9. I do not read any of those requirements to extend to proving that the biological parents of these children are deceased. Nor does it require the Sponsor to be the carer or legal guardian of the children involved<sup>1</sup>. Specifically there is no requirement that a legal adoption be proven. The fact that the UK does not recognise Eritrean

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<sup>1</sup> Nor, although the ECO has now dropped this point, does the rule require the applicants to demonstrate that they show that they have been "continuously been supported" by their Sponsor, another erroneous ground for refusal.

documents under either *The Adoption (Designation of Overseas Adoptions) Order 1973* or the *The Adoption (Designation of Overseas Adoptions)(Variation) Order 1993* is therefore entirely irrelevant, as is the absence of any death certificates of the Respondents' parents. The rule simply requires that the child be a "relative" of the Sponsor. It was quite open to the drafter of the rule to include a formal requirement of adoption or legal guardianship and they have not done so. I have no doubt that this was in recognition of the difficulties that refugee families might face in establishing such a legal nexus to children who are, nevertheless, part of their family. The original decision maker was wrong to have read in such a requirement, and the ECO was wrong to have pursued the point on appeal. That dispenses with paragraph 1 of the grounds as they were pleaded before me.

10. Paragraph 2 of the grounds criticises Judge Mills for not making a finding about whether the Respondents are presently in the care of another uncle, who was at one point at least, living in Ethiopia. That was not a point taken in the refusal letter, and since the ECO did not attend the hearing before Judge Mills we know it cannot have been a point put to the Sponsor, or made in submissions at the hearing. Perhaps more pertinently the grounds do not identify why the presence of this uncle might have made a difference to Judge Mills' decision, predicated as it is on the proportionate response being that these young refugees should be reunited with the 'parents' who brought them up after their own parents died.
11. Paragraph 2 of the grounds further reiterates the submission that Judge Mills was not entitled to find that the Sponsor is the guardian of the Respondents. Again: irrelevant under the rule. The rule simply required that he is their 'relative'. There can be no doubt that the Respondents meet the requirement of 319X(i) since DNA evidence has been produced to show that the Sponsor is indeed their maternal uncle as claimed. Nor has any issue ever been taken with the evidence of everyone involved that the Respondents were living with the Sponsor and his wife at the time that they both fled Eritrea.
12. At ground (ii) the ECO submits that Judge Mills may have miscalculated whether the Sponsor's housing would have been too small for his nieces to join him in the UK. Judge Mills' reasoning on maintenance and accommodation was as follows:
  34. I therefore conclude that the appellants' inability to meet the financial requirements of the rules is a significant matter that carries substantial weight in my consideration of the proportionality of the decision to refuse them entry clearance. That said, the weight to be attached must vary according to the degree to which the rules have not been met.
  35. For similar reasons, immigrant families should not be encouraged or expected to live in overcrowded accommodation, and it is important that the provisions of the Housing Act of 1985

are considered in assessing entry clearance applications, and that this issue is given due weight in the balance when those provisions are not met.

36. However, in this respect I accept the sponsor's contention, at paragraphs 13 and 14 of his statement, that the property would not be overcrowded by the appellants coming to reside there. He is correct that children under 10 years of age, which applies to all four of his own children, count as only half a person in the calculation. This means that the current occupancy of his three bedroom house is four people, and that two more could reside there without it becoming statutorily overcrowded. I find that the requirements of 319X (vi) are therefore met.

13. The grounds of appeal state that calculation to be wrong, without providing any explanation as to why. As Mr Diwnycz candidly accepted at the hearing before me, it is difficult to see what possible difference a 'correct' calculation might have made to Judge Mills' central conclusions. He had already found that the family did not have enough money but allowed the appeal anyway, and nothing said on the ECO's behalf shows that this was a decision that was demonstrably irrational or otherwise wrong. Furthermore I am not satisfied that Judge Mills was necessarily wrong. As the Sponsor explains in the statement that Judge Mills' refers to, this is a three bedroomed property *with a living room*: under the Housing Act that is space that should be taken into account, something that the ECO does not appear to have done.
14. The key 'Article 8' element of paragraph 319X is found in sub-clause (iii), which requires that the applicants show there to be "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". The ECO's refusal makes no reference to paragraph 319X(iii). Judge Mills was quite entitled to read this as a concession that the ECO regarded that element of the rule to be met. I say this for two reasons. First the refusals themselves do expressly set out, in bold type, those paragraphs of the rule that are placed in issue, and sub-clause (iii) does not feature. Furthermore on the facts, there would be good reason for such a concession to have been made: these were children whom the Sponsor named as part of his family in his original asylum application in 2015, and they were now living as refugees in Ethiopia. That being the case, Judge Mills was required to conduct a proportionality balancing exercise against that factual background, which he did in the following manner:

38. I have no hesitation in concluding that the appellants enjoy family life with the sponsor, given that I accept that they have been financially and emotionally dependent upon him and his wife for several years.

39. Likewise, I have no hesitation in finding that the public interest is outweighed on the facts of this case and that it would be unjustifiably harsh, and therefore disproportionate under

Article 8 of the ECHR, to refuse to allow the appellants to come to the UK and reunite with their family members here.

40. I take into account their best interests as a primary consideration, though I acknowledge that the elder appellant has turned 18 since the application was made. I find that it is strongly in their best interests to be allowed to come to reside with their uncle and aunt, who took over their care when their mother passed away in 2011, when they were aged 8 and 7. Effectively the sponsor and his wife have acted as the parents of the appellants for more than half of their lives.

41. The alternative is that they remain, as a household of two teenage young women, living in a refugee camp in Ethiopia without any other family support. This is quite plainly a harsh outcome.

15. That seems to me to be a perfectly rational and humane response to the predicament faced by this family, all of whom are recognised to have international protection needs. This was a well-reasoned decision, built upon impeccable legal direction, and I have no hesitation in upholding it.

### **Anonymity**

16. Both Respondents were minors at the date of the application, and the second applicant remains so. In those circumstances I consider it appropriate to make an order for anonymity in the following terms:

“Unless and until a tribunal or court directs otherwise, the Respondents are granted anonymity. No report of these proceedings shall directly or indirectly identify them, any of their witnesses nor any member of their family. This direction applies to, amongst others, both the Appellant and the Respondents. Failure to comply with this direction could lead to contempt of court proceedings”

### **Decisions**

17. The decision of the First-tier Tribunal is upheld. The ECO’s appeal is dismissed.
18. There is a direction for anonymity.



Upper Tribunal Judge Bruce



September 2022