IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004287
UI-2023-004288

First-TierNo.s: HU/52077/2023
LH/00929/2023

HU/52073/2023
LH/00930/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 10th May 2024

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Yasir Yahya Mohamed Adam
Esmail Yahya Mohamed Adam
(no anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms Brakaj , Iris Law Firm
For the Respondent: Mr Thompson, Senior Home Office Presenting Officer

Heard at Phoenix House (Bradford) on 10 May 2024

DECISION AND REASONS

1. The Appellants are both nationals of Sudan. They are brothers, born respectively in May 2005 and January 2008. They seek permission to enter the United Kingdom in order to settle here with their elder brother and sponsor, Mohamed. Mohamed has limited leave to remain as a refugee, and the applications for entry clearance were made pursuant to paragraph 319X of the Immigration Rules when both Appellants were minors.

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2. Paragraph 319X of the rules provides that entry clearance shall be granted where the following conditions are met:

> "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."

3. By its decision dated the 14th July 2023 the First-tier Tribunal (Judge ST Fox) found that the Appellants had failed to discharge the burden of proof in respect of sub-paragraphs (ii), (v), (vi) and (vii). It further rejected the contention, argued in the alternative, that the decisions to refuse entry amounted to a disproportionate interference with the Appellants' Article 8 rights.

Error of Law

4. This matter came first before me on the 10th January 2024. The Appellants were represented on that occasion by Ms Brakaj and the Home Office by Senior Presenting Officer Mr Diwnycz. Having heard argument that day about whether

the decision of the First-tier Tribunal contained an error of law I found that it did, and that it must be set aside for the reasons that follow.

5. The first, and fundamental, error in the decision is that the Tribunal apparently conflated its task under Article 8 with its evaluation of the claim under the Immigration Rules. In its assessment of the latter the Tribunal appears to take into account wholly irrelevant matters like the extent to which the Sponsor has been providing financially for his brothers, whether they can speak English or have qualifications and who would look after the boys' grandmother if they left Sudan. None of that was relevant to the matter in issue under paragraph 319X. The proper approach should have been to first decide whether the matters placed in issue under paragraph 319X could be resolved in the Appellants' favour. If they were, then it was common ground that there would be no justification in refusing entry to the Appellants so that they could be reunited with their brother: TZ (Pakistan) [2018] EWCA Civ 1109. In particular there was no need for the Tribunal to conduct its own enquiry into whether Article 8 was engaged here, because it is implicit in the ECO's acceptance of the relationship requirements at 319X(i) that it is. Paragraph 319X is classified as a 'human rights rule'; that is why the right of appeal here arises.

6. The only matter placed in issue under paragraph 319X was whether 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". That this is the only issue between the parties was confirmed before me by Mr Diwnycz. That being the case it is agreed that the Tribunal erred in dismissing the appeals on the grounds that the maintenance and accommodation requirements could not be met. The ECO was satisfied that they could, and that is why no evidence was produced on this matter by either side. It is an error of law for the Tribunal to have gone behind a concession in this way. The same can be said of the Tribunal's conclusion that the boys had failed to demonstrate that they were not living independently (ie they had not in fact married and founded families of their own).

7. Further error arises in that the Tribunal failed to make findings on the central evidence going to the matter actually in issue: whether these young men are facing discrimination, harassment, and danger because they are members of the non-Arab Darfuri Bergu tribe. Membership of this tribe had led to the Sponsor being recognised as a refugee. Now his brothers, as they approached adulthood, were facing the similar risks to those which had caused him to flee Sudan. The Tribunal does not deal with any of this, instead saying this:

> 17. There does not appear to be any dispute that the Appellants and the sponsor are non-Arab Darfuri - Bergu tribal members. Although suggested in the skeleton argument that the Appellants may be persecuted, no asylum claim or similar, has been put forward.

8. It is unsurprising that the Appellants have not made asylum claims, since by operation of law they are unable to do so because they are not "outside of the country of their nationality". As to 'similar' arguments, that was precisely the case that was made before the Tribunal, which it omitted to address.

9. For all of these reasons I was satisfied that the decision must be set aside.

Remaking the Decision

10. At the hearing in January I was invited to proceed to remake the decision on the evidence before me. I was however uneasy about doing that for the following reasons. Much is made in the skeleton argument prepared for the Appellants of the fact that they are non-Arab Darfuris, and that the Respondent's CPIN accepts that AA (non-Arab Darfuris – relocation) [2009] UKAIT 56 continues to be the operative country guidance. I note however that the Appellants do not live in Darfur. As far as I can make out they live in Sennar. I was unable to find, on the material before me, any information relating to their circumstances there. Unlike the First-tier Tribunal, I did not have the benefit of hearing from the Sponsor. I perhaps missed it, but I could find no documentary evidence about, for instance, the house they live in, or whether they have themselves suffered any of the problems which led their elder brother to be recognised as a refugee. I therefore indicated to the parties that I would be assisted in the remaking by hearing further submissions on the relevance of the country guidance, and on the Appellants' current circumstances. I directed that both parties have leave to adduce any further evidence upon which they would wish to rely.

11. The matter has now come back before me for final determination.

12. On behalf of the Appellants Iris Law filed a supplementary bundle of material and made further submissions. They make two central points. The first is that the Upper Tribunal has given guidance that the dangers faced by non-Arab Darfuris such as this family are not confined to the Darfur region: MM (Darfuris) Sudan CG [2015] UKUT 00110 (IAC). The second point is that the Respondent's own guidance currently indicate that Sennar, where the Applicants are living, is now so dangerous for civilians – Darfuri or otherwise – that the conditions there are considered to engage Article 15(c) of the Qualification Directive. The February 2024 Country Policy and Information Note *Humanitarian Situation: Sudan* reads:

> In general, the humanitarian situation in Khartoum, Darfur, Kordofan, Al Jazira and Sennar (which have experienced the most intense fighting) is so severe that there are substantial grounds for believing that there is a real risk of serious harm because conditions amount to torture or inhuman or degrading treatment as set out in paragraphs 339C and 339CA(iii) of the Immigration Rules/Article 3 ECHR.

13. Before me Mr Thompson, acting on instructions, indicated that in light of this guidance the Secretary of State now accepts that 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". I am invited to allow the appeal on that basis. I do so, and add that Mr Thompson indicated that consideration had been given to whether these boys could reasonably be expected to internally relocate; the Respondent concludes that they could not. In view of their ages, and the prevailing country conditions, that is a concession properly made. I find that the Appellants have shown that they meet all of the requirements of paragraph 319X of the Rules and the appeals are accordingly allowed on human rights grounds.

Decisions

14. The decision of the First-tier Tribunal is set aside.

15. **The appeals are allowed. The facts now accepted in these linked cases are that these are two very young Appellants who are living in dangerous and precarious circumstances in Sudan. Their applications for entry clearance were refused as long ago as October 2022, and the Respondent now concedes that the requirements of the rules are in fact met. Although I have no power to make directions on this matter, I urge the Respondent to expedite the processing of this decision so that visas can be issued as soon as possible.**

16. I have not made an order for anonymity as I was not asked to do so. If either party considers that such an order is required, an application should be made in writing.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
10th May 2024