IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/02356/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 December 2014	**On 20 January 2015**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MISS PATTIYAGE DEVINDI NAYANTHARA PEIRIS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Kannangara, Counsel, instructed by Jade Law Solicitors
For the Respondent: Miss C Johnstone, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Sri Lanka born on 14 September 2011. She seeks entry clearance into the United Kingdom as the adopted daughter of her parents both British citizens. She was adopted on 20 January 2012 following the due procedure and evaluation of the evidence by the competent authority in Sri Lanka. It is by virtue of the Adoption (Recognition of Overseas Adoptions) Order 2013, an adoption which is recognised as an overseas adoption by the United Kingdom.

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2. The appellant first applied for entry clearance on 23 April 2012 and her application was refused on 23 July 2012. That refusal was not appealed. The second application was made on 7 January 2013 and refused on 13 May 2013. It was conceded by the respondent subsequently that that had been erroneously considered under Appendix FM. Re consideration of that application was made but was refused on 12 December 2013 after an interview with the appellant's adoptive mother on 12 November 2013.

3. The reason for the refusal on 12 December 2013 was because the parents had not obtained a certificate of eligibility from the Department of Education as required by paragraph 309B of the Immigration Rules.

4. The appellant sought to appeal against that refusal, which appeal came before First-tier Tribunal Judge Thanki on 19 August 2014. The appeal was dismissed both as to the Immigration Rules and as to Article 8 of the ECHR.

5. Permission to appeal was granted, however, and thus the matter comes before me in pursuance of that permission.

6. The submission which is made by Mr Kannangara, who represents the appellant and her parents, is that is a certificate of eligibility should not be required for those adoptions that are recorded under the Adoption (Recognition of Overseas Adoptions) Order 2013. The requirement for eligibility is one made and processed by the Department of Education. It was the same department which put in the Adoption (Recognition of Overseas Adoptions) Order 2013

7. It is contended that paragraph 309B, as inserted into the Rules on 6 September 2012, refers to prospective adopters requiring them to be assessed as suitable to adopt by a competent authority. It was the same department which put in the Adoption (Recognition of Overseas Adoptions) Order 2013.

8. It is further contended that paragraph 309B refers to prospective adopters requesting them to be assessed as suitable to adopt by a competent author in the UK. In this case the parents of the appellant have adopted her and the adoption is recognised under the Order of 2013. It is submitted that it makes very little sense for an adoption to be recognised yet further requirements are made concerning it.

9. Miss Johnstone, who represents the respondent, invites me to find that that is a requirement under the Rules and it is to be followed unless and until it is to be revoked. She draws my attention also to the last sentence of paragraph 309B which provides "The certificate of eligibility must be provided with all entry clearance adoption applications under paragraphs 310-316F". The obvious route for application to be made for a child seeking indefinite leave to enter the United Kingdom as an adopted child

of a parent is paragraph 310 and thus the requirement for a certificate of eligibly must be seen as an additional requirement that has been posed.

10. I share the concern of Mr Kannangara as to the real purpose behind the extension of the certificate of eligibility to paragraph 310. It is to be recognised, however, as indeed the First-tier Tribunal Judge recognised, that it is important that the welfare of children be considered and that the United Kingdom is entitled to impose a minimum requirement upon those seeking to bring children into the jurisdiction. It may well be that although certain adoptions are recognised as such, nevertheless the United Kingdom may feel itself required to impose further investigations upon those families who choose to come to the United Kingdom.

11. It is however somewhat difficult to reconcile 309B with the Adoption (Recognition of Overseas Adoptions) Order 2013, particularly when for the purposes of paragraph 309A a de facto adoptions would seem not to have been caught by the same stringent requirements as overseas adoptions made through the proper judicial channels.

12. It may, however, be that concerns have been expressed that prospective adopters were intentionally circumventing legislative safeguards introduced in relation to international adoption in recent years by choosing to adopt children in the countries listed in the 1973 Order. Various options canvassed by government during the consultation would show that there was support for the idea that the 1973 Order be replaced with an order that recognised adoptions made in a country that is implemented in the 1993 Hague Convention on the Protection of Children and completion in respect of inter country adoptions. Seemingly therefore the countries that are in the 2013 order are those that are signatories to that Convention.

13. The Order of 2013 came into force on 3 January 2014 after the implementation of 309(B). It may well be that the inter-relation between 309B and the Order will need to be considered elsewhere.

14. For the present purposes, however, as indeed Miss Johnstone indicated 309(B) is in operation and controlling paragraph 310. In those circumstances it seems to me that the First-tier Tribunal Judge was entitled to act upon it in the way that she did dismissing the immigration appeal.

15. However, it seems to me that both the Entry Clearance Officer in the decision and the Immigration Judge in her determination, have been over-optimistic in the calculation of the time that it would take to obtain the certificate of eligibility and the difficulties which are placed in front of the adoptive parents in so doing. Although the Entry Clearance Officer purports to look at the wellbeing of the child as the paramount consideration, little regard was given to the best interests of the adoptive parents and of their rights and responsibilities. Acknowledgment has been given to the delay of nearly a year caused by an erroneous decision.

16. The starting point for a proper consideration of Article 8 it seems to me comes first of all from the date of the adoption, namely 20 January 2012. This was before the implementation of paragraph 309B. Ordinarily had matters gone according to plan the application under 310 could have proceeded given, that by virtue of the previous Adoption (Recognition of Overseas Adoptions) Order 2013, the adoption in Sri Lanka would have been one in accordance with the decision taken by a competent administrative authority or court in her country of origin or country in which she is resident being a country whose adoption orders are recognised by the United Kingdom.

17. It is not a case, therefore, of either of the adoptive parents choosing to ignore the requirement to get a certificate of eligibility before going to Sri Lanka to adopt the child, that requirement was not then present.

18. Both parents are British citizens who, prior to the adoption lived and worked in the United Kingdom, the country where they choose to live and are entitled to live. The husband has given up work in order to be with appellant. His wife continues to work but, as was made clear in her evidence to the Tribunal, that has created difficulties for her. Indeed as is noted in paragraph 16 of the determination she had been placed on notice that absence may lead to her employment being terminated.

19. It was also noted the evidence of the adoptive mother in paragraph 10 of the determination. She relied upon her witness statement as evidence-in-chief and gave evidence in English. She has contacted the London Borough of Harrow to obtain a certificate of eligibility and was told that she would have to register, pay a substantial fee and have to wait a long period before it is established if they are suitable.

20. In the context of that evidence I find that the approach taken by the judge in paragraph 27 towards Article 8 is manifestly defective. I was asked to recognise the difficulties faced by the adoptive parents and the period of time that they would have to spend away from the appellant living in the United Kingdom in order to obtain the certificate of eligibility which they seek. It is no answer to the difficulties which they face to speak of a temporary basis.

21. In those circumstances I find that analysis to be defective as distorting the proper consideration of proportionality and I therefore set that finding aside for error of law and proceed to remake it.

22. I heard further evidence from Mrs Peiris, the adoptive mother.

23. She and her husband are British citizens, having lived in the United Kingdom since 2004. She works as a systems engineer and has done so for many years. To date she has managed to work for the company from Sri Lanka with a few visits to the United Kingdom but that situation is

becoming untenable and she fears that if she does not return full-time to the United Kingdom to continue her work she wiill lose her employment.

24. When in the United Kingdom her husband worked in Iceland Stores. He gave up his work in order to be with the appellant in Sri Lanka. He too would welcome a return to work and further income into the family.

25. She and her husband have been living with their grandmother and a nanny bringing up the appellant. The grandmother is, however, 82 years old and the witness did not consider that it would be sensible or reasonable to leave the appellant with her whilst she and her husband return to the United Kingdom. She has made enquiries as to the length of time that it will take to obtain the necessary certificate of entitlement from the local authority, having been told that that will take up to eight months. It is a requirement that both she and her husband reside in the United Kingdom for the full length of the assessment. The situation has placed both in an impossible position. Given the age of the appellant neither consider that it would be in the interest of the child to leave her and return to the United Kingdom without her. Without the certificate they cannot return to begin any process to resolve the situation.

26. Miss Johnstone, on behalf of the respondent, submits that there is no breach of Article 8 rights in this case because the parents are living with their daughter in Sri Lanka. The Secretary of State is entitled to impose the requirement of a certificate of eligibility.

27. Having considered the matter and particularly the most important factor that the adoption took place before the implementation of the immigration Rule, I do not find that the parents of the appellant are seeking to circumvent the requirements imposed to obtain a certificate of eligibility. At the time that the adoptions took place that requirement as set out under paragraph 309B was not in existence. Indeed, it may be considered that the length of time which the parents have been living with the appellant since the adoption is nearly such as to satisfy the Rules as to de facto adoption in any case as set out under paragraph 309A.

28. When considering Article 8 I bear in mind the interests of all parties and that includes the parents of the appellant. No challenge has been made to the genuineness of the adoption or of the concern which the adoptive parents have for the appellant. Nothing has been raised to cause doubt as to their suitability as adoptive parents subject to the issue of the certificate of eligibility.

29. I find that, were they to leave the appellant in Sri Lanka and return to the United Kingdom for the purposes of obtaining the certificate of eligibility that would not be in the best interests of the appellant. It is clearly a very important time in the child’s life to bond with the parents and I accept the evidence that has been presented that the process to obtain such a

certificate is a lengthy one. I find that such prolonged separation would be harmful to the child's proper development.

30. I am reminded of the hardship that has been caused financially and emotionally to the parents in being separated from the United Kingdom, a country to which they are entitled to reside. There is no indication that they are seeking to circumvent the requirement but are merely placed in an impossible position as to how to meet it. It is unfortunate that the original application was not successful or appealed but I do consider that the length of time in which this matter has failed to be resolved is an exceptional and compelling circumstance in this situation as are the obstacles placed in the way of British citizens to resolve the matter and to comply with the Rules.

31. I bear in mind the interest of immigration control but balance that against the damage caused to the integrity of the family unit as a whole.

32. I find in the circumstances therefore that the decision to withhold leave to enter is in the circumstances disproportionate. It is always open of course to the Entry Clearance Officer to make that grant of leave conditional upon the fulfilling of circumstances such as obtaining the certificate of eligibility, unless a de facto adoption is now deemed to have taken place.

33. In the circumstances therefore the appeal in respect of Article 8 of the ECHR is allowed.

Notice of Decision

The Appeal is dismissed under the Immigration rules
The appeal is allowed under Human Rights.

No anonymity direction is made.

Signed Date **16 January 2015**

Upper Tribunal Judge King TD