



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/15702/2014

THE IMMIGRATION ACTS

Heard at Field House
On 17th November 2017

Decision & Reasons Promulgated
On 18th December 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

[Z A]

~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms D Revill (Counsel)

For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan and a minor born on 24th July 2012. Consequently at the date of this hearing the Appellant is aged 5 and she lives with a carer in Pakistan. The Appellant had applied under the Immigration Rules to enter the United Kingdom either under paragraph 316 of the Immigration Rules, namely with a view to settlement as the adopted child of a parent or parents given limited leave to enter or remain in the UK with a view to settlement and/or in the alternative under paragraph 297 of the Immigration Rules, namely seeking indefinite leave to enter the UK as the child of a parent, parents or a relative present and settled or

being admitted for settlement in the UK. In this instance the Appellant's Sponsors are her aunt and uncle, [SH] and [AZ]. The Appellant is the biological daughter of the male Sponsor's brother and sister-in-law and responsibility was passed to the Sponsors when, shortly after the birth, her mother developed postnatal depression and was unable to bond with her. The Sponsors have been granted a guardianship order by a Pakistani court and are approved as adopters in the UK. They are currently paying for a neighbour to look after the Appellant in Pakistan.

2. The original application was refused by the Entry Clearance Officer on 12th November 2014. That decision was appealed and came before Judge of the First-tier Tribunal S Taylor sitting at Taylor House on 16th September 2015. In a decision and reasons promulgated on 15th October 2015 the Appellant's appeal was dismissed. Following permission being granted to appeal to the Upper Tribunal the matter came before Upper Tribunal Judge King sitting at Field House on 10th May 2015. UTJ King found that there was a material error of law in the decision of the First-tier Tribunal and set aside the decision to be remade upon a de novo hearing and directed that such hearing should focus particularly upon paragraph 297 of the Immigration Rules but should not exclude other considerations.
3. The remitted appeal came before Judge of the First-tier Tribunal A W Khan sitting at Taylor House on 4th November 2016. In a decision and reasons promulgated on 2nd December 2016 the Appellant's appeal was again dismissed under both the Immigration Rules and on human rights grounds.
4. On 22nd December 2016 a further application was made for permission to appeal to the Upper Tribunal. The Grounds of Appeal contended:-
 - (a) the judge erred in focusing on the circumstances as of the date of hearing, rather than the date of decision;
 - (b) the judge failed to give adequate reasons for finding that there had been a genuine transfer of parental responsibility to the Sponsors;
 - (c) that the judge erred in finding that paragraph 316A(vi) required that the neighbour currently caring for the Appellant be unable to care for her;
 - (d) the judge erred in his treatment of the witness statements from the Appellant's biological parents and neighbour; and/or
 - (e) the judge erred in his approach to paragraph 297(i)(f).
5. On 26th June 2017 First-tier Tribunal Judge Shimmin granted permission to appeal.
6. On 10th July 2017 the Secretary of State responded to the Grounds of Appeal under Rule 24. The relevant paragraph therein is paragraph 2 whereby the Secretary of State submits that the First-tier Tribunal Judge's decision did not contain a material error and that the determination contained significant reasoning for the findings between paragraphs 17 to 20. It was contended that the Appellant's grounds amount to a disagreement with the First-tier Tribunal Judge's findings.

7. It was on that basis that the appeal came before me to determine whether or not there was a material error of law in the decision of the First-tier Tribunal Judge on 14th August 2017. It was agreed after discussion by both legal representatives that in the event that I found that there was a material error of law that bearing in mind the lengthy history of this matter, age of Appellant and the time it takes to get a matter reheard on remittal to the First-tier Tribunal that the correct approach would be that I would retain the matter within the Upper Tribunal and rehear it at the soonest available date.
8. For the reasons set out in paragraphs 20 to 22 of my error of law decision I found that I was satisfied that there were material errors of law and gave a direction that none of the findings of fact were to stand and that the matter be reheard before me. It is on that basis that the appeal comes back before me for rehearing. The legal representatives who attended before me on error of law hearing reappear. That is helpful. The Appellant is represented by her instructed Counsel Ms Revill and the Secretary of State by her Home Office Presenting Officer Mr Duffy.
9. The appeal centres on the application made by the Appellant's aunt and uncle to bring her in to the UK. They rely on two paragraphs of the Immigration Rules. Firstly paragraph 316A(f) whereby they seek limited leave for the Appellant to enter the UK for the purpose of being adopted when one of the prospective parents is settled in the United Kingdom or is being admitted for settlement on the same occasion that the child is seeking admission and has sole responsibility for the child's upbringing and in the alternative under paragraph 297(i)(f) namely that seeking indefinite leave to enter as the child of a parent, parents or relative present and settled in the UK or being admitted for settlement in the UK that one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care.
10. The arguments put forward on behalf of the Secretary of State in refusing the application originally were due to the Respondent not being satisfied that the Appellant's biological parents were unable to care for her or that there had been a genuine transfer of parental responsibility because the application referred to her being "gifted" to the Sponsors and that the Respondent was not satisfied that the Appellant had lost or broken ties with her family of origin or that she intended to do so given the relationship between the Sponsors and her biological parents. Further the Secretary of State was not satisfied that there were serious and compelling family or other considerations making the Appellant's exclusion undesirable because her biological parents remained in Pakistan and that the Respondent did not consider refusing entry clearance breached Article 8 of the European Convention of Human Rights.
11. Mr Duffy contends that the Entry Clearance Officer's position was that the way the Rules were drafted the application did not quite meet the Rules particularly as to proof and evidence that the biological mother could not look after the child and he

pointed out that there was still a father around. He comments that it was the view of the Entry Clearance Officer that the Appellant had been given by her natural father to his uncle. He accepts however that there is now a lot more evidence but I acknowledge that the question is how much of this can be taken into account. This is a pre-2015 decision and I have to look at the evidence as would have been available at the date of decision. Though I acknowledge that following the authority of *DR (Morocco)* it is open for me to look at later evidence. A lot turns on the genuineness of the transfer of the Appellant to her proposed adoptive parents. It is agreed by both legal representatives that the current carer of the Appellant can be disregarded.

Evidence

12. There are two witnesses in this matter and they are the Appellant's proposed adoptive parents. Principal evidence is provided by [SH]. [SH] confirms and adopts her witness statement of 16th September 2015 as her evidence-in-chief. She is the wife of [AZ]. [AZ] is the brother of the Appellant's natural father. However [AZ] speaks only limited English, [SH] speaks fluent English. She is a reception class teacher and gives her evidence clearly and forcefully. She has provided the principal witness statement in this appeal amounting to some fifteen pages and 37 paragraphs. Her evidence and demeanour are impressive. I have given due consideration to all paragraphs of her witness statement. In essence her evidence is that following the birth of two daughters a third daughter was born to her sister-in-law namely the Appellant. She was abandoned by her mother who suffered from postnatal depression and by her natural father in the village where they live in Pakistan. It is the wish of [SH] and [AZ] to adopt the Appellant and to provide her with a home secure family life in the UK. It is I consider of extreme importance within these proceedings that it is acknowledged and accepted that [SH] and [AZ] firstly hold a guardianship order issued by the High Court in Pakistan over the Appellant and secondly they have been approved by Kent Social Services as suitable parents for adoption specifically for the adoption of [ZA].
13. [SH] advises that they speak to [ZA] daily by Skype and that they have recently seen her in the summer holidays for two and a half weeks. They went to Pakistan and she stayed with them at her parents' home. Apparently her parents have a quite substantial holiday home in Pakistan. She lives with a nanny in the local village who looks after her and the nanny brought her to the house. All funding for the Appellant including the private schooling that she has now started is met for by the prospective adoptive parents.
14. [SH] advises that her current circumstances are that [ZA] lives in a house with a nanny and that they fund her completely and if they did not do so then the Appellant would be in an orphanage. She confirms that [ZA] has no contact with her biological parents although she accepts that living in the same village there may be passing contact with her biological parents, her two elder siblings and her grandmother. She emphasises any contact is not planned and that she is not treated as part of their family and that she calls her and [AZ] mum and dad.

15. She points out that [ZA] has now started at reception class at school and has introduced them as her mummy and daddy. She has been in reception class for about a year and they fund her education.
16. Under cross-examination from Mr Duffy [SH] confirms that [ZA]'s natural mother suffered from postnatal depression and when asked as to whether that is continuing responds by saying that she does seem to be down all the time. She indicates that she believes it was heartbreaking for [ZA] when she and [AZ] had to leave Pakistan after their last visit and that she has no bond whatsoever with her natural parents or family in Pakistan. [ZA] is now aged 5. She was 2 when the application in this matter was made. The prospective parents have been to Pakistan on at least six or seven occasions and she confirms no member of [ZA]'s biological family other than her husband shows any affection to her whatsoever.
17. [AZ] gave evidence through an interpreter although he does speak a limited amount of English. He made a witness statement in October 2016 which basically does no more than adopt the witness statement of [SH]. He adopts it before me and confirms that he is married to [SH], that he is the joint Sponsor and that he is a British national. He works in a shop. He believes his sister-in-law gave [ZA] up because she was suffering from postnatal depression and that she still suffers from this condition and is receiving treatment. He confirms that he does speak to his brother and sister-in-law although he has not had a great deal of contact with them and that he and [SH] have made many visits to Pakistan to see her. He confirms the evidence of [SH] that on their last visit they stayed for about two weeks and that they go more than once a year. He confirms that the nanny is one who has been in place for some considerable period of time and that they fund her. He further confirms [ZA] attends an English speaking school.

Submissions/Discussion

18. Mr Duffy relies on the Entry Clearance Officer's Grounds of Refusal and that paragraphs 316 and 297 of the Immigration Rules raise the bone of contention namely whether or not this is a manufactured situation. He indicates that if I find the Appellant's prospective parents to be credible then it is a matter for me to decide under the Rules. He makes no further submissions.
19. Ms Revill relies as her starting point on the submissions she makes in her skeleton argument which were before the First-tier Tribunal. She contends that the Appellant meets the terms of the Immigration Rules although the primary thrust is pursuant to paragraph 297(i)(f) purely because it is less restrictive in its grant under the Rules than paragraph 316A. She submits that the paragraph 297(i)(f) test inevitably involves an assessment of what the child's welfare and best interests require and that there are herein serious and compelling family reasons why this appeal should be allowed.
20. She submits that the Entry Clearance Officer and First-tier Tribunal Judge were wrong to refuse the appeal under paragraph 316A and that it has been consistently stated that [ZA]'s natural mother has suffered from postnatal depression and that

there was produced to the court (referring me to page 47 of the original bundle) evidence of her depression. She submits that the correct approach is to accept that evidence and that the witness statement of [SH] refers to the natural father's inability to support [ZA].

21. In the alternative she relies on paragraph 297(i)(f) pointing out that [SH] and [AZ] have been appraised as adoptive parents by Kent Council, that they are relatives, that this is not "a set up" and that [ZA] regards [SH] and [AZ] as her parents, that they meet her emotional needs and that the nanny was in any event only ever intended to be a temporary solution. She asked me to allow the appeal under paragraph 297(i)(f) and under Article 8 pointing out that the considerations under 297 are the same under Article 8 and that there is family life enjoyed between [ZA] and her prospective parents. Clearly she contends it is not realistic to expect them to move to Pakistan and it will be disproportionate for them to do so.

Findings

22. It is understandable in a case of this nature that the Secretary of State initially adopted a cynical approach to the application that has been made. It would not be the first case where attempts have been made to bring children under false pretences into the United Kingdom. However it is essential that I consider the credibility of the witness evidence. [SH] is a very credible witness. She has given her evidence clearly and succinctly. Her family and social background are fully disclosed within her witness statement. Of considerable importance in this matter is that the suitability and genuineness of both [SH] and [AZ] have been considered by both the court in Pakistan in granting the guardianship order and following a thorough investigation by Kent Social Services adoption department. I find their findings in obtaining the guardianship order and in being in receipt of a recommendation of suitability for adoption to be compelling.
23. It is understandable that there is only limited evidence available as to [ZA]'s natural mother's postnatal depression. Further she has two female children already and living in poor conditions it does appear that the weight of having a third female child was too much for her and for her husband. The evidence is not challenged that in the event of this appeal not succeeding [ZA] will be condemned to life in a rural village in an orphanage. That I am satisfied would be a tragedy.
24. These are prospective parents who are not merely paying lip service to the application. [SH] has a professional very well educated son from her former marriage. Both she and [AZ] indicate that they are unable to have children from their union. They are both in full-time employment, they fully support [ZA]'s development financially and emotionally. They speak to her daily and they have visited her on as many occasions as is practical for them to do so. Those visits are not challenged by the Secretary of State. They fund a nanny. They pay for [ZA] to be privately educated at a school where she speaks English. Due to modern technology they are able to Skype [ZA] on a daily basis and Mr Duffy does not seek to challenge such contact.

25. Similar issues have been considered in a number of cases. General principles were set out in *Mundeba (Section 55 and para 297(i)(f) [2013] UKUT 00077 (IAC)*. That case is authority for the following principles:

“Serious and compelling” considerations are those that are “persuasive and powerful”; the test requiring more than the parties simple desiring a state of affairs to obtain and the test inevitably involves an assessment of what the child’s welfare and best interests require.

“Family considerations” relate to an evaluation of a child’s emotional needs, and other considerations, which may include cases where a child is in “an unacceptable social and economic environment”.

The focus should be on the circumstances of the child in light of their age, social background and development history, including enquiry as to whether there is evidence of neglect or abuse of unmet needs that should be catered for or of stable arrangements for the child’s physical care.

As a starting point a child’s best interests are usually served by being with both or at least one of their parents. Continuity of residence is also important “where a child has grown up for a number of years when socially aware”.

26. I am satisfied having looked at this case in the round of the following factors. Firstly that the respective parents are credible witnesses. Secondly that it would be in the best interests for [ZA] to live with her Sponsors who are able to meet her emotional and physical needs and have visited regularly and that thirdly she is young enough to adapt to a new country without problems. That conclusion is based because clearly that would have been an issue that has been given very thorough consideration by the adoption agency in Kent. Fourthly there are consequently serious and compelling family considerations which make exclusion of [ZA] undesirable and I am satisfied that suitable arrangements have been made for her care. The Appellant consequently meets the requirements of paragraph 297(i)(f) of the Immigration Rules. In addition the Appellant also meets the conditions of paragraph 316A.
27. In such circumstances the appeal is allowed both under the Immigration Rules and on human rights grounds.

Notice of Decision

The Appellant’s appeal is allowed under the Immigration Rules and on human rights grounds.

No anonymity direction is made.

Signed

Date: 13th December 2017

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date: 13th December 2017

Deputy Upper Tribunal Judge D N Harris