



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02792/2016

THE IMMIGRATION ACTS

Heard at Field House
On 1 February 2018

Decision and Reasons Promulgated
On 12 April 2018

Before

THE RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
UPPER TRIBUNAL JUDGE JORDAN

Between

TY (a minor)

appellant

and

The Entry Clearance Officer in Sheffield

Respondent

Representation:

For the appellant: Ms K. Cronin, Counsel, Garden Court Chambers

For the respondent: Mr P. Duffy, Home Office Presenting Officer

DECISION AND REASONS

Introduction and immigration history

1. The appellant is a citizen of Jamaica who was born on [] 2001. He remains a minor. His sponsor, [CM], is his maternal aunt. She is a British citizen and resident in London. She applied on the appellant's behalf for entry clearance to enable her nephew to join her in the United Kingdom. The application was refused by the entry clearance officer in Sheffield and, on review, by the entry

clearance manager. Those decisions were made respectively on 14 October 2015 and 8 August 2016. The appellant appealed on the ground available to him, namely, that the decision was unlawful as incompatible with s.6 of the Human Rights Act 1998 and Article 8 of the ECHR.

The facts

2. The appellant's mother died in March 2010 of renal failure. A copy of a death certificate was provided to the Tribunal. The appellant is currently living with his grandmother in Jamaica. She is now 74 years old. The appellant's grandmother had suffered a stroke and was partially paralysed on the left side as well as having speech and memory impairment. The judge accepted on the strength of the medical evidence that the appellant grandmother would be unable to carry out a role as a parent to a teenage boy.
3. The appellant's father can no longer be traced but took no active part in bringing up the appellant. He disappeared in February 2016 and the Jamaican police suspected that they had discovered part of his body but were unable to identify it positively as the father. The sponsor's mother and father (the appellant's maternal grandparents) had been separated for more than 35 years and the sponsor financially supported (and continues to support) both the appellant's grandmother and the appellant.
4. The appellant has four siblings in Jamaica. All of them are adult and have left home. There are two older sisters. The appellant's two brothers, aged 26 and 24 respectively, have never been considered as suitable to look after the appellant during his minority. His two sisters have shown no willingness to do so.
5. In 2011, shortly after the death of the appellant's mother, [CM] commenced adoption proceedings in Jamaica. Jamaica was one of several countries named in the Adoption (Designation of Overseas Adoptions) Order 1973 ('the designated list') as they related to adoptions made from 1 February 1973 to 2 January 2014. Such adoptions were recognised in the United Kingdom. On 3 January 2014, the designated list was revoked and replaced by the Adoption (Recognition of Overseas Adoptions) Order 2013 and the 2013 Scottish Regulations. Jamaica was omitted from the list of countries whose adoptions, since January 2014, were recognised in the United Kingdom. Only the countries so listed were known as 'overseas adoptions'.
6. The appellant submitted a Jamaican adoption certificate dated 16 December 2014 as part of her application. By then, this adoption certificate had ceased to be recognised by the authorities in the United Kingdom.

The appeal to the FTT

7. The appellant's appeal came before First-tier Tribunal Judge S. Taylor on 12 June 2017. The determination was promulgated on 27 June 2017. The First-tier Tribunal Judge found that the appellant could not meet the requirements of the

Rules for entry clearance. Having not met them, the refusal of entry clearance was not an interference with the appellant's family life sufficient to engage Article 8. He rejected the appellant's appeal.

Adoption law

8. Not all foreign adoptions are recognised, that is, have legal effect in the United Kingdom. Sections 66 and 67 of the Adoption and Children Act 2002 and sections 39 and 40 of the Adoption and Children (Scotland) Act 2007 define the adoptions treated in law as having legal effect in England, Wales and Scotland (termed in the Adoption and Children Act as '*Chapter 4 adoptions*'). These include certain intercountry adoptions:
 - (i) An adoption effected under the law of a Hague Convention country outside the British Islands, and certified in pursuance of Article 23(1) of the Convention (a "*Hague Convention adoption*"). The UK incorporated the Hague Convention of 29 May 1993 on *Protection of Children and Co-operation in Respect of Intercountry Adoption* into domestic law by the operation of the Adoption (Intercountry Aspects) Act 1999 Schedule 1 and Adoptions with a Foreign Element (Scotland) Regulations 2009/SI 182 (Scottish SI).
 - (ii) An overseas adoption (as referred to in paragraph 5 above) effected under the law of a country or territory listed in the Schedule to the Adoption (Recognition of Overseas Adoptions) Order 2013 from 3 January 2014 and to the Adoption (Designation of Overseas Adoptions) Order 1973 for adoptions made from 1 February 1973 to 2 January 2014. These state that such adoptions must not be a Hague Convention, customary or common law adoption. This change is the underlying factor in this appellant's appeal.
 - (iii) An adoption recognised by the law of England and Wales and effected under the law of any other country. The inherent jurisdiction invoked to recognise foreign adoptions is described in detail by Sir James Munby President in *N (A Child), Re* [2016] EWHC 3085 (Fam). We only attempt a summary: the adoptive parents must have been domiciled in the foreign country at the time of the foreign adoption; the child must have been legally adopted in accordance with the requirements of the foreign law; the foreign adoption must in substance have the same essential characteristics as an English adoption and there must be no reason in public policy for refusing recognition.

The prohibition upon entry on those whose adoptions are not recognised in the UK

9. Where an adoption carried out in accordance with the law and customs of a foreign country is not so recognised, there is a prohibition in bringing the child into the UK except where the Immigration Rules make other provision.
10. The prohibition is found in s. 83 of the Adoption and Children Act:

83 Restriction on bringing children in

- (1) This section applies where a person who is habitually resident in the British Islands (the “British resident”) –
- (a) brings, or causes another to bring, a child who is habitually resident outside the British Islands into the United Kingdom for the purpose of adoption by the British resident, or
 - (b) at any time brings, or causes another to bring, into the United Kingdom a child adopted by the British resident under an external adoption effected within the period of twelve months ending with that time.

The references to adoption, or to a child adopted, by the British resident include a reference to adoption, or to a child adopted, by the British resident and another person.

11. In Scotland the prohibition is found in s. 58 of the Adoption and Children (Scotland) Act 2007 and in Northern Ireland by NI SI 144 regs 3 and 4.
12. By virtue of s.83(2) of the Adoption and Children Act where it is intended the child is to be adopted under a Hague Convention adoption, the prohibition contained within s. 83(1) is expressly excluded. However, the prohibition *does* apply to all ‘external adoptions’ – defined as an adoption other than a Convention adoption of a child effected under the law of any country or territory outside the British Islands, whether or not the adoption is an adoption within the meaning of ACA Chapter 4 (that is a recognised or ‘overseas adoption’) or a full adoption (within the meaning of section 88(3) – that is an adoption by virtue of which the child is treated in law as not being the child of any person other than the adopter(s).)

The exception to the prohibition

13. The Act envisages its provisions being implemented by Regulations which may require a person intending to bring, or to cause another to bring, a child into the United Kingdom (a) to apply to an adoption agency (including a Scottish or Northern Irish adoption agency) in the prescribed manner for an assessment of his suitability to adopt the child, and (b) to give the adoption agency any information it may require for the purpose of the assessment.
14. The Regulations may require prescribed conditions to be met. The principal condition with which we are concerned is the condition to produce a certification from the Secretary of State from the Department for Education (DfE) or, in Scotland, from the Scottish Ministers.
15. It is a striking feature of the scheme created by these provisions that an individual who does not comply with the requirements to engage an adoption agency for a suitability assessment or with conditions imposed under sub-s. (5) commits a criminal offence punishable summarily or on indictment.

16. It is important to note at this stage that the Home Office in its capacity to regulate the entry of non-nationals in to the UK is not yet involved.

The Immigration Rules

17. The current version of paragraph 309B – which HC 667 states applies to all applications made on or after 24 November 2016 - is in these terms:

'309B. Inter-country adoptions may be subject to section 83 of the Adoption and Children Act 2002 or the equivalent legislation in Scotland or Northern Ireland if the adopter's habitual residence is there. Where this is the case, a letter obtained from the Department for Education (England and Wales habitual residents) or the equivalent from the relevant central authority (Scotland or Northern Ireland habitual residents) confirming the issue of a Certificate of Eligibility must be provided with any entry clearance adoption application under paragraphs 310-316C.'

18. The version of 309B applying to paragraphs 310 or 316A entry applications prior to 24 November 2016 - and thus to the appellant TY - is in these terms:

'309B. Inter-country adoptions which are not a *de facto* adoption under paragraph 309A are subject to the Adoption and Children Act 2002 and the Adoptions with a Foreign Element Regulations 2005. As such all prospective adopters must be assessed as suitable to adopt by a competent authority in the UK, and obtain a Certificate of Eligibility from the Department for Education, before travelling abroad to identify a child for adoption. This Certificate of Eligibility must be provided with all entry clearance adoption applications under paragraphs 310-316F.'

19. The exceptions to the prohibition are found in the Immigration Rules which make provision for adopted and adoptive children entering for settlement with their settled parents or entering with temporary leave to await the outcome of an adoption order by a British court or a partner parent's qualification for settlement. These provisions are found in the Immigration Rules, paras 309A - 316F. The Rules make provision for the entry and stay of children adopted via Hague Convention and 'overseas adoptions' as well as for those termed '*de facto*' adoptions. *De facto* adoptions take effect for immigration law purposes but are not adoptions under United Kingdom family law and the *de facto* parents will not have parental responsibility for the children under family law on entry and will need to obtain a family order to have such parental responsibility rights and responsibilities.
20. The Immigration Rules, Part 8, Family Members, contain the Home Office provisions that reflect the statutory framework set out in the Adoption and Children Act. Paragraphs 297 to 316F concern children.
21. The more familiar provisions are found in paragraph 297 which, in general, permit a person settled in the UK to seek entry clearance or leave to remain to their minor, dependent child if both parents are settled or being settled in the United Kingdom or where one parent, settled or being settled, has sole

responsibility for the child. The provisions are designed to avoid recourse to public funds in both forms. However, paragraph 297 is not limited to parents and their children but also permits *a relative* to apply for a child to join them in the UK within the terms of paragraph 297 (i) (f):

‘[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 and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made to the child’s care’

22. It hardly needs be said that the ‘*serious and compelling family or other considerations*’ presents a high threshold for those parents or relatives who seek to meet the requirements of paragraph 297. For our purposes, we are, of course, considering the situation of a relative. The purpose of making reference to paragraph 297 is because it was through the mechanism of this provision that the First-tier Tribunal Judge came to determine the appeal and to dismiss it.
23. In contrast, the provisions relating to adoptions which are not otherwise recognised in the United Kingdom is through the operation of paragraph 316A:

Requirements for limited leave to enter the United Kingdom with a view to settlement as a child for adoption

316A. The requirements to be satisfied in the case of a child seeking limited leave to enter the United Kingdom for the purpose of being adopted (which, for the avoidance of doubt, does not include a *de facto* adoption) in the United Kingdom are that he:

(i) is seeking limited leave to enter to accompany or join a person or persons who wish to adopt him in the United Kingdom (the “prospective parent(s)”), in one of the following circumstances:

...

(f) one prospective parent is present and settled in the United Kingdom or is being admitted for settlement on the same occasion that the child is seeking admission, and has had sole responsibility for the child’s upbringing; ...

and

(ii) is under the age of 18; and

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

(iv) can, and will, be maintained and accommodated adequately without recourse to public funds in accommodation which the prospective parent or parents own or occupy exclusively; and

(v) will have the same rights and obligations as any other child of the marriage or civil partnership; and

(vi) is being adopted due to the inability of the original parent(s) or current carer(s) (or those looking after him immediately prior to him being physically transferred to his prospective parent or parents) to care for him, and there has been a genuine transfer of parental responsibility to the prospective parent or parents; and

(vii) has lost or broken or intends to lose or break his ties with his family of origin; and

(viii) will be adopted in the United Kingdom by his prospective parent or parents in accordance with the law relating to adoption in the United Kingdom, but the proposed adoption is not one of convenience arranged to facilitate his admission to the United Kingdom.

Limited leave to enter the United Kingdom with a view to settlement as a child for adoption

316B. A person seeking limited leave to enter the United Kingdom with a view to settlement as a child for adoption may be admitted for a period not exceeding 24 months provided he is able, on arrival, to produce to the Immigration Officer a valid passport or other identity document and has entry clearance for entry in this capacity.

The Entry Clearance Officer's decision

24. As will have become immediately apparent, the paragraph 297 threshold (*'serious and compelling family or other considerations which make exclusion of the child undesirable'*) is lacking and there is, instead, the alternative requirements of the appellant/sponsor establishing (a) the inability of the current carer to care for him, (b) the genuine transfer of parental responsibility to the prospective parent or parents (c) the breaking of ties with his family of origin and (d) the prospective adoption in the United Kingdom in accordance with the law relating to adoption in the United Kingdom, (an adoption of convenience being excluded).
25. The Entry Clearance Officer refused entry clearance to the appellant on the grounds that
 - (a) there was no evidence to connect the appellant as the son of the deceased [DM];
 - (b) there was no evidence to show that the appellant's grandmother was unable to provide for his care;
 - (c) there was no evidence to show that the appellant's father consented to his adoption.
26. It is apparent that each of those challenges has been successfully refuted by the appellant. The birth certificates of the appellant's and his mother, [DM], as well as that of the sponsor, [CM] were before the First-tier Tribunal Judge. A medical report was provided in evidence before the First-tier Tribunal Judge. A letter from Jamaica's Child Development Agency dated 30 January 2013 confirmed that the father consented to the adoption and the police report dated 12 June 2017 confirmed that the father was missing, efforts to locate him were futile and the investigation into his disappearance is continuing. Ms Cronin noted that as the father was not named on the appellant's birth certificate, he does not have parental responsibility under English family law. His consent to the English adoption is not, therefore, required.

27. The documentary evidence before the First-tier Tribunal Judge established the appellant countered each of the Entry Clearance Officer's stated reasons for refusal.
28. [CM] began the adoption process in 2011 when the appellant was 12 (and, at which time, Jamaica was on the designated list made under the 1973 Adoption Order); first in the UK where, after a detailed home study report and adoption agency panel decision, the DfE approved and certified her adoption proposal on 4 March 2014; then in Jamaica where the appellant's father consented to the adoption on or about 30 January 2013 and, after repeated home study investigations, the Spanish Town magistrate's court made the adoption order on 16 December 2014. According to Jamaican law, [CM] is the appellant's parent. In English law she is not his parent as the adoption is not an 'overseas adoption' and thus is not recognised. This, as we have pointed out, is the combined effect of the Adoption and Children Act 2002 and the Adoption (Recognition of Overseas Adoptions) Order 2013.
29. The evidence presented was that his grandmother carer was medically unfit and unable to continue his care; the grandmother's poor health and disability was confirmed by the Chief Medical Officer at the SMN Medical centre, Dr Nesbeth who stated that the appellant's 74 year-old grandmother is 'a known diabetic and hypertensive'; has had a stroke which has left her 'partially paralysed'; her speech is slurred, her memory 'very poor' and 'she is not cognizant or coherent enough to care, monitor or supervise a teenage boy'. The doctor stated that the grandmother herself requires a carer - *'that she can no longer care for anyone, especially a teenage boy who needs guidance and supervision'*.
30. [CM] was the appellant's sole carer; she spoke to him each day; checked on his homework; supported him financially and sent him food and clothes. This is the effect of the answers she gave in interview, prior to the refusal, on 26 June 2015. She gave details concerning her immigration history, her and the appellant's family circumstances and the appellant's schooling. She talks to him each day about 'his homework and things like that'; sends money (£100 or £200) each month for the appellant and food and clothing barrels at least twice a year. This evidence was not contested by the Entry Clearance Officer, Entry Clearance Manager or the Presenting Officer or First-tier Tribunal Judge on appeal.
31. The appellant's siblings had shown no interest in him and had taken no steps to assume responsibility towards him.

The error of law

32. The error in the First-tier Tribunal Judge's determination was his failure to apply the effect of the Adoption and Children Act 2002 and the process of re-adoption in the United Kingdom which is permissible pursuant to the Adoptions with a Foreign Element Regulations 2005 and paragraph 309B of the Immigration Rules. It is not altogether surprising that the judge fell into this error and the purpose of this determination is to set out the relevant provisions

in order to provide these provisions with a greater currency. In particular, the First-tier Tribunal judge confused the very distinctive roles played by paragraphs 310 and 316A of the Immigration Rules. The sponsor had been vetted and approved as the applicant's adopter by the accredited adoption agency, the British Association of Adoption and Fostering (BAAF), and the Department for Education.

33. The error was compounded by the unfortunate submission made by counsel appearing on behalf of the appellant that the appellant did not meet the requirements of paragraph 316A. Whilst this renders the determination of the First-tier Tribunal Judge readily understandable, it does not render it lawful, since Counsel's concession cannot obviate the judge's duty to apply the law correctly, wittingly or unwittingly. The concession does not, of course, bind either Ms Cronin or the Upper Tribunal.

The significance of the Regulations

34. A major plank of the submissions made by Ms Cronin is the weight to be attached to the assessment provided by the approved and accredited United Kingdom adoption agency which is the cornerstone of the Secretary of State's Certificate of Eligibility. The report itself (the BAAF Home Study report) was and remains confidential to the adoption proceedings. It was not, and will not, be made available to the Tribunal. However, its positive conclusion resulted in the DfE's Certificate of Eligibility. More importantly, as the report is directed towards an assessment of the suitability of the sponsor to adopt the appellant, weight has to be given to the inference that the proposed adopter is suitable. This will be a factor in the consideration of whether adoption is in the child's best interests.
35. It is for this reason that the process of checks and requirements merits consideration. We have set out the relevant provisions in the Adoptions with a Foreign Element Regulations 2005/392, as an annex to this determination. It is only necessary to provide a brief summary of their contents. Pursuant to reg. 4, prior to the child's entry into the United Kingdom, the prospective adopter must, before visiting the child in her country of origin, notify the adoption agency of the details of the child to be adopted; visit the child; provide the adoption agency with any information and reports received from the relevant country of origin, both before and after, the visit; have discussions with the adoption agency and must accompany the child on entering the United Kingdom. It is easy to see why these steps are deemed necessary. These are requirements imposed upon the prospective adopter.
36. There are also requirements imposed upon the adoption agency, including the writing of the report. These are found in the Adoption Agencies Regulations 2005/389 (as amended) which are also reproduced in the Appendix. The agency must also obtain a written report from a registered medical practitioner about the health of the prospective adopter, obtain written reports of each of the

statutory interviews with persons nominated by the prospective adopter to provide personal references, contact the local authority for information about the prospective adopter which may be relevant to his suitability and, if the agency considers it necessary, obtain personal references from the prospective adopter's former spouse, civil partner or partner.

37. The agency's written plan, written in consultation with the prospective adopter, must map out the procedure for assessing the prospective adopter's suitability. The detailed contents of the report are set out in reg. 30. This material is then conveyed to the adoption panel whose function is to make a recommendation to the agency as to whether the prospective adopter is suitable to adopt a child. In considering what recommendation to make, the adoption panel may request additional relevant information from the adoption agency and obtain legal advice. Before making any recommendation, the adoption panel must invite the prospective adopter to attend a meeting of the panel. There is scope for the prospective adopter to apply to the Secretary of State for a review by an independent review panel.
38. Once this procedure has been followed, and the adoption agency has received the panel's recommendation that a prospective adopter is suitable, the material is then sent to the Secretary of State including the record of the proceedings of the adoption panel, its recommendation and the reasons for its recommendation and, where there has been a review, the relevant material generated by that review.
39. There are also provisions within the regulations imposing a requirement to provide counselling, information and suitable preparation for the adoption. The preparation includes the provision of information to the prospective adopter about a range of material considerations and skills which are necessary for an adoptive parent.
40. In Scotland, the Adoption (Recognition of Overseas Adoptions) (Scotland) Regulations 2013 and the Adoption and Children (Scotland) Act 2007 provide that, if approved by the adoption agency, the application and supporting documents are passed to the Scottish government's Intercountry Adoption (ICA) team which checks that the material complies with the relevant United Kingdom, Scottish and adoptee's home country legislation. The application will then be sent to an independent social worker to ensure that the 'Home Study' assessment has been carried out properly. Once the application is deemed complete and all supporting documents are in place, the ICA team, acting on behalf of Scottish ministers, attaches a Certificate of Eligibility to the prospective adopters.
41. This summary of the detailed regulations imposed upon the prospective adopters, the accredited adoption agency, the adoption panel and those involved in preparing the case for the Certificate of Eligibility demonstrate the nature and scope of the enquiries made and the decision-making process of the

adoption agency. The Certificate of Eligibility must be seen as the definitive outcome of that process which exceeds the ability of either the Home Office or the Immigration and Asylum Tribunal to form its own judgement upon the matters which are the subject matter of the report from the adoption agency and the Certificate of Eligibility.

The interface between the law of adoption and the Immigration Rules

42. Nevertheless, paragraph 316A imposes yet further requirements which may not be the same considerations as the adoption agency or the DfE is required to assess. It is, however, very likely that the requirements of the Immigration Rules have been touched upon in the adoption panel's assessment. For example, sub-paragraph (viii) of paragraph 316A requires that the appellant will be adopted in the United Kingdom in accordance with the law relating to adoption in the United Kingdom which must necessarily include the work of the adoption agency and the DfE. Further, in the same sub-paragraph, an adoption of '*convenience arranged to facilitate the child's admission to the United Kingdom*' is prohibited. However, it seems unlikely that the assessments made by the agency and the adoption panel will not have considered whether the adoption is genuine and not one of convenience.
43. Similarly, the requirement in paragraph 316A(vi) that the adoption is due to the inability of the original parent or carer to care for the child and, therefore, a genuine transfer of parental responsibility to the prospective adopter is likely to have featured in the adoption agency's report on suitability and the Certificate of Eligibility.

'has... broken his ties... with his family of origin'

44. We note that the requirement in paragraph 316A(vii) that the child '*has lost or broken or intends to lose or break his ties with his family of origin*' will be most readily apparent when it is intended that his family of origin cease to have contact with him. However, we would not construe this as requiring a complete cessation of contact. In a case such as this, where the grandmother is incapable of looking after her teenage grandson, it is inconceivable that this should require her to have no further contact. Similarly, whilst the child's adult siblings are not participating in his up-bringing, we do not regard it as necessary to establish that the ties of kinship must be broken completely before entry clearance will be permitted. The words of paragraph 316A(vii) must therefore be read as envisaging the breaking-off of the existing arrangements for the child's care. The expression '*has lost or broken or intends to lose or break his ties with his family of origin*' contemplates a fundamental change in the arrangements for the child's care so as to exclude a situation where the existing arrangements will continue in practice as before but with only a nominal alteration effected by the adoption. However, it must be construed purposively so as not to defeat the aim of the law relating to adoption and the Immigration Rules which contemplate the grant of entry clearance for the purpose of adoption.

45. The above is consistent with, and derived from, the decision of the Immigration and Asylum Tribunal in *VB v Entry Clearance Officer, Ghana* [2002]UKIAT 1323, a decision of its then President, Collins J, paras. 13 to 15.

Our re-evaluation of the First-tier Tribunal's determination

46. In his determination, the First-tier Tribunal Judge commenced his findings by stating in paragraph 10:

“In submissions the appellant’s representatives accepted that the appellant could not meet the requirements of paragraph 316A. The appellant has not disputed that the adoption in Jamaica is not recognised in the UK under the 2013 Order. The current version of the Order still does not include Jamaica, and adoption orders in Jamaica remain unrecognised in the UK. Similarly Jamaica is not a party to the Hague Convention which is a requirement of paragraph 316, through the application of paragraph 316D. I find that the appellant does not reach the requirements of paragraph 316A, as he is already subject to an adoption order which is not recognised under the 2013 Order and from a country which is not party to the Hague Convention.”

47. This paragraph displays a misunderstanding of the circumstances in which a child may be admitted to the United Kingdom for the purposes of adoption. It is, of course, true that Jamaica was not and is not a party to the Hague Convention. It is also true that the adoption affected by [CM] in accordance with Jamaican law is not an ‘overseas adoption’ recognised by the United Kingdom. The fact that such an adoption has taken place, however, does not operate as a bar to the appellant satisfying the requirements of paragraph 316A which was the reason advanced by the judge for stating that the requirements of paragraph 316A were not met.
48. It is also clear that, as the judge records in paragraph 11 of the determination, the submissions made by the appellant’s representative that the arrangement with the sponsor amounted to a *de facto* adoption were also misplaced.
49. Further, the judge appears to have misunderstood the significance the assessment made by the adoption agency. In paragraph 8 of the determination, the judge records:
- “The sponsor had to complete a Home Study and had to be assessed in the UK by a UK social worker with her suitability to adopt. The findings of the UK social worker were then sent to the overseas country as part of the adoption process [in Jamaica] ...”
50. We consider that this suggests the First-tier Tribunal considered the accredited UK adoption agency’s function was to provide evidence in support of the Jamaican adoption. The Judge did not, therefore, engage with the process under which the adoption agencies report was directed towards the UK government through the medium of the DfE certifying [CM] as eligible to adopt the appellant.

51. For the reasons we have stated, whilst it is understandable why the First-tier Tribunal Judge was confused as to the relevance of the adoption agency's report and the Certificate of Eligibility since these matters were not brought to her attention, this does not operate to prevent the determination being legally flawed. Inevitably, once the requirements of the Immigration Rules had not, according to the First-tier Tribunal, been met, the Article 8 claim was bound to fail.

The Rule 24 response

52. It is, perhaps regrettable that the misunderstanding has gone beyond the First-tier Tribunal. In the Rule 24 response, the Specialist Appeals Team opposed the appellant's appeal. The response pointed out that the judge was guided by the legal submissions of the appellant's representative, the judge having been informed that the appellant conceded his case under paragraph 316A. It further alleges that the Judge was bound to accept such a submission and not go behind it. We reject that submission. It is of course for the Judge to apply the law and the concession made as to the law applicable under paragraph 316A was legally flawed. Such a legal flaw as this cannot be remedied by concession.
53. The response makes a further serious error. The writer states:
- “Whilst the judge's findings related to the matters under paragraph 309B and 310 of the Immigration Rules, these were essentially concerned with the same issue and that was the serious and compelling family circumstances (namely whether the grandmother's state of health, lack of parents and lack of interest from his siblings), which make exclusion undesirable.... Although under a different provision, the judge took into account all of the circumstances of the appellant including the grandmother's health, the existence of close relatives in Jamaica, the lack of evidence to suggest efforts were made with siblings to take a role in the appellant's care and upbringing.”
54. In our judgement, the determination was fatally flawed by applying the incorrect - and different - part of the Rules. Paragraph 316A is not '*essentially concerned*' with the same issue at all. It is *not* concerned with serious and compelling family circumstances making exclusion undesirable.
55. Based on what we consider to be an unlawful approach adopted by the Secretary of State in the Rule 24 response, it is unsurprising that the respondent adopted the judge's finding that there was no interference with family life as it would continue on the same basis that it has since its inception.

What was the intended outcome?

56. We are bound to question what the Secretary of State and the First-tier Tribunal considered to be the proper and suitable outcome. It appears to have been contemplated that the child should remain with his partially paralysed

grandmother whose inability to look after him was not challenged. Assuming that it was not considered appropriate that the appellant should become feral, the underlying assumption must be that the child should live with one or other of his adult siblings, none of whom had, on the evidence, taken steps to assume any responsibility towards him, two of whom were his elder brothers aged 26 and 24 and two of whom were his elder sisters whose circumstances had neither been examined nor the subject of any evidence. We consider that such a dismal outcome should at least have sounded alarm-bells.

57. Thankfully, Mr Duffy did not take the same view as that adopted in the Rule 24 response. He did not materially challenge the submissions made by Ms Cronin. In these circumstances, we conclude that the First-tier Tribunal made a material error of law and that its determination should be set aside. We re-make the decision allowing the appeal of TY by our finding that the appellant met the requirements of the Immigration Rules. We consider that a decision made by the respondent that runs counter to the Immigration Rules in the circumstances of this appeal engages Article 8 and amounts to a breach of it, see for example *Singh v Entry Clearance Officer New Delhi* [2004] EWCA Civ 1075 and *Ahmadi & Anor, R (on the application of) v Secretary of State for the Home Department* [2005] EWCA Civ 1721 in which the Courts have found family life to exist as between prospective adopters and adoptive children and that the obligation to respect family life requires not only that a State refrains from interfering with existing family life but may also entails a positive obligation to permit family life to develop.

The re-making of the decision

58. We conclude:
- (i) The Tribunal should be aware of the underlying legal process in each part of the Kingdom by which a Certificate of Eligibility is issued.
 - (ii) The Certificate of Eligibility is the definitive outcome of the fact-finding and assessment that underlies it.
 - (iii) Whilst there is no exact correlation between the requirements that are to be met in the law of adoption and the requirements to be met under the Immigration Rules in order for a minor to be admitted for the purposes of adoption, they ought properly to be seen as a unified whole where each plays its part in determining whether entry clearance should be granted.
 - (iv) The Certificate of Eligibility is capable of informing the decision to be made on the application for entry clearance. In particular, the Immigration and Asylum Chamber should be slow to depart from the underlying circumstances (insofar as they can reasonably be ascertained) which are the subject-matter of the Certificate of Eligibility.

59. We are satisfied that all of the requirements of paragraph 316A have been met. There has never been an issue as to many of them. Thus, the requirements of age, dependency and the absence of any recourse to public funds have each been met. We are also satisfied that the evidence fully established [CM] having sole responsibility because of the grandmother's inability to provide appropriate care for TY. The process adopted by [CM] has been a genuine transfer of responsibility in circumstances where there has been, and is intended that there will be, a fundamental change in the ties with the appellant's family of origin, notwithstanding the fact that members of his family are not expected to sever their links with him. The legal process adopted by [CM] has carefully followed the law relating to adoption in the United Kingdom. The adoption is the result of the circumstances in which TY now finds himself in Jamaica and is not an artificial device to facilitate admission. Accordingly, we allow the appeal under Article 8.
60. If much of the contents of this determination appears to have striking similarities with the contents of Ms Cronin's written submissions as they appear in her note to the Tribunal, her skeleton argument and her grounds of appeal, this is not coincidental. We are indebted to the assistance she has provided in guiding the Tribunal through adoption law in the United Kingdom.

DECISION

1. The Judge made an error on a point of law and we re-make the decision in the following terms:
 - a. the appellant satisfies the requirements of the Immigration Rules;
 - b. accordingly, the appeal is allowed on human rights grounds.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL

Appendix

Adoptions with a Foreign Element Regulations 2005/392

3. Requirements applicable in respect of bringing or causing a child to be brought into the United Kingdom

A person intending to bring, or to cause another to bring, a child into the United Kingdom in circumstances where section 83(1) of the Act applies must-

- (a) apply in writing to an adoption agency for an assessment of his suitability to adopt a child; and
- (b) give the adoption agency any information it may require for the purpose of the assessment.¹

4. – Conditions applicable in respect of a child brought into the United Kingdom

(1) This regulation prescribes the conditions for the purposes of section 83(5) of the Act in respect of a child brought into the United Kingdom in circumstances where section 83 applies

(2) Prior to the child's entry into the United Kingdom, the prospective adopter must-

- (a) receive in writing, notification from the Secretary of State that she has issued a certificate confirming to the relevant foreign authority-
 - (i) that the person has been assessed and approved as eligible and suitable to be an adoptive parent in accordance with Part 4 of the Agencies Regulations or corresponding Welsh provision; and
 - (ii) that if entry clearance and leave to enter and remain, as may be necessary, is granted and not revoked or curtailed, and an adoption order is made or an overseas adoption is effected, the child will be authorised to enter and reside permanently in the United Kingdom;
- (b) before visiting the child in the State of origin-
 - (i) notify the adoption agency of the details of the child to be adopted;
 - (ii) provide the adoption agency with any information and reports received from the relevant foreign authority; and
 - (iii) [discuss with the adoption agency the proposed adoption and information received from the relevant foreign authority;
- (c) visit the child in the State of origin (and where the prospective adopters are a couple each of them); and
- (d) after that visit-
 - (i) confirm in writing to the adoption agency that he has done so and wishes to proceed with the adoption;
 - (ii) provide the adoption agency with any additional reports and information received on or after that visit; and

(iii) notify the adoption agency of his expected date of entry into the United Kingdom with the child.

(3) The prospective adopter must accompany the child on entering the United Kingdom unless, in the case of a couple, the adoption agency and the relevant foreign authority have agreed that it is necessary for only one of them to do so.

(4) Except where an overseas adoption is or is to be effected, the prospective adopter must within the period of 14 days beginning with the date on which the child is brought into the United Kingdom give notice to the relevant local authority–

(a) of the child's arrival in the United Kingdom; and

(b) of his intention–

(i) to apply for an adoption order in accordance with section 44(2) of the Act; or

(ii) not to give the child a home.

(5) In a case where a prospective adopter has given notice in accordance with paragraph (4) and subsequently moves his home into the area of another local authority, he must within 14 days of that move confirm in writing to that authority, the child's entry into the United Kingdom and that notice of his intention–

(a) to apply for an adoption order in accordance with section 44(2) of the Act has been given to another local authority; or

(b) not to give the child a home, has been given.

Note 1 - Regulation 34 of the Agencies Regulations and corresponding Welsh provision impose additional functions on the adoption agency in relation to a case where section 83 applies. (see below)

Note 2 This text is that same as that Adoptions with a Foreign Element (Scotland) Amendment Regulations 2010/173 (Scottish SI) reg 4 save that this provision has an additional clause stating that (6) - In this regulation, “entry clearance” has the same meaning as in the Immigration Act 1971

Adoption Agencies Regulations 2005/389 (as amended)

Duties of Adoption Agency in Respect of a Prospective Adopter

Stage 1 - the pre-assessment process

21. Registration of interest in adoption

Regulations 22 to 27 apply when a person has notified an adoption agency that they want to adopt a child and the agency has notified that person that it has decided to proceed with the pre-assessment process in respect of that person.

22. Prospective adopter stage one plan

The adoption agency must prepare a written plan in consultation with the prospective adopter (“the prospective adopter stage one plan”) which includes the following matters –

- (a) information about the counselling, information and preparation for adoption to be provided under regulation 24;
- (b) the procedure for carrying out police checks under regulation 25;
- (c) details of any training that the prospective adopter has agreed to undertake;
- (d) information about the role of the prospective adopter in the stage one process;
- (e) any applicable timescales;
- (f) information about the process for making a representation (including a complaint) under the 1989 Regulations; and
- (g) any other information that the agency considers relevant.

23. – Prospective adopter's case record

- (1) The adoption agency must set up a case record in respect of the prospective adopter (“the prospective adopter's case record”) and place on that case record –
 - (a) the prospective adopter stage one plan;
 - (b) the information and reports obtained by the agency by virtue of this Part;
 - (c) the prospective adopter assessment plan;
 - (d) the prospective adopter's report and the prospective adopter's observations on that report;
 - (e) the written record of the proceedings of the adoption panel under regulation 30A (and where applicable regulation 30B(8)), its recommendation, the reasons for the recommendation and any advice given by the panel to the agency;
 - (f) the record of the agency's decision under regulation 30B(1), (6) or as the case may be (9);
 - (g) where the prospective adopter applied to the Secretary of State for a review by an independent review panel the recommendation of that review panel;
 - (h) where applicable, the prospective adopter's review report and the prospective adopter's observations on that report;
 - (i) the prospective adopter matching plan; and
 - (j) any other documents or information obtained by the agency which it considers should be included in that case record.
- (2) The adoption agency may ask the prospective adopter to provide any further information the agency may reasonably require.

24. – Requirement to provide counselling, information and preparation for adoption

- (1) The adoption agency must –
 - (a) provide a counselling service for the prospective adopter;
 - (b) in a section 83 case, explain to the prospective adopter, and provide written information about, the procedure in relation to, and the legal implications of,

adopting a child from the country from which the prospective adopter wishes to adopt;

(c) in any other case, explain to the prospective adopter, and provide written information about, the procedure in relation to, and the legal implications of, placement for adoption and adoption;

(d) provide the prospective adopter with any information and any training materials relating to adopting a child available for use; and

(e) make arrangements for the prospective adopter to receive such preparation for adoption as the agency considers appropriate.

(2) In paragraph (1)(e) "*preparation for adoption*" includes the provision of information to the prospective adopter about –

(a) the age range, sex, likely needs and background of children who may be placed for adoption by the adoption agency;

(b) the significance of adoption for a child and the child's family;

(c) contact between a child and the child's parent or guardian or other relatives where a child is authorised to be placed for adoption or is adopted;

(d) the skills which are necessary for an adoptive parent;

(e) the adoption agency's procedures in relation to the assessment of a prospective adopter and the placement of a child for adoption; and

(f) the procedure in relation to placement for adoption and adoption.

25. – Requirement to carry out police checks

(1) In respect of the prospective adopter and any other member of the prospective adopter's household who is aged 18 or over, the adoption agency must obtain an enhanced criminal record certificate issued under section 113B of the Police Act 1997 ¹ which includes suitability information relating to children (within the meaning of section 113BA(2) of that Act).

(2) An adoption agency may not consider a person suitable to adopt a child if that person or any member of that person's household aged 18 or over –

(a) has been convicted of a specified offence committed at the age of 18 or over; or

(b) has been cautioned by a constable in respect of any such offence which, at the time the caution was given, was admitted.

(3) In paragraph (2) "*specified offence*" means –

(a) an offence against a child;

(b) an offence specified in Part 1 of Schedule 3;

(c) an offence contrary to section 170 of the Customs and Excise Management Act 1979 in relation to goods prohibited to be imported under section 42 of the Customs Consolidation Act 1876 (prohibitions and restrictions relating to pornography) ² where the prohibited goods included indecent photographs of children under the age of 16;

(d) any other offence involving bodily injury to a child, other than an offence of common assault or battery,

and the expression "*offence against a child*" has the meaning given to it by section 26(1) of the Criminal Justice and Courts Services Act 2000³ except that it does not include an offence contrary to section 9 of the Sexual Offences Act 2003 (sexual activity with a child)⁴ in a case where the offender was under the age of 20 and the child was 13 or over at the time the offence was committed.

(4) An adoption agency may not consider a person suitable to adopt a child if that person or any member of that person's household aged 18 or over –

(a) has been convicted of an offence specified in paragraph 1 of Part 2 of Schedule 3 committed at the age of 18 or over or has been cautioned by a constable in respect of any such offence which, at the time the caution was given, was admitted; or

(b) falls within paragraph 2 or 3 of Part 2 of Schedule 3,

notwithstanding that the offences specified in Part 2 of Schedule 3 have been repealed.

(5) Where an adoption agency becomes aware that a prospective adopter or a member of the prospective adopter's household falls within paragraph (2) or (4), the agency must notify the prospective adopter as soon as possible in writing that they cannot be considered suitable to adopt a child.

26. Other pre-assessment information

The adoption agency must –

(a) obtain the information about the prospective adopter which is specified in Part 1 of Schedule 4;

(b) obtain a written report from a registered medical practitioner about the health of the prospective adopter following a full examination which must include the matters specified in Part 2 of Schedule 4 unless the agency has received advice from its medical adviser that such an examination and report is unnecessary;

(c) obtain a written report of each of the interviews with the persons nominated by the prospective adopter to provide personal references for the prospective adopter;

(d) where the adoption agency considers it necessary, obtain a personal reference from the prospective adopter's former spouse, civil partner or partner; and

(e) where it is not the local authority in whose area the prospective adopter has their home ascertain whether the local authority in whose area the prospective adopter has their home have any information about the prospective adopter which may be relevant to an assessment of the prospective adopter's suitability to adopt and if so obtain from that authority a written report setting out that information.

27. – Pre-assessment decision

(1) The adoption agency must, taking into account the information obtained under regulations 25 and 26, decide whether –

(a) the prospective adopter may be suitable to adopt a child; or

- (b) that the prospective adopter is not suitable to adopt a child.
- (2) Subject to paragraph (3), the agency must make its decision under paragraph (1) within a period of two months from the date on which the adoption agency notified the prospective adopter that they had decided to proceed with the pre-assessment process in accordance with regulation 21.
- (3) The adoption agency may delay making the decision under paragraph (1) –
 - (a) where it is satisfied there are good reasons because, for example, there has been a delay in obtaining information about the prospective adopter; or
 - (b) upon the request of the prospective adopter.
- (4) Where the adoption agency decides that the prospective adopter may be suitable to adopt a child the agency must –
 - (a) as soon as practicable, notify in writing the prospective adopter of its decision; and
 - (b) explain to the prospective adopter that they must notify the adoption agency that they wish to continue with the assessment process within six months of the date on which the notification is given.
- (5) Where the adoption agency decides that the prospective adopter is not suitable to adopt a child the agency must as soon as practicable after making the decision notify the prospective adopter in writing of its decision together with reasons for its decision.

Stage 2 - the assessment decision

28. – Stage 2 assessment

- (1) Regulations 28 to 30G apply where the prospective adopter notifies the adoption agency that they wish to continue with the assessment process within six months from the date on which the agency notified the prospective adopter that they may be suitable to adopt under regulation 27(4).
- (2) Where the prospective adopter notifies the adoption agency that they wish to continue with the assessment process more than six months from the date on which the agency notified the prospective adopter that they may be suitable to adopt under regulation 27(4), the agency must notify the prospective adopter in writing that the prospective adopter cannot proceed with the assessment process.

29. Prospective adopter assessment plan

The adoption agency must prepare a written plan in consultation with the prospective adopter (“the prospective adopter assessment plan”) which includes the following matters –

- (a) the procedure for assessing the prospective adopter's suitability to adopt a child;
- (b) any applicable timescales;

- (c) the arrangements for the prospective adopter to receive any additional counselling or preparation for adoption;
- (d) details of any training that the prospective adopter has agreed to undertake;
- (e) information about the role of the prospective adopter in the assessment process;
- (f) information about the process for submitting representations or applying to the Secretary of State for a review under regulation 30B(5)(c); and
- (g) any other matters which the agency considers relevant.

30.— Prospective adopter's report

- (1) The adoption agency must obtain the information about the prospective adopter which is specified in Part 3 of Schedule 4.
- (2) The adoption agency must prepare a written report (“the prospective adopter's report”) which includes —
 - (a) the information about the prospective adopter and the prospective adopter's family which is specified in Parts 1 and 3 of Schedule 4;
 - (b) a summary, written by the agency's medical adviser, of the state of health of the prospective adopter;
 - (c) any relevant information obtained by the agency under regulation 26(e);
 - (d) any observations of the agency on the matters referred to in regulations 24 and 25;
 - (e) the agency's assessment of the prospective adopter's suitability to adopt; and
 - (f) any other information which the agency considers relevant.
- (3) In a section 83 case, the prospective adopter's report must also include —
 - (a) the name of the country from which the prospective adopter wishes to adopt a child (“country of origin”);
 - (b) confirmation that the prospective adopter meets the eligibility requirements to adopt from the country of origin;
 - (c) any additional information obtained as a consequence of the requirements of the country of origin; and
 - (d) the agency's assessment of the prospective adopter's suitability to adopt a child who is habitually resident outside the British Islands.
- (4) Where the adoption agency receives information under paragraph (1) or other information in relation to the assessment of the prospective adopter and is of the opinion that the prospective adopter is unlikely to be considered suitable to adopt a child, it may prepare the prospective adopter's report under paragraph (2) notwithstanding that the agency may not have received all the information about the prospective adopter which may be required by this regulation.
- (5) The adoption agency must —

- (a) notify the prospective adopter that the prospective adopter's application is to be referred to the adoption panel;
 - (b) give the prospective adopter a copy of the prospective adopter's report;
 - (c) invite the prospective adopter to send any observations in writing to the agency within 5 working days, beginning with the date on which the notification is sent; and
 - (d) explain to the prospective adopter that the adoption agency may, in exceptional circumstances, extend the timescale referred to in paragraph (c) above.
- (6) At the end of the 5 working days referred to in paragraph (5)(c) (or, where that timescale is extended by the adoption agency, as soon as possible after the prospective adopter's observations are received) the adoption agency must send –
- (a) the prospective adopter's report and the prospective adopter's observations;
 - (b) the written reports and references referred to in regulation 26(b) to (e) but in the case of reports obtained in accordance with regulation 26(b), only if the agency's medical adviser advises it to do so; and
 - (c) any other relevant information obtained by the agency,
- to the adoption panel.
- (7) The adoption agency must obtain, so far as is reasonably practicable, any other relevant information which may be required by the adoption panel and send that information to the panel.

30A. – Function of the adoption panel

- (1) Subject to paragraphs (2) and (3), the adoption panel must consider the case of the prospective adopter referred to it by the adoption agency and make a recommendation to the agency as to whether the prospective adopter is suitable to adopt a child.
- (2) In considering what recommendation to make the adoption panel –
 - (a) must consider and take into account all the information and reports passed to it in accordance with regulation 30;
 - (b) may request the adoption agency to obtain any other relevant information which the panel considers necessary; and
 - (c) may obtain legal advice as it considers necessary in relation to the case.
- (3) In relation to the case of a prospective adopter in respect of whom a report has been prepared in accordance with regulation 30(4), the adoption panel must either –
 - (a) request the adoption agency to prepare a further prospective adopter's report, covering all the matters set out in regulation 30(2); or
 - (b) recommend that the prospective adopter is not suitable to adopt a child.
- (4) Where the adoption panel makes a recommendation to the adoption agency that the prospective adopter is suitable to adopt a child, the panel may consider and give advice to the agency about the number of children the prospective adopter may be suitable to adopt, their age range, sex and likely needs.

(5) Before making any recommendation, the adoption panel must invite the prospective adopter to attend a meeting of the panel.

30B. – Adoption agency decision and notification

(1) Subject to paragraph (2), the adoption agency must decide whether the prospective adopter is suitable to adopt a child within four months of the date on which the agency received the prospective adopter's notification that they wished to proceed with the assessment process.

(2) The adoption agency may delay making the decision under paragraph (1) –

(a) in a case where the adoption agency considers there are exceptional circumstances which mean it cannot make the decision within that time, or

(b) upon the request of the prospective adopter.

(3) No member of the adoption panel may take part in any decision made by the adoption agency under paragraph (1).

(4) Where the adoption agency decides to approve the prospective adopter as suitable to adopt a child, it must notify the prospective adopter in writing of its decision.

(5) Where the adoption agency considers that the prospective adopter is not suitable to adopt a child, it must –

(a) notify the prospective adopter in writing that it proposes not to approve the prospective adopter as suitable to adopt a child (“qualifying determination”);

(b) send with that notification its reasons together with a copy of the recommendation of the adoption panel if that recommendation is different; and

(c) advise the prospective adopter that within 40 working days beginning with the date on which the notification was sent the prospective adopter may –

(i) submit any representations the prospective adopter wishes to make to the agency; or

(ii) apply to the Secretary of State for a review by an independent review panel of the qualifying determination.

(6) If, within the period of 40 working days referred to in paragraph (5)(c), the prospective adopter has not made any representations or applied to the Secretary of State for a review by an independent review panel, the adoption agency must proceed to make its decision and notify the prospective adopter in writing of its decision together with reasons for that decision.

(7) If, within the period of 40 working days referred to in paragraph (5)(c), the adoption agency receives further representations from the prospective adopter, it may refer the case together with all relevant information to the adoption panel for further consideration.

(8) The adoption panel must consider any case referred to it under paragraph (7) and make a fresh recommendation to the adoption agency as to whether the prospective adopter is suitable to adopt a child.

(9) The adoption agency must make a decision on the case but –

(a) if the case has been referred to the adoption panel under paragraph (7), the agency must make the decision only after taking into account the recommendations of the adoption panel made under both paragraph (8) and regulation 30A; or

(b) if the prospective adopter has applied to the Secretary of State for a review by an independent review panel of the qualifying determination, the agency must make the decision only after taking into account the recommendation of the independent review panel and the recommendation of the adoption panel made under regulation 30A.

(10) As soon as possible after making its decision under paragraph (9), the adoption agency must notify the prospective adopter in writing of its decision stating its reasons for that decision if they do not consider the prospective adopter suitable to adopt a child, and of the adoption panel's recommendation under paragraph (8), if this is different from the agency's decision.

(11) In a case where an independent review panel has made a recommendation, the adoption agency must send to the Secretary of State a copy of the notification referred to in paragraph (10).