



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/21369/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 19 April 2018

Decision & Reasons Promulgated  
On 16 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

AED  
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

**Representation:**

For the Appellant: Mr. L. Kareem, Atlantic Solicitors

For the Respondent: Mr. D. Clarke, Home Office Presenting Officer

**DECISION AND REASONS**

1. Following my decision, promulgated on 6 March 2018, in which I set aside the decision of the First-tier Tribunal, the appeal came before me to be remade.
2. At the outset of the hearing I indicated that, in my consideration of Article 8, it would of course be necessary to consider the extent to which the Appellant met the requirements of the immigration rules. In the notice of decision the Respondent had stated that he was not satisfied that the Appellant met the requirements of paragraph

310(ix), (x) and (xi). There had been no consideration in the decision of the First-tier Tribunal of these aspects of paragraph 310.

3. In response, Mr. Kareem submitted that he intended to proceed by way of submissions only. He submitted that the Appellant met “the law”, as the adoption had been concluded by December 2013, given that the “2014 Act” was not retrospective. He proceeded to refer to a case from 2013 although he did not provide me with a copy, and he did not provide the full reference.
4. I had found in my error of law decision at [17] that the Judge in the First-tier Tribunal had not erred in finding that the Appellant did not meet the requirements of the immigration rules. I indicated to Mr. Kareem that I did not intend to reopen the issue of the certificate of eligibility which had been fully discussed at the error of law hearing.
5. However, following the hearing, in the interests of justice, I have carefully considered the entirety of the Appellant’s submissions on file as provided both in the First-tier Tribunal, at permission stage, and in the Upper Tribunal. If there is a case which straightforwardly concludes the issue of the necessity of the certificate of eligibility, I am surprised that I was not referred to it at the error of law hearing. Similarly I would have expected it to be relied on in the First-tier Tribunal. However, there is no reference to any such case. The letter accompanying the application dated 27 May 2016, which was provided again with the grounds of appeal before the First-tier Tribunal, stated that the Appellant’s adoption was a “de facto” adoption in any event, and made no submissions to the effect that the amendment to the rules did not apply to the Appellant.
6. In the grounds seeking permission to appeal against the decision of the First-tier Tribunal, it merely stated that a certificate of eligibility was not required with no reference to any caselaw. It stated that this was because a certificate of eligibility is not required for those adoptions recorded under the Adoption (Recognition of Overseas Adoptions) Order 2013 (the “2013 Order”). However, Nigeria is not listed in the Schedule to the 2013 Order, so irrespective of the date on which it came into force, it cannot have any application to the Appellant’s adoption, and the Appellant’s adoption cannot be one recorded under the 2013 Order. Further, an adoption is only an “overseas adoption” for the purposes of the 2013 Order if it is “effected ... after the coming into force of this Order”. The adoption took place before the 2013 Order came into effect. It is therefore difficult to understand the submission made in the grounds seeking permission to appeal.
7. Nigeria is listed in the schedule to the Adoption (Designation of Overseas Adoptions) Order 1973 (the “1973 Order”), and therefore up until the commencement of the 2013 Order which did not list Nigeria, an adoption from Nigeria would be recognised as an “overseas adoption”. As the Appellant’s adoption took place before then, subject to the other requirements being met, the adoption would have been recognised as an “overseas adoption”. However, as pointed out in the grant of permission to appeal,

“The grounds assert that it is not necessary for a certificate of eligibility to be required for adoptions which are “recorded” under the Adoption (Recognition of Overseas Adoptions) Order 2013. It does not follow however that such an adoption is not an inter-country adoption.” “Inter-country adoption” is the phrase used in the immigration rules.

8. I have been unable to find any caselaw which confirms that the Appellant was not required to provide a certificate of eligibility. In the circumstances, I proceed on the basis that, for the purposes of the Article 8 appeal, the Appellant has not met the requirements of the immigration rules, as set out in my error of law decision.
9. I stated at the hearing that I was surprised that Mr. Kareem was not calling the Sponsor to give evidence, especially as he had not provided any up-to-date documentary evidence, and I had to consider Article 8 as at the date of the hearing. The Sponsor was present, and I therefore suggested to him that it would be appropriate, and in the interests of justice, for the Sponsor to give oral evidence. Without it, I had no evidence of the human rights position as at the date of the hearing. The previous hearing was in September 2017, some seven months earlier, and the decision of the First-tier Tribunal had not considered Article 8 in any detail. Mr. Clarke had no objection to this, stating that he would simply be submitting, if she did not give evidence, that there was no up-to-date evidence on which a decision could be made.
10. Mr. Kareem proceeded to call the Sponsor to give evidence. She adopted the contents of her witness statement made for the hearing in the First-tier Tribunal dated 22 August 2017. I asked her whether she had brought any documents with her, and she replied that she had brought records of travel, receipts for nursery payment, and several photographs. No reference had been made to these by Mr. Kareem. I gave Mr. Clarke an opportunity to consider these. I have also taken into account the documents contained in the Appellant’s bundle provided for the hearing in the First-tier Tribunal (146 pages).
11. The burden of proof in this appeal lies on the Appellant to show that the decision is a breach of her rights, and/or those of the Sponsor, to a family life under Article 8. The standard of proof is the balance of probabilities.

### **Findings and conclusions**

12. I found the Sponsor to be an honest and credible witness who answered all questions put to her and was not evasive. Her evidence was consistent with the documentary evidence provided, both in the bundle, and that provided at the hearing. I accept that all elements of her evidence were not corroborated by documentary evidence, but I do not find that this damages the credibility of her evidence. I find that her evidence can be relied on.

*Immigration rules*

13. I have found above that there is no evidence before me to show that my conclusion at [17] of the error of law decision is wrong, and I find that the Appellant cannot meet the requirements of the rules as she has not provided a certificate of eligibility. It was not submitted before me that this was a “de facto” adoption.
14. Despite my raising at the start of the hearing that the Respondent had also refused the application under paragraph 310(ix), (x) and (xi), which had not been addressed in the decision of the First-tier Tribunal, no specific submissions were made by Mr. Kareem in relation to these aspects of the immigration rules.
15. In relation to paragraph 310(ix), (x) and (xi), I find that the Appellant was abandoned at birth. At page 22 of the Appellant’s bundle is a letter from the coordinator at the Unique Orphanage Home which states that the Appellant “was abandoned at a refuge sight (sic) on 1<sup>st</sup> of November 2013. She was picked up by the community and brought to Unique Orphanage Home, who immediately took the baby to social welfare office where she was fostered out to Mr. & Mrs. [PD] on 2<sup>nd</sup> of November, 2013 for proper caring.”
16. At page 23 of the bundle is an undertaking by the Sponsors made on 2 November 2013 in the magistrates court in Barnawa Kaduna in which the Sponsors undertook to care for the Appellant and bring her up as they would do a child of their own. At page 24 is a Form of Mandate dated 21 February 2014, which states that the Sponsors are mandated to care for the Appellant. It refers to the Appellant as having been abandoned.
17. At page 26 is a document dated 23 December 2013 from the Principal District Court of Kaduna State. This is the Adoption Order. Again it refers to the Appellant as having been abandoned. It states that the application, which is for legal authority for the guardianship and custody of the Appellant, is granted. I find, taking into account the evidence of the Sponsor in her statement, that it was not an adoption of convenience, and was not arranged to facilitate entry into the United Kingdom. I find that the Sponsor had been looking to adopt a child for some time, as shown by the letter at page 25 from the Social Welfare Office dated 6 December 2006 which indicates that the Sponsors had applied and been approved to foster in 2006.
18. No objection was taken by Mr. Clarke to this evidence. There has been no challenge to the genuineness of the adoption. The adoption order is referred to in the ECO decision, and there is no objection to it there. I find it corroborates the evidence of the Sponsor as set out at [10] of her witness statement regarding the circumstances in which the Appellant was adopted. I find that the Appellant meets the requirements of paragraph 310(ix), (x) and (xi).

19. I therefore find, when considering Article 8, that the Appellant has shown that, but for the failure to provide a certificate of eligibility, she meets the requirements of paragraph 310 of the immigration rules.

*Article 8 outside the immigration rules*

20. I have considered the Appellant's appeal under Article 8 outside the immigration rules in accordance with the case of Razgar [2004] UKHL 27. I find that the Appellant has a family life with the Sponsor sufficient to engage the operation of Article 8. I find that the Sponsor fostered the Appellant on 2 November 2013, one day after she was abandoned. I find that the Appellant was formally adopted by the Sponsor under two months later in December 2013. I find that the Sponsor has spent significant periods of time in Nigeria since then with the Appellant. I find that her husband has spent even longer periods of time in Nigeria caring for the Appellant. He was in Nigeria at the date of the hearing. I find that the Sponsor works, and so cannot spend all of her time in Nigeria with the Appellant. She maintains family life by visiting the Appellant and speaking to her on Facebook and Skype. While I have no corroborative evidence of her contact over Facebook or Skype, I accept her evidence of regular contact. I was also provided with a plethora of photographs showing the Appellant and Sponsor together at various stages of the Appellant's life. I find that the decision is an interference in their family life.
21. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.
22. In assessing the public interest I have taken into account all of my findings above in relation to the immigration rules. I have taken into account section 117B of the Nationality, Immigration and Asylum Act 2002. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest.
23. The only reason why I have found that the Appellant cannot satisfy the requirements of the immigration rules is due to the lack of a certificate of eligibility. Mr. Clarke submitted that without it, an assessment of best interests could not be done. However I do not find that this is the case. There is no requirement for such a certificate under the immigration rules for example in paragraph 297, when children are granted entry clearance to live with a parent with whom they may have spent very little time living in the same household. There is no suggestion in those cases that the Tribunal cannot carry out a best interests assessment.

24. I have also taken into account, when considering the lack of the certificate, the history of the Appellant's adoption. I find that the Sponsor had been trying to adopt a child since 2003 ([8] of her witness statement). Prior to this, owing to premature ovarian failure, she had tried to use one of her sister's eggs, but her sister had been refused entry clearance to the United Kingdom in order to donate.
25. The Sponsor and her husband were cleared by the authorities in Nigeria to adopt a child in December 2006 (see page 25). At the time, Nigeria was recognised under the 1973 Order. There was no requirement for a certificate of eligibility prior to seeking to adopt a child from Nigeria.
26. The Sponsor then had to wait almost seven years until she was able to adopt. Once she had fostered the Appellant, she adopted her in December 2013, shortly before the 2013 Order came into force. This did not list Nigeria as a country from which overseas adoptions would be recognised. However, at the date of the adoption, Nigeria was listed as a country from where adoptions would be recognised as "overseas adoptions" in the United Kingdom.
27. Having been cleared for adoption as long ago as December 2006 in Nigeria, and having adopted the Appellant in December 2013, the Sponsor did not obtain a certificate of eligibility to adopt as the Appellant had already been adopted. She had been cleared to adopt in Nigeria in 2006 when Nigeria was listed in the schedule to the 1973 Order.
28. I find that there was no requirement for the Sponsor's suitability to be assessed prior to the date of the adoption. The adoption of the Appellant took place at a time when Nigeria was listed as a country from where adoptions would be recognised by the United Kingdom without further requirements. There has been no attempt to circumvent the requirement for a certificate of eligibility, as there was no requirement for one when the adoption took place.
29. Further I find that, aside from the lack of certificate, there has been no issue raised as to the suitability of the Sponsors to adopt, either in the ECO decision, the ECM review, or by Mr. Clarke before me.
30. I find that the timing of the Appellant's adoption, and the subsequent amendment to the immigration rules requiring an assessment to be done prior to the adoption of a child from certain overseas countries, which by that time included Nigeria, constitutes exceptional circumstances. I find that the fact that the Sponsor does not have a certificate of eligibility in these circumstances is not fatal to the Appellant's Article 8 appeal.
31. I find that the best interests of the Appellant will be served by coming to live in the United Kingdom with the Sponsors, which was their intention all along by adopting her. Their intention since 2003 has been to extend their family by adopting a child. They adopted the Appellant who was abandoned at birth, and then taken to an

orphanage. The Respondent was satisfied that the Sponsor would be able to maintain and accommodate the Appellant. The Sponsor works as a nurse in the NHS.

32. I accept that there were some deficiencies in the evidence but, as stated above, I found the Sponsor to be an honest and credible witness. I attach no blame to her for the deficiencies in the evidence. She came to the hearing better prepared than her representatives, and any criticism I have regarding the lack of corroborative documentary evidence lies entirely with them.
33. In particular, I accept the Sponsor's evidence that her husband, [PD], the Appellant's father, spends the majority of his time in Nigeria in order that he can care for the Appellant. The Sponsor provided evidence at the hearing of his travel between Nigeria and the United Kingdom in the form of flight itineraries. She gave evidence that he spent from 15 October 2017 to 28 February 2018 in Nigeria. He returned to Nigeria in March and has been there ever since. She provided a letter from the Graceland Hagwop Hospital dated 20 April 2016 which confirms that the Appellant is registered with her father, [PD], at the hospital (page 18). She provided a letter from the Divine Grace Academy dated 10 February 2016 which attested that the Appellant was a pupil of the school, and was being taken care of by her father, [PD] (page 21). The Sponsor provided at the hearing receipts for payment for the Appellant's fees at the Divine Grace Academy, including the receipt for the first and second term of 2017/2018.
34. I find that the Sponsor and/or her husband have spent most of the Appellant's life with her in Nigeria. She is now four years old. I find that they have been doing this only because the applications for entry clearance for her have been refused. They applied for entry clearance for the Appellant soon after the adoption. That application was refused. They applied again, and it is this second refusal decision against which they have appealed. There was never any intention that the family move to Nigeria, but that the Appellant come to join the Sponsor in the United Kingdom, as she was entitled to. The Sponsor is a British citizen, working in the United Kingdom. Her son also lives here. When she and her husband started to look to adopt, he was a child. He is now 21 years old. The Sponsor was in Nigeria from 3 December 2017 until 9 February 2018. This was corroborated by the documents provided.
35. Taking into account all of the evidence, I find that the Appellant's best interests, which must be a primary concern, are best served by her coming to live with the Sponsor in the United Kingdom.
36. In relation to section 117B(2), I have no evidence of the Appellant's English language skills, but she is only a child, and the Respondent does not consider it necessary for children to be able to speak English, as there is no requirement in the immigration rules. In relation to financial independence, the Respondent was satisfied that the Appellant would be adequately maintained and accommodated (117B(3)). Although time has passed since that decision, and the Sponsor has given up her permanent employment, I find that this is due to the circumstances created by the refusal

decisions. She has given up full time employment in order to spend more time in Nigeria with the Appellant, but I find that she is still working when she is in the United Kingdom. I find that the Sponsor will be able to resume full time employment when the Appellant comes to the United Kingdom, and I find on the balance of probabilities that the Appellant will be maintained and accommodated without recourse to public funds. Sections 117B(4) to (6) are not relevant.

37. Taking into account all of the above, and giving particular weight to the best interests of the Appellant, to the fact that I have found that the Appellant meets the requirements of the immigration rules bar the requirement for a certificate of eligibility, which was not required when she was adopted, and taking into account the family circumstances, including the medical and adoption history, I find that the balance comes down in favour of the Appellant. I find that the decision is not proportionate. I find, in carrying out the balancing exercise required, that the Appellant has shown on the balance of probabilities that the decision is a breach of her rights, and those of her parents, the Sponsors, to a family life under Article 8 ECHR.
38. I continue the anonymity direction given the age of the Appellant.

### **Decision**

39. The appeal is allowed on human rights grounds, Article 8.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 11 May 2018

**Deputy Upper Tribunal Judge Chamberlain**



**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award. I have decided not to make a fee award. As I have set out above, the Sponsor was better prepared for the appeal hearing than her representatives. I have had to spend considerable time going back over the file to find the evidence given the lack of preparedness of her representative. No witness statement or up-to-date documentary evidence had been prepared by her representatives for the resumed hearing. While submitting only that the Appellant met the rules, he made no attempt in submissions to show how all of the Respondent's concerns were addressed by the evidence before me. In the circumstances, I make no fee award.

Signed

Date 11 May 2018

**Deputy Upper Tribunal Judge Chamberlain**