



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/25449/2016
HU/25450/2016

THE IMMIGRATION ACTS

Heard at Field House
On 11th June 2018

Decision & Reasons Promulgated
On 19th June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

ENTRY CLEARANCE OFFICER, SHEFFIELD

and

H.D.E

S.D.E

(ANONYMITY DIRECTION MADE)

Appellant

Respondents

Representation:

For the Appellant: Ms K. Pal, Senior Presenting Officer
For the Respondent: Mr M. Adophy, a Solicitor Advocate

DECISION AND REASONS

1. Although this is the Entry Clearance Officer's appeal, I shall refer to the parties by their original status before the First-tier Tribunal for ease of comprehension. The Entry Clearance Officer appeals against the decision of First-tier Tribunal Judge A.J.M. Baldwin allowing the Appellants' applications for settlement as the adopted daughters of their grandmother following the refusal of their applications for entry clearance

pursuant to paragraph 316A of the Immigration Rules and the refusal of entry clearance dated 22nd November 2017 made by the Entry Clearance Officer in Sheffield.

2. For ease of reference I will refer to the Entry Clearance Officer as the Respondent hereafter.
3. The decision of Judge Baldwin was promulgated on 2nd November 2017. The Respondent appealed against that decision and was granted permission to appeal by Designated First-tier Tribunal Judge Macdonald. The grounds upon which permission was granted may be summarised as follows:

“The grounds of application state that the judge failed to follow adoption legislation and in particular Section 83 of the Adoption and Children Act 2002. There was no evidence that the requirements had been complied with. While the judge gave clear reasons for allowing the appeals there may be arguable merit in the grounds for the reasons stated.”

4. I was provided with a Rule 24 response from Mr Adophy on behalf of the Appellants as was Ms Pal which was considered by all concerned before the hearing commenced.

Error of Law

5. At the close of submissions I indicated I would reserve my decision which I shall now give. I find that there is a material error of law in the decision such that it should be set aside. My reasons for so finding are as follows.
6. The Grounds of Appeal are somewhat sparse but it is worth setting them out in their entirety to make clear the nature of this challenge. Those grounds read as follows:

“It is respectfully submitted that the FtT has failed to follow adoption legislation governing the bringing of children into the UK, which applies to all prospective adopters who are habitually resident in the British Islands, whatever their nationality [23, 24]. This means that bringing a child into the UK where Section 83 of the Adoption and Children Act 2002 applies without complying with the relevant requirements, including being approved and assessed by a registered adoption agency, is a criminal offence. It is respectfully submitted that this is a case where Section 83 applies and there is no evidence that the requirements have been complied with, e.g. a letter confirming approval from the Local Authority or registered Adoption Agency.

Section 83 of the Adoption and Children Act 2002 applies to anyone habitually resident in the British Islands, who:

- ‘(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’.

Permission to appeal is respectfully sought. An oral hearing is requested.”

7. In respect of those grounds, Ms Pal on behalf of the Entry Clearance Officer summarised the issue at stake as being that the Immigration Rules do require that a certificate of eligibility must be provided under paragraph 316A(viii) but that the First-tier Judge had failed to consider this issue.
8. Prior to the commencement of the hearing I brought to the parties’ attention the unreported decision of the Upper Tribunal in *TY (a minor) v Entry Clearance Officer, Sheffield* (HU/02792/2016) [unreported], which was a decision of an Upper Tribunal panel (composed of the Rt. Hon. Lord Boyd of Duncansby and Upper Tribunal Judge Jordan), and which is the only decision in the public domain at the date of hearing which dealt with the subject matter of Section 83 of the Adoption and Children Act 2002 (that decision being promulgated on 12th April 2018). In particular, I drew to the parties’ attention [9], [10], [15]-[19] and [58]-[60] of that decision which collectively analysed the ability to adopt a foreign national child.
9. As I pointed out to Ms Pal, the difficulty she faced was that Section 83 of the Adoption and Children Act 2002 was *not* mentioned by the Entry Clearance Officer in the refusal of entry clearance dated 22nd March 2017, *nor* had it been raised as a live issue before the First-tier Tribunal on behalf of the Respondent, (perhaps because the Entry Clearance Officer was unrepresented at the hearing before the First-tier Tribunal by her own volition by failing to send a Presenting Officer to represent her). Thus, the Entry Clearance Officer had not put the Appellants on notice that the meeting of Section 83 of the Adoption and Children Act 2002 was to be a live issue which they would be required to meet on appeal.
10. However, I note that the refusal of entry clearance does mention in the final paragraphs that the Appellants had not provided a “Certificate of Eligibility” from the Department of Education to confirm that their adoption had taken place under UK law and for that reason the Entry Clearance Officer was not satisfied that they would be adopted in the United Kingdom by a prospective parent in accordance with the law relating to adoption in the United Kingdom. This issue was said to arise in relation to paragraph 316A(viii). Paragraph 316A(viii) of the Immigration Rules reads as follows:

“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:

...

(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.” (my emphasis)

11. As such, whilst the Refusal of Entry Clearance decision makes reference to the adoption needing to be “in accordance with the law relating to adoption in the United Kingdom” it does not mention Section 83 of the Adoption and Children Act 2002 specifically, nor does the rule mention the need to have provided a Certificate of Eligibility from the Department of Education as the Entry Clearance Officer thought it did.
12. With that in mind, in light of the unreported decision of *TY (a minor) v Entry Clearance Officer, Sheffield* which clarifies this matter, I observe that the relevant paragraph which in fact governs the production of a Certificate of Eligibility is paragraph 309B. The relevant version of the rule for the purposes of this appeal is the version prior to 24th November 2016 (as the underlying application for entry clearance which gave rise to this appeal was made on 17th August 2016). Paragraph 309B reads as follows:

“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.”
13. In the light of that rule, one can see that the relevant paragraph of the rules that the Entry Clearance Officer should have referred to was in fact paragraph 309B which does refer to the need for an assessment to be made by a competent authority in the UK and also refers to the need to obtain a Certificate of Eligibility from the Department for Education.
14. However, as I have stated above, this rule was not raised by the Entry Clearance Officer but paragraph 316A(viii) was pointed to instead which did not lead to the Appellants being put on notice that this issue would be live and it is for this reason I presume that the First-tier Tribunal Judge has focused more squarely upon the adoption order made by the High Court in Sierra Leone rather than the suitability of the children for adoption by a competent authority in allowing the appeal.
15. I pause to note that Mr Adophy has not suggested that there is a Certificate of Eligibility at present for the sponsoring grandmother of the Appellants. However this is most likely a matter which would need to be dispensed with *before* leave to enter could be granted at port.
16. I observe that paragraph 309B states that the Certificate must be provided with all entry clearance adoption applications, which would include the current one; however,

given the manner in which this requirement has come to light and the fact that paragraph 309B was not even referred to by the Entry Clearance Officer and the sheer passage of time since the Refusal of Entry Clearance was drafted, were a Certificate of Eligibility to be produced now in my view it would be unattractive for the Entry Clearance Officer to bar its admission given that the children have been languishing in Sierra Leone for almost two years and given that it is open to a Tribunal to consider the document in the context of a human rights appeal in any event (which this is) given that evidence can be produced to satisfy the Tribunal of a requirement at a hearing and given that we are not discussing *specified* evidentiary immigration rules and given that all evidence may be considered up to the date of hearing in a human rights appeal if it relates to the proportionality of any impugned decision.

17. There was much argument between the representatives as to whether Section 83 of the Adoption and Children Act 2002 would apply or not. For the Entry Clearance Officer Ms Pal simply submitted that the provision would apply and that without the production of a Certificate of Eligibility this omission did reveal a material error of law. For the Appellants Mr Adophy submitted that Section 83 of the Adoption and Children Act 2002 might not apply given that Section 83(2) of the Act states as follows:

“But this section does not apply if the child is intended to be adopted under a Convention adoption order”.

18. With respect to that submission Mr Adophy may well be right in highlighting that there is an exception to Section 83 which the Entry Clearance Officer seeks to rely upon in that it will not apply to all prospective adoptions in the United Kingdom and certainly not to ones where a child is intended to be adopted under a Convention Adoption Order (notwithstanding that Sierra Leone is not party to the Hague Convention). Equally, it appears that the legislation might not apply to *de facto* adoptions. However, as interesting as that submission may be, it is not for me to decide whether Section 83 of the Adoption and Children Act 2002 applies or not. The key question for me is whether the First-tier Tribunal Judge erred in not considering this legislation at all. To that end, having given the matter a great deal of thought, I find that the Entry Clearance Officer has only just demonstrated a material error of law, in that Section 83 of the Adoption and Children Act 2002 should have been considered by the First-tier Tribunal Judge for the sole reason that paragraph 316A(viii) of the Immigration Rules mentions that leave to enter will be given only where the child is to be adopted by the prospective parent “in accordance with the law relating to adoption in the United Kingdom” (*cf.* §10 above). To that extent, there is unfortunately no assessment as to whether the adoption on this discrete point is “in accordance with the law relating to adoption in the United Kingdom” and to that very limited extent I do find that there is a material error of law in the First-tier Tribunal Judge’s decision in that the Judge should have gone on to consider that matter *after* making the findings that he did in relation to paragraph 316A. Therefore, to the extent that the grounds reveal a material error of law it is solely in relation to paragraph 316A(viii) and I set aside that discreet element of the First-tier Tribunal Judge’s decision in relation to that rule alone.

19. Given the above, in my view the matter should be remitted to the First-tier Tribunal for an assessment of whether the prospective adoption will meet the terms of paragraph 316A(viii) and whether it will be “in accordance with the law relating to adoption in the United Kingdom” specifically in relation to Section 83 of the Adoption and Children Act 2002.
20. Further to my observations above, if the Appellants’ sponsoring grandmother adduces a Certificate of Eligibility before the First-tier Tribunal such evidence should be considered by the Tribunal given the late manner in which the Secretary of State has sought to rely upon the 2002 Act in relation to these children who are languishing in Sierra Leone. In my view, upon remittal, this appeal should be heard swiftly, *unless* the sponsoring grandmother requires time to obtain, file and serve a Certificate of Eligibility from the Department of Education or relevant authority. In that eventuality, the appeal hearing may need to be heard after sufficient time is given for production of a Certificate of Eligibility in the interests of fairness and justice to all parties and given the unattractive way in which this requirement has come to light whilst two children remain in limbo.
21. Furthermore, there was a mild suggestion by Ms Pal that the Entry Clearance Officer may on a further appeal argue that one of the children is past the age of 18 and therefore would not qualify for leave to enter. As I relayed to the parties - and to which I received no objection - in my view, such a submission by the Entry Clearance Officer would be misguided given that this is a human rights appeal (albeit in the context of an entry clearance application) and given that both Appellants were children at the date of their joint application and it is only owing to the passage of time that one of the children is no longer a child. Such an action would have the effect of stranding one of the two children on its own and cutting it off from its sibling over a technicality. Furthermore, if the appeals were to succeed it would follow that the children would have qualified for leave to enter historically on the basis of being children when they applied for entry clearance for prospective adoption by their grandmother.
22. I further observe that if the rules strictly cannot be met in this appeal, in the course of considering this human rights appeal, it would of course be necessary for the First-tier Tribunal to consider whether the refusal of entry to the Appellants would be proportionate given all of the facts at stake in this appeal and in particular the extent to which the Appellants are said to not meet the Immigration Rules under paragraphs 316A etc. which would help quantify the public interest in denying them entry. In that light, as observed by Stanley Burnton, LJ at [24] of *Singh & Anor v The Secretary of State for the Home Department* [2015] EWCA Civ 630, a child enjoying a family life with his parents (or grandparents) does not suddenly cease to have a family life at midnight as he turns 18 years of age. In my view, the same should logically follow in respect of pre-existing family life between a grandparent and dependent grandchild whom becomes an adult, given that family life exists between grandparents and grandchildren, as established since the decision in the European Court of Human Rights in *Marckx v Belgium* [1979] 2 EHRR 330, as there is no reason to distinguish between the two forms of family life against this principle.

23. For the sake of completeness, given the above decision I have reached, and the unravelling of the law was necessary by me to resolve the unfortunate and quite unhappy scenario that the Entry Clearance Officer's appeal has drawn to the parties' attention, in my view, the Entry Clearance Officer's poor drafting of the Refusal of Entry Clearance in respect of these children and not setting out clearly the requirements that the Appellants would have to meet to secure entry for adoption in the UK could have been avoided and she is responsible for the position that the parties must now address. This behaviour is quite unreasonable given that children are involved and given that they have been in limbo since at least August 2016. Thus, if the Appellants' representatives were to apply for costs occasioned by the Entry Clearance Officer's poor drafting and having to meet and address the further issue before the First-tier Tribunal, such an application should be treated with extreme sympathy and be likely to succeed.
24. Thus, for the above reasons, I do find that there is a material error of law in the decision in relation to the finding that paragraph 318A(viii) of the immigration rules is met. I make clear that this is an error which First-tier Tribunal Judge Baldwin is ultimately blameless for, but which cannot go unaddressed.
25. In light of the above findings, I set aside the finding of the First-tier Tribunal that paragraph 316A(viii) is met and the appeal is to be remitted to the First-tier Tribunal to be heard in relation to whether paragraph 316A(viii) is or is not met, and if it is not as to whether the decision is a proportionate one against Article 8 ECHR outside of the rules, in light of the facts as previously found and in light of the above history.

Notice of Decision

26. The appeal to the Upper Tribunal is allowed.
27. The appeal is to be remitted to the First-tier Tribunal to be heard by a differently-constituted bench.

Directions

- (1) Standard directions are to be issued.
 - (2) Should either party require any further directions they must make a request in writing to the First-tier Tribunal at the earliest opportunity.
28. I make an anonymity direction given that this appeal concerns children and given that this decision is likely to be made available online. As such, I must seek to protect the identity of the appellant-children.

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 him or any member of

their 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

Deputy Upper Tribunal Judge Saini