IAC-AH-BW-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08301/2019

THE IMMIGRATION ACTS

Heard via Skype for Business at Field House	**Decision & Reasons Promulgated**
On 18 November 2020	**On 11 December 2020**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

ENTRY CLEARANCE OFFICER – UKVS SHEFFIELD

Appellant

and

[U O]

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Ms H Gore, instructed by Gans & Co Solicitors LLP

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of a Judge of the First-tier Tribunal who in a decision promulgated on 4 March 2020 allowed the appeal of [UO] against the Entry Clearance Officer's decision of 10 April 2019 refusing her application for entry clearance to the United Kingdom under paragraph 314 of HC 395.

2. I will refer hereafter to [UO] as the appellant, as she was before the judge, and to the Entry Clearance Officer as the respondent, as he was before the judge.

3. The appellant, who is a child born on 9 September 2012, sought entry clearance to the United Kingdom under paragraph 314 on the basis of family life with her stated adopted mother, Atim [O].

4. In the application it was stated that the appellant had been adopted by her adopted mother, Ms [O], when she was 2 days old. She had been left at a motherless babies' home when she was born and provided evidence of this in the form of a certificate. This certificate stated that she was taken in on 11 September 2019 by Ms [O]. She had also provided a birth certificate naming Ms [O], her adopted mother, and her adopted maternal grandfather as her parents and this was registered six months after her birth.

5. She provided adoption documents showing that her stated adopted mother submitted her application on 6 January 2014, but the adoption was not granted until 15 March 2017. As evidence she provided a Family Court order at Oran Magisterial District Court granting the adoption.

6. The Entry Clearance Officer was not satisfied that she had been legally adopted in Nigeria until March 2017 and noted that inter-country adoptions after 3 January 2014 from certain countries, including Nigeria, were no longer recognised by the UKVI. The Entry Clearance Officer also observed that in addition to the Immigration Rules there were specific legal requirements which had to be followed by those bringing an adopted child to the United Kingdom. These were contained in the Adoption Act 2002 and the Adoptions with a Foreign Element Regulations 2005.

7. As any adoptions processed after 3 January 2014 from Nigeria were not recognised in accordance with the Adoption Order 2013, the appellant's adoption could not be considered as legal in the United Kingdom. Department for Education records showed that no Certificate of Eligibility had been issued to her claimed adopted mother. She had made no attempt to begin adoption proceedings in accordance with UK law and therefore the decision maker noted that she was unable to consider the appellant as the child of her stated adopted mother and the application was refused under paragraph 314(v) of the Immigration Rules.

8. The decision maker went on to say that additionally, she was not satisfied that the appellant was not adopted for convenience in order to facilitate admission to the United Kingdom and therefore refused the application under paragraph 314(x) of the Immigration Rules.

9. As the appellant had made no mention of applying for entry clearance for the purposes of being adopted once in the United Kingdom the decision maker was satisfied that she and the sponsor were applying as legally adopted mother and daughter and therefore could not be considered under paragraph 316.

10. In addition, the application was refused with regard to the financial requirements set out at paragraph E-ECC.2.1 of Appendix FM and there was also a refusal in respect of accommodation under paragraph EC-P.1.1(d) of Appendix FM.

11. The decision maker went on to consider whether there were exceptional circumstances under paragraphs GEN.3.1 and GEN.3.2 of Appendix FM but concluded that there were no such exceptional circumstances in the appellant's case. The decision maker considered the best interests of the appellant both individually and cumulatively. It was noted that her stated adopted mother and sponsor had married her spouse on 13 June 2015 and relocated to the United Kingdom as a spouse. In her absence the appellant had been put in the care of her grandparents (grandmother and adopted father/grandfather). They had died, in June and September 2017 respectively. Death certificates had been provided. She was now in the care of her nanny, who was unwilling to continue this living arrangement, and a statement had been provided from her.

12. The decision maker went on to say that she acknowledged that the living arrangements of the appellant were at risk in Nigeria but she had not been adopted in accordance with UK laws and therefore the UKVI did not recognise her as the adopted child of her stated mother. She had not demonstrated that her stated personal circumstances were exceptional. The Entry Clearance Officer was mindful that the sponsor was able to travel to Nigeria to care for her or make other arrangements for her care and had made no efforts to adopt her once she was in the United Kingdom and therefore there were no other entry clearance routes for her to be considered under at this time. There were no compassionate factors that warranted a grant of entry clearance outside the Immigration Rules.

13. The judge accepted that, as the appellant had not been legally adopted in Nigeria in 2017, such an adoption from Nigeria was no longer recognised and the appellant therefore could not meet the requirements of paragraph 314 of HC 395.

14. The judge was satisfied that the requirements of the Rules in regard to maintenance and accommodation were now met.

15. The judge went on to say at paragraph 14 that while the appellant could not meet the requirements of paragraph 314 of the Immigration Rules in respect of the Adoption Order, she was persuaded that these were exceptional circumstances, taking into account that the appellant was at risk. It was noted that the risk was accepted by the respondent in the refusal letter and it appeared that the appellant's grandparents died in 2017 and she had previously been looked after by a nanny but that care was no longer available, the appellant having now been looked after by another friend since August 2019. The judge was persuaded that these were exceptional circumstances and that the appellant should be reunited with her mother and stepfather in the United Kingdom. She took into account that the financial and accommodation requirements had been met and under GEN.3.1 and 3.2 of Appendix FM there would be unjustifiably harsh consequences for the appellant or her family in her being separated. The best interests of the child required to be considered under GEN.3.3. The appeal was therefore allowed.

16. The Secretary of State sought and was granted permission to appeal on the basis that the judge had misdirected herself in law, provided inadequate reasoning and was guilty of a procedural irregularity in not adjourning the proceedings. It was acknowledged with regard to the final point that it was not specifically asserted in the absence at the hearing of a Presenting Officer. Permission to appeal was granted on all grounds.

17. In his submissions, Mr Clarke noted what had been said in the decision letter and also in the conclusions of the Entry Clearance Manager who reviewed the matter on 16 October 2019 and concluded among other things that with regard to paragraph 309A of HC 395 it could not be said that a de facto adoption had taken place as the sponsor had not spent the last twelve months immediately preceding the application living with the appellant. Further consideration was given to the issues of exceptional circumstances and the best interests of the child and the decision was maintained.

18. It could be seen from paragraph 95 of the application that the appellant and the sponsor had lived together for some thirteen months by the time when the sponsor came to the United Kingdom in October 2013. He said that there was no challenge to the conclusion as to the effect of the 2013 Order. The Schedule did not include Nigeria. The appeal clearly could not succeed on the basis of a de facto adoption for the reasons set out by the Entry Clearance Manager.

19. It was clear from paragraph 309B of HC 395 that 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. The Certificate of Eligibility must be provided with all entry clearance adoption applications under paragraphs 310 to 316F. It was clear that this provision, which underpins section 83 of the Adoption and Children Act 2002, existed due to the need to maintain the safeguarding of children crossing borders to come to the United Kingdom. Whether the child would have been brought to the United Kingdom for the purposes of adoption or it would be an external adoption in accordance with the provisions of section 83(3), this could not be a Convention adoption as Nigeria was not a signatory to the Convention. In that case, subparagraphs (4) and (5) were applicable. The relevant Regulations referred to in section 83(5) were the Adoption (Recognition of Overseas Adoptions) Order 2013. It was necessary also to bear in mind (7) and (8) of section 83 of the 2002 Act, making it clear that an offence would be committed if a person brings or causes another to bring a child into the United Kingdom at any time in circumstances where the section applies if any requirement imposed under subsection (4) or condition required to be met under subsection (5) is not met and this is punishable on summary conviction or on conviction on indictment to imprisonment or a fine or both.

20. Regulation 4 of the 2005 Regulations set out the conditions applicable in respect of a child brought into the United Kingdom and these were the conditions provided for in section 83(5) of the 2002 Act. It was therefore clear that the statute provided for regulations and the requirements to be able to verify the suitability for local authorities to bring children to the United Kingdom and there was no such evidence here and no certificate of obtaining a paragraph 309 certificate.

21. Turning to the judge's decision, she had observed that the Rules were not met as the adoption was not recognised in the United Kingdom. She then made the findings on accommodation and support. Thereafter at paragraph 14 she made findings about risk and the fact that the appellant was being looked after by a friend. The judge had not reasoned the findings with regard to exceptional circumstances and risk. The issue was essentially one of the need to consider the Immigration Rules with the criteria set out there. This had not been done and there was no consideration as to what the risk the judge spoke of was. This had to be taken into account in evaluating proportionality. There was no consideration of the public interest or the primary legislation and the safeguarding measures. The decision was wholly unsustainable and should be set aside.

22. In her submissions, Ms Gore accepted that most of Mr Clarke had said about the Regulations was not in dispute. The judge had accepted that the appellant could not succeed under paragraph 314. She had, however, focussed on what the Entry Clearance Officer had accepted and took it into consideration in assessing the best interests of the child.

23. The appellant was 7 at the time of the appeal. Her parents were recorded as the sponsor and the maternal grandfather. It was not a case therefore where the appellant was coming to the United Kingdom to be adopted but she had been a member of the sponsor's family being named on her birth certificate and this gave parental responsibility. She had been released to her adopted mother on the second day of her life. The case was in a class of its own. She had been the sponsor's child since the age of 2.

24. With regard to the procedures in the United Kingdom for adoption not being complied with, as that was so, the judge had focussed on what the Entry Clearance Officer accepted. He had in fact stated the nature of the risk, at paragraph 14 of the decision, this having been accepted by the Entry Clearance Officer. The grandfather on the birth certificate had died and the nanny was not prepared to continue, so the Entry Clearance Officer had accepted that the living arrangements were at risk. There was a temporary arrangement for a friend to take over. The judge's decision was therefore based on what the Entry Clearance Officer accepted. The judge had looked at the essential issue, which was that the appellant was a child of 7 whose living arrangement was at risk. It should be questioned whether it was proportionate to concentrate on the formalities. The sponsor and the appellant had lived together for thirteen months and the sponsor had sole responsibility. This should be put into the balance on one side of the scale and risk on the other side. A finding was made with

regard to her best interests to be with the mother. Whether there was an error in that respect was not material. The child would be at risk and the judge had concentrated on that. There was no issue here of an absence of connection or a lack of sole responsibility or trafficking. It would be disproportionate to concentrate on a formality that did not really apply. The sponsor was not bringing the appellant to the United Kingdom to adopt her but she was a member of the family. The Certificate of Eligibility was irrelevant in the circumstances of the case.

25. Mr Clarke had referred to whether the sponsor should be required to return to Nigeria to live with the appellant but that was not a material consideration. The judge had found that the living arrangements were appropriate in the United Kingdom and there were adequate funds. There was no home or job in Nigeria for the sponsor. Such a requirement would be unreasonable and the answer was obvious. It would be disproportionate to leave the child and prolong the current situation in circumstances where the Entry Clearance Officer had accepted what she did.

26. By way of reply, Mr Clarke argued that it was relevant to bear in mind that if the appeal were allowed this would impose a criminal liability on the sponsor under section 83(7). If the checks were not done, that was a criminal offence. This was clearly relevant. There had been no consideration of insurmountable obstacles. The guidance in Agyarko [2017] UKSC 11 made it clear that there was a relevant factor for consideration with regard to proportionality and it was a matter considered in the decision letter.

27. I reserved my determination.

28. I have set out above in the course of my summary of Mr Clarke's submissions the relevant legal principles in this case. It is clear, as identified by the Entry Clearance Manager, that the adoption in this case cannot properly be regarded as a de facto adoption since it is a requirement under paragraph 309A of HC 395 that during their time abroad the adoptive parent or parents must have lived with the child for a minimum period of eighteen months of which the twelve months immediately preceding the application for entry clearance must have been spent living together with the child. It is clear that in this case the sponsor and the appellant have not lived together since the sponsor came to the United Kingdom in October 2013.

29. Thereafter the provisions of paragraph 309B apply. Nigeria is not a signatory to the Hague Convention, and this is a case to which section 83 of the Adoption and Children Act 2002 applies. The relevant Regulations referred to in subsections (4) and (5) of section 83 are to be found in the Adoption (Recognition of Overseas Adoptions) Order 2013. This is not an overseas adoption since Nigeria is not a country listed in the Schedule to the Regulations. Thereafter it is necessary to consider the Adoptions with a Foreign Element Regulations 2005, which prescribe 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. These are summarised at paragraph 309B for the assessment of suitability of prospective adopters who have to obtain a Certificate of Eligibility from the Department for Education and provide such certificate with all entry clearance adoption applications under paragraphs 310 to 316F. It is relevant also, as Mr Clarke reminded me, to bear in mind the criminal sanction set out at section 83(7) of the 2002 Act applying in circumstances where a person brings a child into the United Kingdom where the section applies if there has been a failure to comply with any condition required to be met by inter alia subsection (5).

30. Ms Gore's argument is that in essence the judge was entitled to bypass the regulatory framework since she had accepted that the requirements of paragraph 314 of HC 395 could not be met, on the basis that the appellant was at risk, as had been observed by the decision maker in the circumstances where her grandparents having died and the nanny no longer being available, she was being looked after by another friend.

31. I do not consider, focussed and articulate though Ms Gore's submissions were, that this argument can be sustained. There is a clear regulatory framework in this case, and it is impossible to ignore Mr Clarke's observation that to allow the appeal would in effect place the sponsor in a position where she would be likely to be committing a criminal offence under section 83, a point which was not considered by the judge. Quite apart from this, the judge was, in my view, not entitled to focus, as she did, purely on the issue of risk, bearing in mind that the risk had been identified, and as this is an Article 8 appeal it is necessary to bear in mind the public interest side of the argument and the proportionality of the decision. The judge in effect said very little. She identified the risk and was persuaded as a consequence that these are exceptional circumstances and there would be unjustifiably harsh consequences for the appellant or her family in being separated. No consideration was given to any insurmountable obstacles to family life being continued in Nigeria. There may well be some force to the points argued by Ms Gore in this regard as concerns the sponsor's work and living arrangements, but these were not matters that were considered by the judge. In my view, the extent to which the decision needs to be reconsidered is such as to make it one that is appropriate for a full reconsideration in the First-tier Tribunal, and it is accordingly remitted for a full rehearing at Taylor House before a judge other than Judge Sweet.

Notice of Decision

The appeal is allowed to the extent set out above.

No anonymity direction is made.

Signed
Upper Tribunal Judge Allen

Date 24 November 2020