



**Upper Tribunal
(Immigration and Asylum Chamber)**

Case Number: UI-2022-002365
First-tier Tribunal number: HU/07476/2020

THE IMMIGRATION ACTS

**Heard at Field House
On 20 January 2023**

**Decision & Reasons Promulgated
On 23 February 2023**

Before

**UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE LEWIS**

Between

**D K E
(Anonymity order made)**

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr S Unigwe of Counsel instructed by Chris Solicitors

For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant and the Sponsors herein are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant and/or the Sponsors. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria born on 9 July 2017. She appeals against a decision of First-tier Tribunal Judge Black dismissing her appeal against a decision of the Respondent dated 13 February 2020 refusing an application for entry clearance as the adopted child of British citizens.
2. The application for entry clearance was based on the relationship between the Appellant and her mother's stepbrother, 'PE', and his wife, 'RE' ('the Sponsors').
3. Although in support of the application and appeal the Appellant and her Sponsors relied upon an order of adoption purportedly made in Nigeria on 9 November 2017, it was the Respondent's position that adoptions in Nigeria are not legally recognised in the UK, and there was otherwise no evidence of any adoption proceedings commenced in the UK or a 'certificate of eligibility' (pursuant to the Adoption and Children Act 2002 and paragraph 309B of the Immigration Rules). The Respondent also noted that the Sponsors' names appeared on the Appellant's birth certificate, even though it had been issued prior to the adoption order: the Respondent considered this "*casts doubt on the credibility*" of the application. In the circumstances the Respondent was not satisfied that the Appellant could be considered to be the child of the Sponsors within the contemplation of paragraph 310(vi)(a) of the Rules. Further, the Respondent was not satisfied that there had been a genuine transfer of parental responsibility. No application was made under paragraph 316A of the Immigration Rules for entry clearance for an adoption order to be made in the UK.
4. The First-tier Tribunal Judge made findings of primary fact that were broadly supportive of the position of the Sponsors. In particular: she "*found them in general to be reliable witnesses*", found they were related to the Appellant as claimed, and found that they wished to adopt the Appellant and had concerns about her welfare (paragraph 8).
5. However, noting that the birth certificate named the Sponsors as parents prior to the date of the adoption order, the Judge commented "*this causes me to doubt the lawfulness of the adoption proceedings*" (paragraph 9). The Judge also noted that that in any event a Nigerian adoption order was not recognised in the UK (paragraph 9). In this context the Judge accepted that the Sponsors had been badly advised, and noted that they "*now realise that intercountry adoption (including from Nigeria) was not recognised in the UK and were unaware that it was possible to make an application from the UK*"; in this context it was also noted and accepted "*They propose to start adoption proceedings in the UK*"(paragraph 9).
6. The Judge went on to consider the circumstances of the Appellant and her relationship with the Sponsors (paragraphs 10-11) - to which we return below.

7. The Judge concluded that the Appellant had not met the relevant Immigration Rules, and did not otherwise find there to be any exceptional circumstances that would justify a favourable outcome with reference to human rights grounds (paragraph 12). In this concluding paragraph the Judge also stated:

"In any event Article 8(1) is not engaged as the sponsor did not show that they have adopted the child in a legally recognised process in the UK and there remains concern as to the process in Nigeria in light of the error in the birth certificate, and so it cannot be established that there is family life."

8. The Appellant challenged the decision of the First-tier Tribunal by way of an application for permission to appeal to the Upper Tribunal. Permission to appeal was granted by First-tier Tribunal Judge Grey on 27 April 2022. A challenge to the effect that the Judge's findings were contradictory was rejected. However permission was granted for the following reasons:

"[A]lthough the Judge states at [12] that she has considered where the best interests of the Appellant child lie and that this is a primary consideration, she fails to go on to state her findings as to what she considered to be the best interests of the child, particularly in view of her acknowledgement that the present care arrangements are temporary in nature and the Appellant's present carer wishes to end the arrangement. It should be noted that the Judge found the sponsors "in general to be reliable witnesses". Although it may be implicit that the Judge considered that the best interests of the Appellant are served by maintaining the status quo, it is arguable that there are insufficient reasons and specific findings in regard to this key issue in light of the Appellant's current circumstances."

9. The Respondent has filed a Rule 24 response dated 26 May 2022 resisting the challenge to the decision of the First-tier Tribunal. It is - appropriately - acknowledged therein that notwithstanding the geographical jurisdictional limitations of section 55 of the Borders, Citizenship and Immigration Act 2009, the best interests of relevant children will be considered in applications for entry clearance. However, in substance it is pleaded that the Judge considered the concerns of the Sponsors, recognised the current circumstances of the Appellant, and had express regard to the concept of 'best interests'. In so far as there was no express conclusion as to where the best interests might lie, it was submitted that this was not material in the overall context of the Judge's findings, all relevant factors having been taken into account. Reference was also made to the Judge's finding in respect of the absence of family life. The concluding submission was in these terms: *"On the evidence and findings, in particular the lack of family life and the absence of any concrete welfare concerns, the best interests of the appellant taken at their highest could not properly have resulted in the F-tT appeal being allowed"*.

10. Before us Mr Unigwe maintained the Grounds of Appeal, and repeated the emphasis on the absence of any clear statement as to what the Appellant's best interests were, also advancing the assertion that the best interests of the Appellant would be served by being allowed to come and stay with her adoptive parents in the UK. Ms Ahmed placed reliance on the pleadings of the Rule 24 notice.
11. We acknowledge that two particular concerns may be identified in the Decision of the First-tier Tribunal. However, notwithstanding such concerns we do not consider that this is a case where the decision of the First-tier Tribunal should be set aside – pursuant to our exercise of the discretion in section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.
12. The Judge's finding that Article 8(1) was not engaged is a matter that was challenged in the application for permission to appeal, but not commented on in the grant of permission. We make the following observations:
 - (i) The Judge's reasons for the finding in this regard is set out at paragraph 12 on two bases: the non-recognition in domestic law of Nigerian adoption orders; and the Judge's doubts as to the process in Nigeria because of the birth certificate describing the Sponsors as parents prior to the date of the adoption order (see quotation from paragraph 12 set out at paragraph 7 above).
 - (ii) The Judge's expression of 'doubt' (paragraph 9) and 'concern' (paragraph 12) does not constitute a clear finding that the Appellant was not duly adopted in Nigeria within the parameters of Nigerian law and procedures, and does not amount to a clear and adequately reasoned conclusion that the Appellant (through the Sponsors) had failed to discharge the burden of proof in this regard – although this may be implicit.
 - (iii) The Grounds plead that the mere fact that the adoption order is not recognised in the UK does not mean that there has not been an adoption in Nigeria such that family life is established in Nigeria. Ms Ahmed, without making any formal concession, acknowledged that there was some weight to such a submission. We agree.
13. In such circumstances we accept that the finding that Article 8(1) was not engaged is not adequately reasoned: there was no clear definitive reasoned finding as to whether or not due process had been followed in Nigeria; the fact that UK law does not recognise Nigerian adoption orders is not determinative evidence of an absence of family life in a relationship established pursuant to a Nigerian adoption order. However, we have ultimately reached the conclusion that a different approach could not have resulted in a successful outcome: any proportionality balance would still have to have regard to 'best interests', and for the reasons below we do not accept that the best interests of the Appellant could outweigh the public interest such as to render the Respondent's decision disproportionate.

14. This brings us to the other area of concern, the matter specifically identified in the grant of permission to appeal. It is to be acknowledged that there is no definitive statement of where the Appellant's 'best interests' lie. However, we make the following observations:

(i) We accept the substance of the Respondent's argument that the Judge recognised that best interests needed to be considered as "*a primary consideration*" (paragraph 11). We also accept that the Judge had full regard to the Appellant's circumstances (paragraphs 11-12), and does not appear to have omitted consideration of any specific matter raised on her behalf. We do not accept that there was any inconsistency in the Judge's analysis: in particular the Judge acknowledged the Sponsor's dissatisfaction with the current arrangement - but this was not inconsistent with the Judge's finding that there were no specific concerns about welfare (that is to say such matters as care, feeding, clothing, and ensuring attendance at nursery school).

(ii) The Judge explicitly identified one reservation about the extent to which the Sponsors had effectively protected the Appellant's best interests: "*I am not satisfied that the sponsors have taken all steps that would be in the best interests of the child, such as to make an application for entry clearance to adopt the child in the UK*" (paragraph 11).

(iii) It seems to us that implicit in this latter observation is the Judge's recognition that the best interests of the Appellant would be served by following due and proper process in respect of adoption. This is reinforced in the Judge's concluding paragraph: "*However, it remains open to the sponsors to make an application for adoption in the UK and in the meantime the current arrangements can continue...*" (paragraph 12).

15. In our judgement the First-tier Tribunal Judge thereby made an appraisal of 'best interests' - essentially that best interests were served by preserving the status quo whilst due process in respect of seeking to effect an international adoption was pursued - which accords with the balance to be struck between individual rights and the public interest in cases of international adoption.

16. The checks and balances of satisfactory formal adoption proceedings - either domestically or in foreign proceedings duly recognised by inclusion in the list of countries in the Schedule of the Adoption (Recognition of Overseas Adoptions) Order 2013 - and, as appropriate, the certificate of eligibility process - are the mechanisms by which best interests are to be ascertained, evaluated, protected, and promoted, further to examination by agencies with relevant expertise. These mechanisms are designed to protect the individual child, and also seek to serve the public interest by guarding against international trafficking and/or exploitation of minors. Absent such procedures best interests are not duly and properly

safeguarded. It is not in the best interests of a child to allow international migration to live as the child of non-birth 'parents' without scrutiny of the arrangement by duly recognised agencies experienced in protecting and promoting the best interests of children.

17. The best interests of the Appellant are to ensure that she is subjected to such protective procedures. The Judge's observation that the Sponsors have not taken all steps in the best interests of the child "*such as to make an application for entry clearance to adopt the child in the UK*" in substance reflects adequate consideration of best interests as a primary feature of this appeal.
18. Accordingly we find that there was no material error of law in the Judge's approach to the issue of best interests. Moreover, we find that even if it may be said that the Judge fell into error in respect of the engagement of Article 8(1), this could not ultimately avail the Appellant because the Appellant's rights and best interests and the rights of the Sponsors could not outweigh the public interest imperative of protecting children's rights and best interests through due process in cases involving international adoption. As such, it is our conclusion that the decision of the First-tier Tribunal should stand.

Notice of Decision

19. The decision of the First-tier Tribunal contained no material error of law and stands.
20. The Appellant's appeal remains dismissed.

Signed: I A Lewis

Date: **22 January 2023**

Deputy Upper Tribunal Judge I A Lewis