



Upper Tribunal

**(Immigration and Asylum Chamber)
HU/10829/2019 (P)**

Appeal Number:

THE IMMIGRATION ACTS

Decided under rule 34 (P)

**Decision & Reasons
Promulgated**

On 30 September 2020

On 6 October 2020

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

**TANCHHO HANG NEMBANG LIMBU
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

For the ENTRY CLEARANCE OFFICER

Respondent

Representation (by way of written submissions)

For the appellant: Goulds Green Chambers

For the respondent: No submissions received

DECISION AND REASONS

Background

1. This appeal comes before me following the grant of permission to appeal to the respondent by First-tier Tribunal Judge O'Brien on 8 April 2020 against the determination of First-tier Tribunal Judge Suffield-Thompson, promulgated on 14 January 2020 following a hearing at Newport on 10 January 2020. For convenience, I shall refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a Nepalese national born on 18 March 2001. He seeks entry clearance as the adopted son of the sponsor and his wife who is the appellant's biological mother's sister. The respondent refused the application on 30 May 2019 because (i) as a non-Hague adoption, it was not recognised in the UK; (ii) it was not a de facto adoption because the appellant had not lived with his adoptive parents for a minimum period of 18 months of which 12 months preceded the application; (iii) there was no evidence of a genuine transfer of parental responsibility from his biological to his adoptive parents; (iv) it was not accepted that the adoption was not one of convenience; (v) no certificate of eligibility had been adduced from the DCSF in the UK; (vi) the appellant still had contact with his biological parents; (vii) there were no serious and compelling considerations that made his exclusion from the UK undesirable; and (viii) article 8 was not breached. The decision was reviewed by the Entry Clearance Manager but maintained on 9 October 2019. According to the respondent's chronology, this is the appellant's fourth entry clearance application¹. It was made on 10 March 2019 a few days before the appellant's 18th birthday. Two previous appeals against two of the earlier decisions were dismissed.

3. The appeal came before Judge Suffield-Thompson. She heard oral evidence from the sponsor and allowed the appeal. She found that although the adoption was not recognised in the UK, the appellant had been legally adopted in Nepal. She found that he did not have the DCSF certificate of assessment as required but that in any event, as he was over 18, he could not be adopted in the UK. The judge found that the appellant had not lived with his adoptive parents for a minimum of 18 months of which 12 preceded the application. She found the sponsor to be an honest witness and accepted that the appellant's parents had relocated to another area. She noted that the appellant felt depressed and anxious, had fallen behind at school and was no longer in education, that his grandmother had died and he was unhappy about being alone in Nepal with just a guardian who was not a family member. The judge found that he was suffering from mental health issues and it would be better for him to be with his family in the UK. She found that he was wholly dependent upon the sponsor, that the sponsor and his wife made all the decisions for him and that the guardians he had in Nepal and India, where he had been studying, would not make any decisions without their approval. Evidence

¹ The judge was wrong to find there had been only two previous applications (at 18(ii)).

of phone records to show contact was adduced. The sponsor confirmed that the reason for the adoption was because Nepalese law did not allow daughters to inherit family property and as he only had one daughter he had no one to leave his property and money to. The judge found that there was adequate accommodation for the appellant in the UK and that there were adequate funds to support him. The judge concluded that there were serious and compelling family or other considerations which made the exclusion of the appellant from the UK undesirable and that suitable arrangements had been made for his care. She proceeded to allow the appeal under paragraph 297(i)(f). She then considered article 8, relying on her earlier findings. She found that the appellant had family life in the UK and that the refusal interfered with that. In considering proportionality, she found that the rules had been met, that the appellant spoke English and was of good character, that he would be coming to a family that could support him and that he would not, therefore, be a drain on the public purse. She had regard to the public interest in maintaining a fair but firm immigration policy but found that it was unreasonable to expect the appellant to remain in Nepal away from his family. She found that having to lead a separate life was having a profound impact on his mental health. She found there was more than mere hardship in this appeal and that the balance came down strongly in favour of the article 8 rights of the appellant and his family. Accordingly the appeal was allowed under article 8 as well as under the immigration rules.

4. The respondent successfully sought permission to appeal. She argued: (i) that the judge had mistakenly allowed the appeal on the basis that the appellant was still a child, that her assessment of the facts was therefore unreliable and her conclusion fatally flawed; (ii) that as the appellant was 19 at the date of the decision, it was incumbent upon the judge to provide reasons for why the parental relationship was considered to be over and above one that demonstrated normal emotional ties particularly in circumstances where the sponsor and the appellant had not lived together for any substantial period of time and the appellant had not formed an integral part of their family unit; and (iii) that the judge had failed to engage with the respondent's contention that the adoption was one of convenience particularly when the sponsor's own evidence was that it took place so that he could have a son to inherit his property.

Covid-19 crisis: preliminary matters

5. The matter would ordinarily have been listed for a hearing after the grant of permission but due to the Covid-19 pandemic and need to take precautions against its spread, this did not happen and instead directions were sent to the parties with the grant of permission on 4 June and again on 29 July 2020. They were asked to present any objections to the matter being dealt with on the papers and to make any further submissions on the error of law issue within certain time limits.

6. The Tribunal has received a response from the appellant which confirms reliance on the grounds for permission. The representatives also

submit that a remote hearing would not be suitable because they do not have Skype for Business, because the sponsor would like to be present on the day to give oral evidence and it would be convenient to produce "*all sorts of evidence*" in support of the case if and when required. There has been no reply from the respondent. I now consider whether it is appropriate to determine the matter on the papers.

7. In doing so I have regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules), the judgment of Osborn v The Parole Board [2013] UKSC 61, the Presidential Guidance Note No 1 2020: Arrangements during the Covid-19 pandemic (PGN) and the Senior President's Pilot Practice Direction (PPD). I have regard to the overriding objective which is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as being "*to enable the Upper Tribunal to deal with cases fairly and justly*". To this end I have considered that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues (Rule 2(2) UT rules and PGN:5).

8. I have had regard to the appellant's brief submissions. The fact that the appellant's representatives do not have Skype for Business facilities does not impact upon the issue of whether the error of law can be determined on the papers. The facility is, however, easily downloadable and no reason is offered as to why the representatives cannot access it. The sponsor is not required to give oral evidence at this stage and the Tribunal is able to refer to the evidence on file in order to determine the issue at hand. The appellant has had the opportunity to reply to the respondent's grounds for permission but has chosen to remain silent on the issues raised, despite plainly having received the directions (as a partial response has been made). I am satisfied that the respondent's grounds have been clearly set out, that a speedy determination of this matter is in the appellant's best interests, given the long history of applications and appeals, and that I am able to fairly and justly deal with this matter on the papers.

Discussion and conclusions

9. I have carefully considered the respondent's grounds and all the evidence before making a decision.

10. I do not accept the respondent's contention that the judge allowed the appeal on the mistaken belief that the appellant was still a child at the date of the hearing. She was clearly aware that he was over 18 at the date of the decision as she specifically says so in her determination (at 18(i) and 24). The appellant was, however, under 18 and still a minor at the date of his application and the judge was entitled to, and indeed required to, consider him as such when assessing whether the provisions

of the Immigration Rules had been met. When citing paragraph 43 of the judge's determination, the respondent, in her grounds, fails entirely to appreciate that the appellant was a minor when he made his application. There has, therefore, been no error as to a material fact as the grounds argue.

11. In her second ground, the respondent argues that the judge did not give reasons for why she found that there was family life between the appellant and his adoptive parents given the appellant's age. The judge's reasoning is, however, detailed and extensive and we know that family life does not suddenly come to an end just because a child turns 18. The judge found that the appellant had been legally adopted in Nepal in 2009, aged 7 or 8, and that from then on he had been seen as the sponsor's legal son by the authorities and by the sponsor and his wife. She found that the adoption papers were genuine and the respondent had not suggested that they were not (at 23). She found that the sponsor and his wife had regularly visited Nepal and had stayed with the appellant for several weeks each time; they were restricted as to the duration of their visits by employment commitments (at 25). The judge had regard to the two earlier decisions by the Tribunal but found that circumstances had changed since then in that the appellant's grandmother had died and his biological parents had moved away (at 30 and 35). She had the benefit of oral evidence from the sponsor and found him to be an honest and open witness (at 33). She had regard to the appellant's mental health issues, his depression at being alone in Nepal and the impact this had had on his schooling, all confirmed by medical evidence which she found to be genuine and which does not appear to have been challenged by the respondent at the hearing (at 36). She found that the appellant's depression and anxiety was caused by the family separation (at 37). She accepted there was regular contact between the parties and that it would be best if the family were to be reunited (at 37). The judge was satisfied that the sponsor would be able to support and accommodate the appellant without recourse to public funds (at 38 and 42). She accepted the evidence regarding the appellant's guardians and noted that they carried out decisions made by the sponsor and his wife (at 40). She had regard to the respondent's submission that the adoption was one of convenience but found that the appellant was a genuine member of the sponsor's family (at 41 and 43).

12. Having found that the Immigration Rules were satisfied the judge then moved on to considering article 8. Relying on her earlier findings, she found that there was family life between the appellant and the sponsor (at 46). She considered the public interest factors (at 49-50) and concluded that it was not reasonable for the appellant to stay away from his family and be forced to live a separate life without them (at 52). She found that the appellant was suffering from mental health problems as a result and that this amounted to more than mere hardship (*ibid*). These were all findings that were entirely open to her on the largely unchallenged evidence.

13. The important point to note in this case when considering whether family life continues between the sponsor and his now adult adopted son is that this is not a recent attempt to bring him to the UK but the culmination of attempts covering seven years. The appellant was a minor when he was adopted and remained so until just after this fourth application for entry clearance was made. The sponsor has not given up on his wish to be reunited with the boy he has considered to be his son since 2009 and nothing has changed for the appellant between the date of his application when he was still a minor and the attainment of his majority such as to end the family life that he would have been accepted as having with the sponsor whilst he was a child. The judge has, in my view, given detailed and wholly sustainable reasons for why she concluded that there was continuing family life between the appellant and the sponsor and why she found that in these specific circumstances the balance came down firmly in favour of the article 8 rights of the appellant and his family in the UK.

14. The respondent's last ground is that the judge did not have regard to the respondent's submission that this was an adoption of convenience. Reference to this is made in the decision notice, as pointed out in the grounds, however the requirement in the rules under paragraph 316A (viii) is that the adoption must not be one of convenience made to facilitate admission to the UK. On the sponsor's own evidence at the hearing, relied on by the Presenting Officer, the reason for the adoption was so that the sponsor would have a male heir to leave his property to. Clearly, then, the adoption was not undertaken in order to facilitate the appellant's admission to the UK. Had that been the case, the sponsor would not doubt have commenced the attempts to obtain entry clearance for the appellant in 2009 when the adoption took place instead of waiting until 2013. In any event, the respondent's complaint that the judge did not have regard to this part of the decision is not made out as the judge specifically referred to this at 41. Plainly, she had it in mind when making her findings but still considered the adoption to be genuine and sincere for all the reasons summarized above.

15. It follows that the judge was entitled to find that article 8 was engaged and to allow the appeal on human rights grounds. I can find no errors of law in that decision.

16. Although not raised in the respondent's grounds, the judge had no jurisdiction, however, to allow the appeal under paragraph 297(i)(f) of the Immigration Rules as she purported to do at paragraphs 43 and at 54. She had before her a human rights appeal and that was the only basis on which a decision could have been made. I find, however, that given her self direction at paragraph 20, what she meant was that the rules were met in so far as they pertained to the proportionality assessment of article 8. In those circumstances, whilst the decision to allow the appeal under the Immigration Rules was an error, it is immaterial as those findings are subsumed within the article 8 assessment.

17. I am reinforced in that view by the respondent not having included that as an error in her grounds for permission. The error is easily corrected by setting aside that part of her decision.

18. The decision to allow the appeal on human rights grounds is upheld.

Decision

19. The decision of the First-tier Tribunal to allow the appeal on human rights grounds contains no errors of law and is upheld. The decision to allow the appeal under the Immigration Rules is set aside.

Anonymity

20. No request for an anonymity order has been made at any stage and I see no reason to make one.

Signed

R. Kekić
Upper Tribunal Judge

Date: 30 September 2020