



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

Appeal Number: HU/04845/2015

THE IMMIGRATION ACTS

**Heard at Birmingham
On 17 October 2017**

**Decision & Reasons Promulgated
On 27 November 2017**

Before

UPPER TRIBUNAL JUDGE LANE

Between

ENTRY CLEARANCE OFFICER

Appellant

and

**BM
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Bates, Senior Home Office Presenting Officer

For the Respondent: Mr De Mello, instructed by Ash Immigration Services

DECISION AND REASONS

1. I shall refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant, BM, is a female citizen of Pakistan who was born in 2001. She applied for entry clearance to the United Kingdom as the adopted child of a parent or parents present and settled in the United Kingdom. The application was refused by a decision of the Entry Clearance Officer (ECO) dated 28 July 2015. The appellant appealed to the First-tier Tribunal (Judge Lagunju) which, in a decision promulgated on 3 March 2017,

allowed the appeal on human rights grounds (Article 8 ECHR). The ECO now appeals, with permission, to the Upper Tribunal.

2. Both parties agreed before the First-tier Tribunal that the appellant could not satisfy the requirements as to a foreign adoption provided for under HC 395 (as amended). The ECO considered that the appellant had failed to show the requirements for a *de facto* adoption as provided for under paragraph 310–316C of the Immigration Rules.
3. It is accepted by both parties that the sponsors had not lived with the appellant in the role of parents for a period of at least eighteen months. The ECO noted that the male sponsor (the sponsors are married) had been registered as the birth father of the appellant in August 2001. The male sponsor now denies being the natural father of the appellant. Consequently, the ECO was uncertain as to the “whereabouts of your biological parents”. In addition to refusing entry clearance under the Immigration Rules, the ECO considered that there were no significant circumstances which would justify a grant of entry clearance outside the Rules (under Article 8 ECHR).
4. In February 2016, the ECO’s decision was reviewed by an Entry Clearance Manager (ECM). The ECM upheld the ECO’s decision. As regards entry clearance outside the Rules, the ECM wrote as follows:

I have considered the appellant’s rights under Article 8 of ECHR. Article 8 of the ECHR is a qualified right, and proportionate with the need to maintain an effective immigration and border control and decisions under the Immigration Rules are deemed to be complied with human rights legislation. Given the concerns raised in the refusal notice regarding the relationship [between the sponsors and the appellant] I am not satisfied that the appellant has a family life with the sponsor. As this is the case, Article 8(1) does not apply to the appellant. However, if the appellant does have a family life with the sponsor, I am satisfied the decision is proportionate under Article 8(2). I note that no satisfactory reason has been put forward as to why the sponsor in the UK is unable to travel to Pakistan to be with the appellant. I am therefore satisfied the decision is justified by the need to maintain an effective immigration and border control.

5. Judge Lagunju recorded the fact that the appellant accepted that she could not satisfy the Immigration Rules as to adoption. The judge noted that the female sponsor was infertile and unable to conceive children. The judge wrote, “the appellant and her husband were unable to have children of their own. They discovered that a pregnant woman in their home village in Pakistan wanted a family to give her child to, as she was unable to care for the child herself”. The judge observed [13] that a court in Islamabad had made an adoption order but he noted also that this order was not recognised in the United Kingdom. The judge also gave weight [14] to a document purportedly signed by the biological parents of the appellant “in which they appear to entirely abdicate responsibility for the appellant”. The judge recorded that the sponsors had attempted to undertake an inter-country adoption of the appellant [15]. The judge was

“satisfied that the appellant had shown that the sponsors have acted as the appellant’s adoptive parents for over sixteen years”. The judge also accepted there was “close bond and affection (*sic*)” between the appellant and the female sponsor. The judge considered that the sponsors “play an important parental role in [the appellant’s] life”. At [24], the judge wrote:

I consider it would be in the best interests of the appellant to be with her two parents after being apart for so many years apart (*sic*). Although they have done their best to maintain family life through visits, I consider the age and health concerns of the sponsors and note that the couple are unlikely to be able to maintain family life in this way before long.

6. The judge recorded that the visits of the sponsors to the appellant in Pakistan had “reduced significantly over the last few years”. Finally, “given the appellant has attained a certain age” the judge considered it would be of benefit to the sponsors in their “old age” to have the valuable support and assistance of the appellant. At [25], the judge records that the male sponsor has ischaemic heart disease.
7. In essence, there is one ground of appeal. The ground correctly states that the appellant “cannot satisfy the Immigration Rules because the adoption is not recognised in the UK”. The grounds rely on the Adoption and Children Act 2002, Sections 83(4) and (5):

(4) Regulations may require a person intending to bring, or to cause another to bring, a child into the United Kingdom in circumstances where this section applies—

(a) to apply to an adoption agency (including a Scottish or Northern Irish adoption agency) in the prescribed manner for an assessment of his suitability to adopt the child, and

(b) to give the agency any information it may require for the purpose of the assessment.

(5) Regulations may require prescribed conditions to be met in respect of a child brought into the United Kingdom in circumstances where this section applies.

8. The grounds assert as follows:

It is not in issue that the sponsors are habitually resident in the UK, have not undergone adoption recognised in the UK and have not complied with Section 83(4) and (5) which is prescribed in the Immigration Rules. On that basis, they are not able to bring the child into the UK, even where the FTTJ [First-tier Tribunal Judge] found that family life exists, as the sponsors would be committing a criminal offence. This is an order to properly assess and protect the interests of the child. As such, it is asserted that the FTTJ has erred in law.

9. The grounds of appeal, therefore, argue that the judge had erred by failing to take any or any proper regard of the fact that the sponsors would commit a criminal offence by bringing the appellant into the United

Kingdom without having complied with the requirements of sub-section (4) and sub-section (5) of Section 83 of the 2002 Act. Sections 7-9 of the Act provide as follows:

(7) If a person brings, or causes another to bring, a child into the United Kingdom at any time in circumstances where this section applies, he is guilty of an offence if—

(a) he has not complied with any requirement imposed by virtue of subsection (4), or

(b) any condition required to be met by virtue of subsection (5) is not met, before that time, or before any later time which may be prescribed.

(8) A person guilty of an offence under this section is liable—

(a) on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both,

(b) on conviction on indictment, to imprisonment for a term not exceeding twelve months, or a fine, or both.

(9) In this section, “prescribed” means prescribed by regulations and “regulations” means regulations made by the Secretary of State, after consultation with the Assembly.

10. I find the argument of the ECO to be problematic. First, the grounds are predicated on the assumption that, having obtained success before the First-tier Tribunal, the sponsors would then actually seek to bring the appellant into the United Kingdom in such a way as to breach the 2002 Act. Despite having won the appeal on human rights grounds, entry clearance enabling the appellant to come into the United Kingdom would still need to be issued to the appellant by the ECO. One might expect the ECO to put into effect the First-tier Tribunal’s decision in normal circumstances, but, if the ECO considered that by doing so he or she would aid or abet an offence under the 2002 Act, then it seems likely that the ECO refrain from issuing entry clearance. Moreover, as Mr De Mello who acted for the appellant submitted, it was not for the First-tier Tribunal to second guess the likely reaction of the prosecuting authority in the United Kingdom if entry clearance were to be granted to the appellant following a successful appeal.
11. The grounds appear to suggest that the judge erred in law by failing to take into account the 2002 Act or, at the very least, that he failed to give weight to the possibility that a decision allowing the appeal on human rights grounds would lead to the commission of a criminal offence. As I have shown above, any link of causation between the judge’s decision on what was an entirely legitimate appeal on human rights grounds and the commissioning of a criminal offence was by no means as certain as the grounds submit. First, there is no reason to assume that the ECO would risk aiding and abetting a criminal offence by granting entry clearance. Secondly, there is no reason to suppose that the sponsors would

knowingly seek to commit an offence notwithstanding the appellant's success in the appeal. Thirdly, it is likely that any prosecuting authority would take into account the extent to which the welfare of the appellant had been and would be safeguarded before making any decision to prosecute. Finally, it is by no means certain that the question of a possible offence under the 2002 Act was ever in fact raised before the judge. If it had been raised, one would have expected him to have referred to it.

12. For the reasons I have given above, I find that the judge did not err in law for the reasons argued in the grounds of appeal. However, that is not the end of the matter. Mr Bates, who appeared for the Entry Clearance Officer, sought to widen the attack on the judge's decision by submitting that the judge had erred in his approach to Article 8 ECHR. Mr De Mello, for the appellant, objected to that attempt. He submitted that the ECO was allowed only to argue on the basis of the grounds of appeal for which permission had been granted. Having considered both submissions carefully, I found that I should consider the further arguments put by Mr Bates on behalf of the ECO. I reached that conclusion for two reasons: first, the grounds of appeal are, in effect, a challenge to the fact that the judge has allowed the appeal on human rights grounds at all. Secondly, the point raised by Mr Bates is an entirely obvious one and was raised in terms by the ECM in the review of the refusal which I have quoted above. Mr Bates argued that the judge should have found that there were no obstacles (as the ECM had also concluded) to prevent the sponsors enjoying family life with the appellant in Pakistan. An assessment of whether it was reasonable for the sponsors to travel to Pakistan to continue their family life with the appellant there was, in my opinion, absolutely fundamental to the analysis on Article 8 grounds given the factual matrix in the appeal and the failure of the judge properly to make that assessment constituted an error of law. The judge was required to consider the appeal on human rights grounds in a structured and thorough manner. The 'family living abroad' argument had been raised by the ECM but, more fundamentally, it was not possible for the judge to be in a position to conclude that Article 8 ECHR would be breached when he had omitted to consider the essential question of the family enjoying such family life as they have established in Pakistan. Indeed, on the particular facts of the case, family life had only ever been enjoyed (other than by electronic means or correspondence) in Pakistan.
13. I have recorded above [5] the judge's consideration, such as it is, of the possibility of family life continuing in Pakistan. The "age and health concerns of the sponsors" are not particularised or evidenced and the judge gives no reasons for finding that "the couple are unlikely to be able to maintain family life [by way of visits] before long". A reference is made to the male sponsor's ischaemic heart disease but the judge makes no assessment as to whether any medical condition of either sponsor could or could not adequately be treated in Pakistan. As for the point made by the judge regarding the assistance which the appellant might give to the sponsors "in their old age", the judge gives no reasons at all as to why such assistance could not be provided by the appellant in Pakistan. The

judge has failed to remind himself of the fact that appellants and sponsors seeking to rely on Article 8 ECHR may not choose in which jurisdiction they shall continue their family life. This is an appeal on Article 8 grounds involving an appellant who lives abroad and who has never lived in the United Kingdom. It is not clear at all to me why the appellant needs to be admitted to the United Kingdom so that such family life she has with the United Kingdom sponsors may be continued or developed. There was no evidence before the First-tier Tribunal which could have justified a conclusion that family life might only take place in the future in the United Kingdom. The judge has, without giving any or any proper reasons, simply rejected the proposition that family life may take place in Pakistan. That, in my opinion, was a serious error in his reasoning and one which requires me to set aside his decision. Having set aside the decision, I have remade it. On the basis of the evidence which was before the First-tier Tribunal (Mr De Mello did not suggest to me that there had been any developments in this case since the First-tier Tribunal hearing) and in the light of my findings and observations above, I have concluded that family life may reasonably take place in Pakistan. That finding defeats the appeal of the appellant on human rights grounds. In consequence, the appellant's appeal against the decision of the ECO dated 28 July 2015 is dismissed.

Notice of Decision

14. The decision of the First-tier Tribunal promulgated on 3 March 2017 is set aside. The Upper Tribunal has remade the decision. The appeal against the decision of the ECO dated 28 July 2015 is dismissed.

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 22 November 2017

Upper Tribunal Judge Lane

TO THE RESPONDENT FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 22 November 2017

Upper Tribunal Judge Lane