IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000588

First-tier Tribunal No: EA/53131/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 7 August 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

OSASERE BLESSING OMOREGBE
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr E Imo, legal representative, of Chancery CS Solicitors
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 25 July 2023

DECISION AND REASONS

Introduction

1. The Appellant appeals with permission of Upper Tribunal Judge Kebede dated 24 April 2023 against the decision of First-tier Tribunal Judge Chohan ("the Judge") promulgated on 6 December 2022. By that decision the Judge dismissed the Appellant's appeal against the Respondent's refusal of an EEA Family Permit, dated 20 April 2021.

2. The Appellant is a national of Nigeria born in 2005 who has been adopted, by order of the Nigerian High Court dated 24 May 2017 ("the Order"), by Mrs Lisa Vincent Philip, a Spanish national claiming to exercise treaty rights in the UK. The Appellant claims that she is accordingly a 'family member' of her adoptive mother and entitled to join her (and her husband) in the UK and to be issued with an EEA Family Permit, pursuant to Regulation 7 of the Immigration (European Economic Area) Regulations 2016.

3. It was common ground before us (and before the First-tier Tribunal ("the FTT")) that:

    a. a lawfully adopted child is in principle a 'family member' for the purposes of the EU citizenship directive; and,
    b. as Nigeria is not a Hague Convention state and has been removed from the list of countries whose adoptions are automatically recognised by virtue of the Adoption (Recognition of Overseas Adoption) Order 2013, the only way in which the Appellant could be considered to have been lawfully adopted as a matter of English law was if her adoption were 'recognised at common law'.

4. It was not submitted before the FTT that the Appellant was the sponsor's extended family member; the case was advanced solely with reference to regulation 7.

5. It was also assumed by all involved below that the FTT had jurisdiction to determine the recognition issue. We have real doubts about the correctness of that assumption. In Re G [2014] EWHC 2605 (Fam) Mr Justice Cobb held that adoption recognised at common law "require[s] specific proceedings" before the adoption is to be treated as lawful. As a common law adoption does not take effect until a court has recognised it, if the FTT were to have such a jurisdiction, there would have been no lawful adoption (as a matter of English law) at the time of the Entry Clearance Officer or Secretary of State's decision, as the case may be, and the matter would then arguably be a "new matter" within the meaning of section 85(6) of the Nationality, Immigration and Asylum Act 2002, which could only be considered if the Secretary of State consented. It would also, and in our experience, uniquely, be a new matter created by the FTT itself. That would be a most unusual jurisdiction for the FTT to possess.

6. As a result of our doubts, when the appeal originally came before us on 24 May 2023, we informed the parties that, given that this was a jurisdictional issue, it was a matter on which we would be assisted by submissions. As the parties had not given the point consideration, we adjourned the hearing in order to permit them to do so and directed them to file their submissions in writing. While grateful for those submissions and the work which the parties' representatives have put into them, they do not in our judgment take matters further. The Secretary of State drew our attention to her various policy documents, but none dealt with the point raised. The Appellant relied principally on the powers of the Upper Tribunal contained in s.25 of the Tribunals, Courts and Enforcement Act 2007. But the issue is not one of the Upper Tribunal's powers.

7. Notwithstanding that this is a jurisdictional question, we have decided that, ultimately, it is not necessary or desirable to decide this issue in light of our conclusions on the grounds of appeal advanced by the Appellant. The question will have to be decided in a case where it is necessary for the resolution of the appeal, and hopefully with fuller submissions from the parties. In the meantime we would observe that those seeking to bring children into the UK who have been adopted in countries where an adoption is required to be recognised at common law would be well advised to seek that recognition from the family courts prior to making their application to the Entry Clearance Officer, thus avoiding this issue altogether. The process of applying for recognition of a foreign adoption under the inherent jurisdiction of the High Court (and, separately, for the grant of a

declaration pursuant to s.57 of the Family Law Act 1986) is well established and has been considered in authorities including Re G.

Background

8. The Appellant was born on 8 May 2005 in Benin City, Nigeria.

9. According to the Order, the Appellant's biological parents are Isehe Omoregbe and Esther Mary Okumafiyi. The Judge states that Mrs Okumafiyi died in 2019.

10. By the Order, leave was "granted to the 1st applicant – **LISA VINCENT PHILIP** of No.57, Hasketon Drive, LU49EZ, United Kingdom to adopt and take full parental care and responsibility of the said [Appellant] and for the purposes of her adoption, guardianship, upbringing and all other parental care, Rights and Duties." It was further ordered that custody of the Appellant was granted to Mrs Vincent. The Second Applicant was the Appellant's biological mother. There is nothing in the Order to indicate that Mrs Vincent was present at the hearing.

11. The Appellant's biological father was not a party to the Nigerian adoption proceedings and no evidence in relation to him, or whether he continues to have parental responsibility (or relevant Nigerian equivalent) was put before the FTT. Likewise, the Order does not, on its face, grant adoption of the Appellant to Mrs Philip's husband, Mr Odia. Mrs Vincent and Mr Odia have three other children.

12. According to the witness statements filed in the FTT, at that time, Mr Odia had visited Nigeria and met the Appellant, but Mrs Vincent had not done so. The witness statements do not set out any background to why it was decided that Mrs Vincent should adopt the Appellant, or what the circumstances were that led to that decision.

13. The Appellant made her application for an EEA Family Permit on 23 February 2021. This was refused on 20 April 2021, on the basis that Nigeria was not on the list in the Adoption (Recognition of Overseas Adoptions) Order 2013 and as such it was not accepted that the Appellant was adopted by a related to Mrs Vincent as a direct family member.

Appeal to the FTT

14. The Appellant's appeal came before the Judge at a hearing on 2 November 2022. At para. 4 of the decision, the Judge records that he "pointed out to Mr Imo that the issues in this case were very narrow and that the factual matrix was not in dispute. As such, [he] put it to Mr Imo as to whether the case could proceed by way of submission only. Mr Imo agreed as did [the ECO's representative]. The hearing proceeded accordingly."

15. At paras. 8-9 the Judge set out the test to be applied in determining whether a court should recognise an overseas adoption at common law and noted that, of the criteria to be applied, only the question of whether the adoptive parents were domiciled in the country of adoption at the time of the foreign adoption was in dispute. The Judge noted that "domicile" is a complex legal term and set out the

summary of the concept from the case of Re V (A Child) (Recognition of Foreign Adoption) [2017] EWHC 1733 (Fam).

16. The Judge's findings in relation to this issue are set out in para.10 of his decision, as follows:

> *"I have considered the witness statements of the sponsor and her husband but there is nothing in those statements dealing with the issue of their domicile. On the evidence before me it does seem that the sponsor and her husband are permanent residents in the United Kingdom and not Nigeria. I have no doubt that they have connections with Nigeria due to their connection with that country by way of birth, culture and customs. The difficulty in this case is that no evidence has been submitted that the sponsor is domiciled in Nigeria despite the fact that she resides in the United Kingdom permanently. As such, I am not satisfied, on the evidence before me, that at the time the adoption order was made in Nigeria that the sponsor was domiciled in that country. The burden rests on the appellant and indeed the sponsor to establish as such, which they have failed to do."*

17. The Judge went on to make observations about the effect of SM (Algeria) [2018] UKSC 9 and appeared to accept that one could be a 'family member' without legal adoption having taken place, taking into account other considerations such as the best interests of the child. However, he continued "the difficulty in this case is that very little, if any, information has been provided about the appellant's circumstances in Nigeria. As such, I cannot make a balanced assessment of the best interests of the appellant."

Appeal to the Upper Tribunal

18. The grounds are poorly drafted, but seem to us to contain the following alleged errors of law in the decision of the FTT:
    a. First, that the finding that the Appellant's adoptive mother was not domiciled in Nigeria at the relevant time was not one that was open to the FTT on the evidence;
    b. Second, it is said that the Judge did not engage with or come to a conclusion on the expert evidence in Re V, para 21, which is crucial to the adoption/domicile question.
    c. Third, the determination is not in accordance with SM (Algeria).
    d. Fourth, it was procedurally unfair to make findings against the Appellant's case while not giving the witnesses an opportunity to give evidence.

19. As already noted, permission was granted by Judge Kebede on 24 April 2023. She considered that the issue of procedural fairness was arguable, but did not limit the grant of permission to this issue.

20. There was no rule 24 response from the Respondent.

21. On the morning of the hearing at 09.50, the Appellant's solicitors emailed a bundle to the Tribunal containing what purported to be an application to adduce new evidence under rule 15(2A) of the Tribunal's Procedure Rules and for an extension of time. The new documents are (a) Mr Odia's bank statements for April-May 2023 for an account held with First Bank; (b) a photo of the family's respective passports, showing a visit to Nigeria from 19 December 2022-11 January 2023; (c) plans of land in Benin City owned by Mr Odia, and jointly by Mr

Odia and Mrs Vincent (there described as Mrs Lisa Philip Okunmafiyi Odia); and (d) two photographs from the trip. In relation to the bank statements, it is said that these could not be obtained because of the difficulties caused by the replacement of bank notes in Nigeria. In relation to the other documents, it is said that the Appellant was waiting for the Respondent's documents and the bank statements, so as to be able to file everything in a consolidated manner.

22. We refuse the rule 15(2A) application. In determining this application we are required to consider by rule 15(2A)(b) whether there has been unreasonable delay in producing the new evidence. We do not consider that there has been unreasonable delay and would not have refused the application for that reason. More fundamentally however, none of these documents is relevant to the question whether the FTT erred in law, which is the only question we are empowered to determine. That question must logically be decided on the basis of the evidence which was before the FTT: CA v SSHD [2004] EWCA Civ 1165. We do not understand the application for an extension of time. There is no time limit for a rule 15(2A) application.

23. That is the basis on which the appeal came before us.

Analysis

Ground 1

24. We do not consider that the finding of domicile was one that was not open to the Judge. It is true that questions of domicile are not to be answered by reference solely to where a person is living, has a right to reside (even permanently) or their citizenship(s). It is also true that, in an appropriate case, continuing ties with a country of birth may show that the country of domicile has not shifted, even where someone has moved abroad on a long-term basis. That is what was decided in Re V. But the question for the FTT was whether that was the case here on the evidence that was before the Judge. That evidence comprised an assertion in the witness statement of Mrs Vincent that "I have maintained close family and social ties in Nigeria and Blessing is remains *[sic]* under the care of my family. They act in accordance with my instructions", and a like statement in the witness statement of Mr Odia. That was it. All the other evidence, beyond a Nigerian passport in the name of Mr Odia (who also adduced his Spanish passport), related to Mrs Vincent's and Mr Odia's life in the UK. The Judge directed himself in accordance with Re V. He was plainly alive to the fact that domicile and residence are not the same, but came to a conclusion that he was entitled to come to. We accordingly reject this ground.

Ground 2

25. This ground – that the Judge did not engage with the expert evidence that was adduced in Re V is predicated on a misunderstanding of how precedent works in English law in relation to questions of fact. It is trite that questions of foreign law are questions of fact in English proceedings. Facts are determined a particular case on the basis of the evidence that is adduced in that case, not on the basis of evidence that was adduced in another case. The fact that an expert gave evidence in Re V as to the irrelevance in Nigeria adoption law of a parent's domicile (as is recorded in para.21 of Re V on which Mr Ido relies in his grounds) does not mean that it can be taken into account in a subsequent case. The only exceptions to this principle are Country Guidance cases and cases to which

Devaseelan [2002] UKIAT 000702 applies. Even if that were wrong, the fact (if it is a fact) that Nigerian law does not take account of a parent's domicile in determining whether to make an adoption order does not assist the Appellant, as the fact of the adoption order would not be indicative of Mrs Vincent's domicile in Nigeria, which was the question for the FTT. Even if this were an error, it would not therefore be material.

Ground 3

26. By this ground the Appellant argues that the decision of the FTT was not "SM(Algeria) compliant". It is necessary to be careful in relation to SM (Algeria) because it has been the subject of a decision of both the Supreme Court and the Court of Justice of the European Union. In that case the guardians of the applicant, who were French nationals with permanent residence in the UK, travelled to Algeria to apply to become guardians of a child under the kefalah system. They were awarded legal custody and parental responsibility under Algerian law. The question was whether the appellant in that case was a 'family member' or an 'other family member' (more usually called an 'extended family member') for the purposes of EU law.

27. The Supreme Court held ([2018] UKSC 9; [2018] 1 WLR 1035) that whether the appellant was a 'family member' was unclear and referred that question to the Court of Justice. If however the child was not a family member, the Court considered that she would be capable of being an extended family member. However, in respect of an extended family member, entry can be refused on a number of bases that do not apply to family members. It is to this latter question – whether entry should be granted to an extended family member – to which questions of the child's best interests are relevant.

28. On the reference to the Court of Justice, it held that a child that had not been adopted was not a 'family member', but an 'other family member': see [2019] 1 WLR 5505.

29. Mr Imo did not seem to appreciate that children in respect of whom only guardianship (or equivalent) orders are made are extended family members, not family members. Before us he expressly accepted that he did not place any reliance before the FTT on Regulation 8 of the 2016 Regulations, which relates to extended family members and relied exclusively on Regulation 7, relating to family members.

30. Given that, unless the Appellant's adoption is recognised in English law, she is an extended family member, and Mr Imo did not rely on her rights as an extended family member, any error in the assessment by the Judge of the wider circumstances if the Appellant was not adopted (as a matter of English law) is not one that can be said to be material.

31. Nonetheless, we consider that the Judge's approach was not vitiated by any such error. The evidence of the Appellant's best interests was all but non-existent. In the Grounds, the Appellant relies on para. 8 of Mrs Vincent's witness statement. But this simply states that the Appellant remains in the care of her family in Nigeria. Nothing is known about that family's situation, nor whether there is adequate food and shelter for the Appellant. These are some of the most basic facts that would be required to be able to assess the Appellant's best interests and the evidential basis for it was simply absent.

Ground 4

32. We do not consider that the approach adopted by the Judge was procedurally unfair. The Judge was correct that the factual matrix was narrow in this case. He was also correct that the facts, such as they were in evidence, were not substantially in dispute. The Appellant appears to consider that the opportunity for Mrs Vincent and Mr Odia to give oral evidence provided them with the chance to expand upon and remedy any holes in the evidence which they had given in their witness statements. That is not however the role of oral evidence. Rather, oral evidence provides an opportunity for the opposing party to test the evidence given in writing and to put their case to the witnesses, and for the party who has called that witness to re-examine in relation to any issues arising from cross-examination. In a case such as this with self-evidently inadequate witness statements that fail to provide evidence in relation to the central issues in the case, calling the makers of those statements to give oral evidence would not have fixed the problem. It would certainly not have been unfair for them not to be permitted such an opportunity. Moreover, the decision whether to call Mrs Vincent and Mr Odia to give evidence was Mr Imo's, not the Judge's. He did not have to consent to the approach suggested by the Judge. In the circumstances, we can see nothing unfair in the Judge's suggestion that the case could proceed on a submissions-only basis.

Notice of Decision

The decision of the First-tier Tribunal does not disclose an error of law. The appeal is accordingly dismissed.

Paul Skinner

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 July 2023