



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003958
UI-2024-003959
First-tier Tribunal No: HU/61208/2023
HU/61206/2023

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 19 November 2024**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

**AB & EB
(ANONYMITY ORDER MADE)**

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms A Smith, counsel instructed by Immigration Advice Service
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

Heard at Field House on 13 November 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellants are granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellants, likely to lead members of the public to identify the appellants. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Easterman who allowed the appellants' appeals following a hearing which took place on 9 May 2024.

2. However, for ease of reference hereafter the parties will be referred to as they were before the First-tier Tribunal.
3. Permission to appeal was granted by First-tier Tribunal Judge ID Boyes on 28 August 2024.

Anonymity

4. No anonymity direction was made by the First-tier Tribunal but this position has been reversed by Upper Tribunal Judge Ruddick who considered the matter on the 4 October 2024. It is appropriate to maintain that direction given the vulnerability of the minor appellants.

Factual Background

5. The appellants are nationals of Ethiopia aged six and four respectively. They applied to join their adoptive parents in the United Kingdom.
6. Those applications were refused in decisions dated 18 August 2023. Points made included that Ethiopia is not on the list of designated countries on The Adoption (Recognition of Overseas Adoptions) Order 2013. The ECO noted that the requirements in Adoption Act 2002 and the Adoptions with a Foreign Element Regulations 2005 had not been met. The appellants were not accepted as the subjects of a de-facto adoption because the requirements of paragraph 309A of the Rules had not been met. It was not accepted that the appellants had provided any evidence of any serious or compelling family or other considerations which make their exclusion undesirable and therefore the application was refused under several provisions of paragraph 310 of the Immigration Rules as well as paragraph 316 which concerns prospective adoptions in the United Kingdom.

The decision of the First-tier Tribunal

7. In his decision, First-tier Tribunal Easterman recorded that the appellants were unable to meet the requirements of the Rules. Having found the sponsors to be credible, the judge was prepared to go behind the Rules and find that the refusal of entry clearance represented a breach of the appellants' Article 8 rights.

The appeal to the Upper Tribunal

8. The grounds of appeal are encapsulated in the following extract from the application:

It is submitted that the FTTJ has materially erred in allowing the Appellants appeals on Article 8 grounds, despite finding that the Appellant's cannot satisfy the requirements of the Immigration Rules. It is submitted that the FTTJ's findings fail to have regard to the findings at [9] of *TY (Overseas Adoptions - Certificates of Eligibility) Jamaica* [2018] UKUT 00197 (IAC) which states the following,

"Where an adoption carried out in accordance with the law and customs of a foreign country is not so recognised, there is a prohibition in bringing the child into the UK except where the Immigration Rules make other provision."

9. Permission to appeal was granted on the basis sought.

10. On 9 October 2024, counsel (Ms K Cronin) filed a Rule 24 response on the appellants' behalf in which it was contended that the ECO had misstated and misapplied the content and findings in *TY*. It being said that there was no evidence that the sponsors intended to bring the appellants to the United Kingdom for the purpose of adoption. The additional point was made that the extract from *TY* referred to other provision in the Rules and that GEN 3.2, provided for entry to be granted to the United Kingdom on human rights grounds.

The error of law hearing

11. The matter comes before the Upper Tribunal to determine whether the decision contains an error of law and, if it is so concluded, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. A bundle was submitted by the Secretary of State containing, inter alia, the core documents in the appeal, including the appellants' and respondent's bundles before the First-tier Tribunal.

12. The hearing was attended by representatives for both parties as above. Both representatives made submissions and the conclusions below reflect those arguments and submissions where necessary. At the end of the hearing, the decision was reserved.

Discussion

13. Mr Lindsay's submissions focused on the following provision of the Adoption and Children Act 2002.

83 Restriction on bringing children in

a. (1) This section applies where a person who is habitually resident in the British Islands (the "British resident")—

(a) brings, or causes another to bring, a child who is habitually resident outside the British Islands into the United Kingdom for the purpose of adoption by the British resident, or

14. The Secretary of State's argument was that there was nothing in the 2002 Act which meant that the adoption referred to was expected to take place in the United Kingdom. Mr Lindsay argued that the nature and purpose of the legislation applied to situations like the instant case where the sponsor had already adopted elsewhere. He contended that the sponsor was seeking to bring the appellants to the United Kingdom for the purpose of adoption which had already happened overseas and that *TY* established that there was a prohibition on doing so except where the Immigration Rules made other provision. He acknowledged that the Rules now made provision for a wider proportionality assessment under GEN 3.2, however this was not the basis under which the appeals were allowed [48-49].

15. Mr Lindsay further argued that the effect of s.83 of the 2002 Act was that if the appeals remain allowed and sponsors seek to bring the children to the UK, as per chapter 6 of 2002 Act, they might find themselves criminalised in that they could be liable to 6 months' imprisonment.

16. I consider that the respondent has misunderstood the effect of *TY* and that the grounds are misplaced. Firstly, the Upper Tribunal found that the appellant in *TY* met the requirements of paragraph 316A of the Rules because his sponsor was proposing to adopt him in the United Kingdom and had obtained a Certificate of Eligibility to that end. The facts in these appeals differ in this respect as paragraph 316A was not met, as the judge found.
17. By contrast, the sponsors in the instant case, whose evidence has not been challenged, have taken no steps to adopt the appellants in the United Kingdom. Furthermore, this argument was not raised before the First-tier Tribunal. Indeed, Ms Smith argued that there are other avenues available to the sponsors, who are foster carers, such as seeking guardianship of the appellants.
18. A common sense reading of section 83 of the 2002 Act and the explanatory statements does not suggest that it applies to an adoption which has already taken place in a different country where the adoption is not recognised in the United Kingdom. I find that this 22-year-old provision refers solely to an adoption intended to take place in the United Kingdom. I therefore conclude that there was no error by the First-tier Tribunal in allowing these appeals without consideration of *TY*.
19. This disposes of the sole ground of appeal.
20. I will now briefly address the additional point raised by Mr Lindsay in response to the mention of GEN 3.2 in the Rule 24 arguments. GEN 3.2 states that when the Rules have not been met the decision-maker
- “must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.”
21. That the judge made no mention of GEN 3.2 does not render his decision unsafe. While the judge found that the Rules were not met, the same outcome was achieved with a consideration under Article 8. There was rightly no challenge to the finding that Article 8 was engaged given what was said in *Ahmadi* [2005] EWCA Civ regarding family life between prospective adopters and adoptive children as well as the positive obligation to permit family life to develop. Nor has there been any challenge to the findings of fact underpinning the conclusions on proportionality.
22. The Secretary of State’s appeal is dismissed.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal shall stand.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 November 2024

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A **“working day”** means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is “sent” is that appearing on the covering letter or covering email