Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16467/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On the 5th May 2016

Decision & Reasons Promulgated
On 17th May 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

[N O]

~~(Anonymity Direction not made)~~

Claimant

And

ENTRY CLEARANCE OFFICER ACCRA

Appellant in the Upper Tribunal

Representation:

For the Claimant: Ms Cronin (Counsel)

For the Entry Clearance Officer: Mr Kotas (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Entry Clearance Officer's appeal against the decision of First-tier Tribunal Judge H. Clark promulgated on the 29th October 2015, in which she allowed the Claimant's appeal against the Entry Clearance Officer's decision

to refuse her entry clearance to join her adopted mother in the United Kingdom. The Claimant is a citizen of Ghana of who was born on the [ ] 2010.

2. Within her decision although First-tier Tribunal Judge H. Clark accepted that Ms [O], the Claimant's adoptive mother, had duly adopted the Claimant by means of an Adoption Order in the High Court in Ghana on the 20th December 2013 and that Ms [O] was the Claimant's sole parent and was present and settled in the United Kingdom and that she had worked for Camden Council for more than 14 years and owned a property in the UK and earned a salary of £38,800. She also accepted that the Claimant did have sole responsibility for the Claimant's care notwithstanding that they lived in different countries. The Judge found that the Claimant has not been granted entry clearance under the Immigration Rules because she did not have a Certificate of Eligibility from the Department of Education in the United Kingdom for the purposes of paragraph 309B of the Immigration Rules. Although Ms Cronin has submitted before the First-tier Tribunal Judge that the provisions of the Adoption with a Foreign Element Regulations 2005 applied to "prospective adopters" rather than those who were already adoptive parents, and it was argued that Ms [O] was not planning to bring the Claimant into the United Kingdom within 12 months of her adoption such that she would not fall foul of Section 83 of the Adoption and Children Act 2002, the Judge decided that the date on the application was in fact the 25th July 2014, and therefore was within 12 months of the adoption, even though she accepted Ms [O]'s evidence that the date of the Claimant's entry into the United Kingdom was in fact going to be in 2015, but found that the Entry Clearance Officer did not have that information.

3. Judge Clark considered the unreported Upper Tribunal case of Peiris v The Secretary of State for the Home Department OA/02356/2014 in which case Upper Tribunal Judge King TD had held that paragraph 309B controlled paragraph 310 of the Immigration Rules and she found that the assumption

was therefore that the Rules imposed additional minimum requirements on those seeking to bring children into the jurisdiction, even when an Adoption Order was made in a country whose adoptions are recognised in the United Kingdom and that therefore the Certificate of Eligibility still needs to be obtained even when the child had already been adopted overseas. Judge Clark considered herself bound by the Upper Tribunal decision in that regard, but went on to consider the Claimant's claim under Article 8 outside of the Immigration Rules and considered and found that it was in the Claimant's best interests to live with her adoptive mother, Ms [O], and found that if it were necessary for a further assessment to be made for the purposes of obtaining a Certificate of Eligibility, that it would be unlikely to be completed and entry clearance granted before the summer of 2016, during which time it was said that Ms [O] would have the difficult judgement of whether or not to visit her daughter and risk her falling ill at the prospect of further separation and as to what arrangements to make for the child's schooling.

4. Judge Clark considered that refusing the Claimant permission to join her mother in the United Kingdom would be a grave interference with her family life, which was in her opinion all the more important given her abandonment by her birth parents and in light of the particular vulnerability of the Claimant demonstrated by her illness in July 2014, when she anticipated separation from her adoptive mother and that it was inimical to her welfare to further delay her admittance to the United Kingdom whilst a Certificate of Eligibility is obtained. Judge Clark found that the Entry Clearance Officer's decision was a disproportionate interference with the Claimant's family life with her mother and the appeal was therefore allowed on Human Rights grounds on the basis of her family life under Article 8.

5. Within the Grounds of Appeal the Entry Clearance Officer has argued in ground 1 that the finding by the Judge that there would be a delay in response to obtaining a Certificate of Eligibility was based upon a guess by

the First-tier Tribunal Judge and that although the Judge referred at paragraph [19] to the decision in the Peiris case, and stated that she had no direct evidence from Ms [O]'s local authority as to the time it would take for an assessment to be made and there was no reason to suppose it would be substantially different from that taken by the London Borough Harrow in Peiris. It was further argued that no application had been made by either party to cite the unreported case and that the Entry Clearance Officer it was argued within the Grounds of Appeal was not put on notice, not furnished with a transcript and not given the opportunity to make submissions in respect of that case and that this was contrary to the First-tier Practice Direction 11. It is argued that it is for the Claimant to demonstrate an interference with family life and not for the Judge to advance that argument on her behalf. It is further argued that the Judge failed to take into account the fact that the delay was wholly the fault of the Sponsor and that the Claimant and Sponsor were on notice of a requirement to obtain an eligibility report given the fact that the adoption took place in December 2013 and Rule 309B came into effect on the 6th September 2012. It is argued that the requirement for an Eligibility Certificate is covered by the Rules and cannot be considered a circumstance warranting consideration outside of the Rules.

6. Within ground 2 it is argued that the First-tier Tribunal Judge did not have jurisdiction to make suitability findings in respect of the care to be provided by Ms [O] and that that was a discretion vested in the competent authority by the executive.

7. Permission to appeal has been granted by First-tier Tribunal Judge Fisher on the 6th April 2016, in which he allowed permission to appeal on both grounds and held that it was arguable that the Judge had engaged in speculation and that it was arguable that she had erred in placing reliance upon an unreported decision when neither party had applied to cite that decision and that it was

arguable that the Judge had substituted her own findings on the Sponsor's suitability and that she had no jurisdiction to do so.

8. In considering this appeal, I have fully considered the submissions made by both parties, which are fully recorded within the record of proceedings.

My Findings on Error of Law and Materiality

9. At the start of the appeal, Ms Cronin indicated that she wish to argue that the Judge's decision under paragraph 309B was incorrect. However, no cross-appeal had been submitted on behalf of the Claimant in this regard, and permission had not been granted by the First-tier Tribunal for her to run that argument. Ms Cronin did not seek on behalf of the Claimant for the case to be adjourned so that permission could be sought from the First-tier Tribunal to cross-appeal on that point, and she argued that the Claimant had specifically asked for the case to be expedited, and that in such circumstances she was simply seeking to rely upon the decision of the Judge under Article 8, and was not seeking that the case be adjourned in order that permission could be obtained from the First-tier Tribunal Judge so that she could pursue the potential cross-appeal on the grounds that the decision under 309B was incorrect. I therefore not taken into account the arguments that she wished to raise in this regard, in reaching my decision.

10. Mr Kotas quite properly conceded on behalf of the Entry Clearance Officer that he was in some difficulties in respect of the appeal given the way that the Grounds of Appeal had been formulated. He conceded that having spoken to Ms Cronin, who attended at the First-tier Tribunal hearing, that in fact the decision of Peiris, was a decision that the Judge herself had obtained, and was not in fact a decision that either party had sought to cite, and that although within the Grounds of Appeal it was argued that the Entry Clearance Officer was not put on notice and not furnished with a transcript or given the opportunity to make submissions in respect of that case, in fact, as Ms Cronin

argued within her Rule 24 Reply the Judge had in fact alerted the parties to the fact that she had read the decision before commencing the hearing, that she had risen to allow the determination to be copied and read by Counsel and the Presenting Officer and that neither party had objected at the time to the case being considered and that there was in fact extended discussion in respect of the case by both parties and the Judge. Mr Kotas conceded that this had in fact happened having spoken to Ms Cronin.

11. Although the Entry Clearance Officer seeks to rely upon First-tier Tribunal Practice Direction 11, that simply refers to the fact that a determination of the Tribunal which has not been reported may not be cited in proceedings before the Tribunal unless:

> '11.1(a) The person who is or was the Appellant before the First-tier Tribunal or a member of that person's family, was a party to proceedings in which the previous determination was issued; or
>
> (b) The Tribunal gives permission.'

12. It is clear from reading the entirety of the Practice Direction including paragraphs 11.1 through to 11.6 in respect of the citation of unreported determinations, that although under 11.3 permission under paragraph 11.1 will be given only where the Tribunal considers that it would be materially assisted by the citation of a determination as distinct from the adoption argument in the reasoning to be found in the determination, it is clear that in fact here Judge Clark did consider that the Tribunal would be materially assisted by reference to the determination, and this is not a case in any event where either party were seeking to cite the decision. In this case where the Judge had referred to the decision herself. The Practice Direction does not prevent the Judge referring to decisions themselves, but clearly if a Judge is to do so, whether or not the decision is reported or unreported, the Judge must give the parties a fair opportunity to deal with that case and to make

submissions in respect of it. Clearly, as was in fact accepted by Mr Kotas on behalf of the Entry Clearance Officer having spoken to Ms Cronin in this regard, that is exactly what in fact Judge Clark had done in this case. She had copied the decision and given the parties the opportunity of making submissions upon it. It is further clear having read paragraph 47 of the decision of First-tier Tribunal Judge Clark that the parties were allowed to make submissions in respect of the case, given that the Judge states "However, notwithstanding Ms Cronin's persuasive submissions, the adoptive parents in Peiris were in materially the same position as Ms [O].".

13. Although the decision in Peiris v The Secretary of State for the Home Department was unreported, and therefore care does need to be taken in respect of such a decision, and at most it will be persuasive, if there is in fact no other reported authority on the point, and no other reported authority on this point was seemingly brought to the attention of Judge Clark or to myself sitting the Upper Tribunal on this point, there is nothing within the Procedure Rules or statutes to prevent the Judge herself producing the same and seeking the parties' submissions in respect of the case, and relying upon the same as persuasive authority in her judgment.

14. Although Mr Kotas sought to argue that in fact the Judge erred in stating that she considered herself bound by the decision of Upper Tribunal Judge King in Peiris, given that it was an unreported decision, in fact permission to appeal was not granted on that basis and that argument was not raised within the Grounds of Appeal. Mr Kotas did not make a formal application to amend the Grounds of Appeal, and therefore I do not consider that in circumstances where permission has not been granted for that argument to be run, that Mr Kotas was in a position to argue that point. However, even if I am wrong in that regard, any error that the Judge might have made in finding that the unreported decision was binding upon her was not material in any event, given that the Judge did not allow the Claimant's appeal under paragraph

309B of the Immigration Rules. Any error in that regard was also in fact in favour of the Entry Clearance Officer, rather than against him.

15. Although it is argued by the Entry Clearance Officer that the Judge entered into speculation, although at [49] Judge Clark stated that "Whilst I do not have direct evidence from Ms [O]'s local authority as to the time it would take for an assessment to be made, there is no reason to suppose it would be substantially different from that quoted by the London Borough of Harrow. The Appellant was adopted at the end of 2013 and the application for settlement was made in June 2014. If it were necessary for a further assessment to be made, it seems unlikely that this would be completed and entry clearance granted before the summer of 2016.". I do not accept the submission by the Entry Clearance Officer that the Judge was simply engaging in speculation. The Judge clearly took account of the fact that the application for settlement had been made in June 2014, and the fact that Ms [O] was not a prospective adopter but had already undergone a rigorous assessment procedure in Ghana, and that although she was required under the Rules to obtain a Certificate of Eligibility, the Judge was entitled to take account of the fact that whilst she did not have direct evidence from Ms [O]'s local authority, there was no reason to suppose it would be substantially different from the time taken to complete such an assessment by the London Borough of Harrow. Although the Judge did not have direct evidence as to the length of time it would take for the assessment in this case given that adoption involved a foreign element, the Judge inevitably had to make some assessment as to the likely timeframe if the Sponsor was simply to make an application for a Certificate of Eligibility, and was in my judgement, in the absence of any other evidence, entitled to say that in the absence of any evidence to the contrary that there was no reason to suppose it would be substantially different from the time that it took for a similar assessment to be completed by the London Borough of Harrow in the Peiris case. The Judge in my judgement was entitled to consider that such an assessment was likely to

take several months and that entry clearance was unlikely to be granted before the summer of 2016. In my judgement this is a finding open to her and she has not simply relied on speculation, but has done her best to estimate the likely period for the grant of such a certificate having considered how long it took for a similar certificate to be granted in another matter, in circumstances where there was no contrary evidence that in this case the certificate could have been obtained quicker produced on behalf of the Entry Clearance Officer.

16. Further, as was properly conceded by Mr Kotas on behalf of the Entry Clearance Officer, whereas in ground 2 it is argued that the First-tier Tribunal did not have jurisdiction to make suitability findings and that decision was vested in the competent authority by the executive, Mr Kotas conceded that in fact the Judge, was entitled to make an Article 8 assessment outside of the Rules and as part of that to assess the care that would be provided to the Claimant by Ms [O]. He conceded that it was not a question of jurisdiction, but the fact that there had not been a Certificate of Eligibility was a significant matter that weighed in the balancing exercise when considering the question of proportionality under Article 8.

17. Again, I agree with Ms Cronin in this regard that the Entry Clearance Officer has not been given permission to argue that in fact the Judge got the assessment of the balancing exercise wrong under Article 8, and permission was only granted on the basis of the original Grounds of Appeal that the Judge had made a material misdirection in law when considering that the Judge was able to make suitability findings when that was a decision vested in the competent authority by the executive. Mr Kotas conceded that ground of appeal was incorrect.

18. I bear in mind that Mr Kotas did not formally apply to amend the Grounds of Appeal in this regard and that the Entry Clearance Officer has not been granted permission to appeal on the new argument sought to be raised, but in

any event, in my judgement given that it has now been accepted on behalf of the Entry Clearance Officer that the Judge did have jurisdiction to consider the Article 8 claim outside of the Rules and to make an assessment as to proportionality and to consider the care that was going to be given by Ms [O], I do not consider that the Judge has materially erred in her assessment and that although I might have reached a different decision, had I been hearing the case, the decision reached by First-tier Tribunal Judge Clark was a decision that was open to her on the evidence.

19. The Judge in this regard when conducting the proportionality exercise had clearly taken account of the fact that there is not a Certificate of Eligibility from the Department of Education and noted specifically at [51] that there is a legitimate public interest in consistent and fair immigration and the need for appropriate safeguards to be in place, to ensure that children brought into the country will be properly cared for. She has therefore taken account both of the fact that there was no certificate and of the public interest in this regard, but the Judge had fully considered the Claimant's case that the Claimant had been abandoned by her birth mother on the 8th November 2011 and that she had been cared for in a children's home and that Ms [O] had applied to be approved as an adopter in Ghana and had been interviewed by the social welfare department which Ms [O] described as being a rigorous assessment process involving consideration of her health, character, employment, accommodation, earnings and her family background as well as information as to why she wanted to be an adopter and that the Claimant had been placed with Ms [O] with a view to adoption and a probation officer had overseen the placement recommended.

20. The Judge found and accepted specifically that the Claimant had bonded very quickly with Ms [O] at [26] and found at [27] that "It is clear from the post placement report on the Appellant that her health is good and that her development has improved greatly since her placement with Ms [O] and her

current guardian". The Judge found specifically at [35] that Ms [O] is the sole parent for the Claimant and that Ms [O] is present and settled within the United Kingdom and that she owned a property in the United Kingdom and worked for Camden Council earning a salary of £38,800 per year. The Judge further took account of the fact that although Ms [O] had not been able to spend long periods of time physically caring for the Claimant in her judgement it was "abundantly clear that she is doing everything she possibly can to parent the Appellant whilst they are living in different countries. The Appellant and her mother have daily contact. Ms [O] chooses and pays for the nursery school which the Appellant attends and has weekly reports from the school as to how the Appellant is getting on, not just educationally, but emotionally and socially. She even knows what the Appellant has for lunch at school. It is clear that Ms [O] takes all the major decisions about the Appellant's life, even though she is being physically cared for by Mrs [N-S]" at [36].

21. The Judge went on to accept and find at [37], that Ms [O] has sole responsibility for the Claimant's care, notwithstanding that they lived in different countries. She went on to find that Ms [O] presented as a proud and caring mother who was desperate to be reunited with her daughter and had experience of raising adopted daughters outside of their country of birth and had realistic expectations about the challenges she may face bringing up a child in these circumstances at [38].

22. The Judge went on to find that the Claimant is a vulnerable young girl and accepted that she had been abandoned by her birth mother in Ghana and that her anxiety at the prospect of being parted from her adopted mother in July 2014 manifested itself as illness and that the Claimant remained at preschool with her guardian, but she was now of an age where it was desirable for her to start primary school at paragraph [39]. The Judge also considered the best interests of the Claimant and found at [50] that it was in the Claimant's best

interests to live with her adoptive mother who loves her and is in a position to offer her the care and security she needs. She took account of the fact that Ms [O] had glowing references from a variety of sources and that she volunteers with vulnerable adults so had been checked by the Disclosure and Barring Service and had already been approved as an adopter in Ghana and had also been approved as an adopter in the United Kingdom in relation to her older daughters. The Judge went on to fully take account of the public interest and the fact that appropriate safeguards do need to be in place to ensure that she will be brought into the country and be properly cared for, but found specifically at [51] that "In light of the particular history and vulnerability of this Appellant, demonstrated by her illness in July 2014 when she anticipated separation from her adoptive mother it was (and is) inimical to her welfare to further delay her admission to the United Kingdom whilst a Certificate of Eligibility is obtained.". In such circumstances it was open in my judgement for the Judge to find that the decision was a disproportionate interference of the Claimant's family life with her adoptive mother and to allow the appeal on Human Rights grounds.

23. The decision of First-tier Tribunal Judge H. Clark therefore does not disclose a material error of law and is maintained.

Notice of Decision

The decision of First-tier Tribunal Judge H. Clark does not disclose a material error of law and is maintained.

No anonymity order has been sought on behalf of the Claimant, and therefore no such anonymity order is made.

Signed

Deputy Judge of the Upper Tribunal McGinty Dated 5th May 2016