Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/15868/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29 October 2014	**On 14 November 2014**

Before

DESIGNATED JUDGE MURRAY

Between

MS KOSISOCHUKWU VANESSA OBI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - ABUJA

Respondent

Representation:
For the Appellant: Mr Chikwe, St Valchikwe, Solicitors, Ilford
For the Respondent: Mr Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria born on 20 August 2010. She appealed against the decision of the respondent dated 13 June 2013 refusing her leave to enter the United Kingdom pursuant to paragraph 310 of HC395 (as amended). Her appeal was heard by Judge of the First-tier Tribunal Carroll and was dismissed in a determination promulgated on 27 May 2014.

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2. An application for permission to appeal was lodged and permission was refused by Judge of the First-tier Tribunal Hollingworth on 7 August 2014. However, permission was granted by Upper Tribunal Judge Warr on 17 September 2014. The permission states that the judge should consider the whole of any relevant rule (Kwok on Tong 1981 Imm.A.R. 214) but a proper opportunity must be given to deal with the point. Judge Warr noted that Rule 309B was drawn to the judge's attention at the hearing. However, he found that that aspect of the case might have been conceded by the Entry Clearance Officer or expressly not relied upon or that it might be a bad point. He also found that there is an Article 8 issue.

The Hearing

3. The appellant's representative submitted that the First-tier Tribunal Judge should not have considered Rule 309B. There is no mention of it in the refusal letter of the Entry Clearance Officer.

4. I referred him to paragraph 7 of the determination. This states "The sponsor must obtain and provide a certificate of eligibility in order to meet the requirements of paragraph 310 of HC395". He submitted that as Rule 310 was accepted as having been satisfied this issue should not have been considered.

5. I asked the representative if looking at this case holistically, he accepts that if there is a certificate of eligibility the claim will succeed under the Immigration Rules and he said he accepts that is the case.

6. The representative submitted that the Entry Clearance Officer refused the application on 14 June 2013 making reference to paragraph 310 of the Rules. There was then the Entry Clearance Manager's review dated 18 March 2013. He submitted that Rule 309B was not mentioned in either of these refusals. He submitted that the judge found that paragraph 310(i)(e) (f) and (ix) have been satisfied. At the hearing the Presenting Officer submitted that paragraph 309B is applicable as the adoption of the appellant is not a de facto adoption. He submitted that the Entry Clearance Officer must have considered Rule 309B when he made his decision on paragraph 310.

7. The representative submitted that the sponsor has dual nationality, British and Nigerian. He referred me to paragraph 309A which sets out the requirements of the Rules and submitted that the Entry Clearance Officer must have had paragraph 309 in mind when he considered the application. He submitted that a de facto adoption is where on parent has spent time in the country where the child is being adopted from and he submitted that in this case bonding has taken place between the child and the sponsor and the Entry Clearance Officer has accepted this. He submitted that the sponsor has been to Nigeria to be with the appellant.

8. He submitted that at the hearing on 16 May 2014 the judge should not have accepted the Presenting Officer's submissions relating to paragraph

309B as this was the first time that this paragraph had been mentioned and at the date of the hearing it was not an issue. He submitted that he is not suggesting that the judge should not take all of the relevant Immigration Rules into account but the refusal letter makes it clear that the Entry Clearance Officer was aware of this paragraph and the introduction of paragraph 309B is a separate issue. He submitted that as the refusal letter was not on that basis the judge's determination contains a material error of law.

9. He submitted that the Entry Clearance Officer relied on the certificate of abandonment. I pointed out to him that this has been provided. He submitted that this therefore makes it clear that Rule 309 was considered by the Entry Clearance Officer and was found to have been satisfied.

10. The representative then referred to Article 8 and the fact that this is not referred to in the determination. He submitted that the Entry Clearance Officer found that this was a genuine adoption. He was satisfied with the finances and the emotional support for the child. He submitted that the appellant's grandmother cannot continue looking after her because of ill health and that her maternal uncle is presently helping to look after her but he is American and will return to the USA after Christmas this year. He submitted therefore that even if Rule 309B applies, the application should be allowed under Article 8.

11. The representative referred to the Rule 24 response by the respondent and submitted that this makes no mention of Article 8.

12. I was asked to set aside Judge Carroll's determination.

13. The Presenting Officer submitted that what the appellant's representative is asking me to do is ignore statute. He submitted that the judge accepted the submission relating to Rule 309 and that Rule 309A makes it clear that a certificate of eligibility must be provided under Rule 310. He submitted that you cannot say that the certificate is not required as it is stated in the Rules that it must be provided. He referred me to the Children's Act.

14. With regard to Article 8 he submitted that the Article 8 claim has to be considered at the date of the decision. He submitted that there is nothing in the evidence to indicate that the judge's decision is not proportionate.

15. He submitted that the appellant's representative has accepted that if the eligibility certificate is provided, the application will succeed. He submitted therefore that the claim should not be allowed under Article 8 and that there is no material error of law in the determination.

16. I was asked to uphold the judge's decision.

Determination

17. The judge at the First-tier hearing did not object to the Presenting Officer making submissions relating to Paragraph 309B of the Rules. Neither did the appellant's representative. It was not clear from the evidence before the judge that the Entry Clearance Officer had considered its terms but it is likely he had not as the certificate of eligibility is required before all the terms of Paragraph 310 can be satisfied. The judge, before making his decision has to consider the whole of the relevant Rule. Statute cannot be ignored.

18. Paragraph 309B requires that all prospective adoptive parents be assessed as suitable to adopt, by a competent authority in the United Kingdom and for a certificate of eligibility to be obtained from the Department of Education. This certificate has to be provided with all entry clearance applications under paragraph 310 of HC395. This certificate was not supplied by the sponsor and there was no explanation from the sponsor as to why she had not obtained this, so although the judge accepted that the requirements of paragraph 310 (i) (e) (f) and (ix) had been satisfied, this certificate of eligibility has to be submitted before all the requirements of paragraph 310 have been satisfied.

19. The judge has set this out in his determination and for that reason he dismissed the appeal.

20. It was accepted by both parties at the hearing that when the certificate of eligibility is produced the application will succeed. A new application should therefore be made with the certificate of eligibility. This appeal cannot succeed based on Article 8 when it can succeed under the Rules when this document is submitted with a new application. Article 8 is not a means of circumventing the Rules.

DECISION

21. There is no material error of law in the First-tier Judge's determination and his decision of 22 May 2014 stands.

Signed Date **29 October 2014**

Designated Judge Murray
Judge of the Upper Tribunal