IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/00250/2020**

THE IMMIGRATION ACTS

Heard at Field House
On the 28th April 2022

Decision & Reasons Promulgated
On the 13 September 2022

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MASTER E S G
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms N Amin, instructed by Riverbrooke Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant E was born on 16th August 2016 and is a male child and citizen of Nigeria. No litigation friend has been appointed. His father presented his appeal. An application was made on his behalf for entry clearance on 3rd July 2019 as the dependent child of OG (father) and AG (mother) who are husband and wife and the sponsors. The application was refused by the Secretary of State on 20th November 2019 and the matter came before First-tier Tribunal Judge Kaler, who considered the human rights appeal.

2. The sponsors are husband and wife and, having married on 9th June 2017, they commissioned the appellant's birth by surrogacy, making arrangements through the Medical Art Centre in Lagos. The child was conceived through donor sperm and egg and so the child is not genetically related to either of the sponsors or his birth mother. He was handed over to the sponsors immediately after his birth and apparently has no connection with the birth or biological mother. Mrs AG has been living with the child in Nigeria in rented accommodation since his birth and she has remained in Nigeria throughout, save for two visits to the United Kingdom for ten days and one month. Mr OG has visited Nigeria regularly about fifteen or twenty times since the child's birth.

3. An application was made for a British passport for the appellant in 2016 and soon after an application for a Certificate of Entitlement to Right of Abode was made. The sponsors subsequently withdrew the application for a British passport in November 2016 and the application for a Certificate of Entitlement to Right of Abode was refused on 20th March 2017.

4. The sponsors were advised that there was no legal provision to adopt a child in Nigeria other than one who had been abandoned and was in the custody of an orphanage and thus they, as an alternative, obtained a Legal Guardianship Order on 21st May 2018.

5. The Entry Clearance Officer's decision stated that there was no provision in the Immigration Rules for entry as a surrogate child; UK law recognised that parental rights of a surrogate child rested with the surrogate mother and her husband until a Parental Order was granted by the UK courts. It was noted that there was no biological link to the appellant and that a Nigerian Guardianship Order had been obtained but this was not an Adoption Order and nor was it a UK Parental Order. Finally, the decision stated that there were no exceptional circumstances.

6. It was submitted in the grounds of appeal that the sponsors were the guardians of the child and entry clearance should have been granted in accordance with paragraph 297 and the decision was contrary to the child's best interests and Article 8.

7. Subsequently the appellant appealed on the basis that the requirements of paragraph 310 of the Immigration Rules had been met as there had been a 'de facto' adoption as set out in 309A. The matter came before the First-tier Tribunal and the judge considered (1) whether the appellant was the da facto adopted child of the sponsor and (2) whether there were exceptional circumstances that would create unjustifiably harsh consequences such that Article 8 would be violated.

8. 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 under Section 83 of the Adoption and Children Act except where the Immigration Rules make other provision. It was agreed by the parties before the First-tier Tribunal that there had been no recognised formal adoption of the appellant.

9. The judge considered from [18] to [31] in his/her decision whether there had been a de facto adoption under paragraph 309A, which provides as follows:

> "***Adopted children***
>
> *309A. For the purposes of adoption under paragraphs 310-316C a de facto adoption shall be regarded as having taken place if:*
>
> *(a) at the time immediately preceding the making of the application for entry clearance under these Rules the adoptive parent or parents have been living abroad (in applications involving two parents both must have lived abroad together) for at least a period of time equal to the first period mentioned in sub-paragraph (b)(i) and must have cared for the child for at least a period of time equal to the second period material in that sub-paragraph; and*
>
> *(b) during their time abroad, the adoptive parent or parents have:*
>
> *(i) lived together for a minimum period of 18 months, of which the 12 months immediately preceding the application for entry clearance must have been spent living together with the child; and*
>
> *(ii) have assumed the role of the child's parents, since the beginning of the 18 month period, so that there has been a genuine transfer of parental responsibility."*

10. The judge found at [19] that the requirements had not been met since both adoptive parents had not been living together with the child for the minimum period of eighteen months and that provision was not a discretionary provision.

11. The judge noticed that the appellants had not obtained a Certificate of Eligibility (a certificate that proves that the parent/s had been assessed and approved as potential adoptive parents from an authoritative body) in accordance with paragraph 309B, which stated that inter-country adoptions "may be subject to Section 83 of the Adoption and Children Act 2002" and if so, a letter from the Department for Education confirming the issue of a Certificate of Eligibility must be provided with any entry clearance adoption application under paragraphs 310 to 316C.

12. The judge cited **TY (Overseas Adoptions - Certificates of Eligibility) Jamaica [2018] UKUT 00197 (IAC)** in which the headnote stated:

> *"In cases where an adoption is not recognised by the law of the United Kingdom:*
>
> *(i) The Tribunal should be aware of the underlying legal process in each part of the Kingdom by which a Certificate of Eligibility is issued.*
>
> *(ii) The Certificate of Eligibility is the definitive outcome of the fact-finding and assessment that underlies it.*
>
> *(iii) Whilst there is no exact correlation between the requirements that are to be met in the law of adoption and the requirements to be met under the Immigration Rules in order for a minor to be admitted for the purposes of adoption, they ought properly to be seen as a unified whole where each plays its part in determining whether entry clearance should be granted.*

> *(iv) The Certificate of Eligibility is capable of informing the decision to be made on the application for entry clearance. In particular, the Immigration and Asylum Chamber should be slow to depart from the underlying circumstances (insofar as they can reasonably be ascertained) which are the subject-matter of the Certificate of Eligibility."*

The judge stated at [24] this:

> *"24. In this case, a Certificate of Eligibility has not been granted. The relevant government department carries out a full assessment in considering applications made, including assessing the best interests of a child. That is where suitably qualified persons make the assessment of where the best interests of a child lie with a proper assessment of the background and family considerations."*

13. The judge also noted at [29] to [31]:

> *"29. These are the provision to be followed for adoption in the UK, and those steps should have been followed by the Sponsors. It does not seem that any successful application has been made in that regard.*
>
> *30. Whilst I have a great deal of sympathy for the Sponsors, they have not followed the correct procedures, have not contacted the adoption agencies in the UK and have not obtained a Certificate of Entitlement (sic).*
>
> *31. I am satisfied that there has been a genuine transfer of parental responsibility to the Sponsors since the surrogate and biological mother have no contact with the child who has been cared for throughout by the Sponsors, and in particular, Mrs Garba. However there has been no de facto adoption in accordance with the Immigration Rules."*

14. The Judge concluded that although the sponsors may have established family life with the appellant, and it was their intention to enjoy that family life in the UK, the UK was not obliged to facilitate the enjoyment of family life in whichever country the parties wished to live. Further, the evidence did not point to there being any serious and compelling circumstances that made the appellant's exclusion undesirable. It was pointed out that the sponsors had the option of making an application for a Certificate of Eligibility and approaching the adoption agencies in the UK to facilitate the adoption of the appellant.

15. On appeal, the matter came before Upper Tribunal Judge Allen, who found that the First-tier Tribunal judge had set out in careful detail the relevant provisions in relation to the immigration rules, and, given that there had been no recognised adoption of the appellant, the judge considered whether there had been a de facto adoption and she, having set out the terms of paragraph 309A, found that the requirements of those provisions had not been met because it required amongst other things that during their time abroad the adoptive parent or parents must have lived together for a minimum of eighteen months of which the twelve months immediately preceding the application for entry clearance must have been spent living with the

child. Judge Allen also identified that the First-tier Tribunal Judge had noted the appellants had not obtained a Certificate of Eligibility. He stated:

> *"9. The judge noted that the appellants had not obtained a Certificate of Eligibility. They had applied for one in 2016 but this was refused as the department concerned was not satisfied that all the relevant documents had been provided."*

16. Judge Allen noted that the judge had considered the guidance in **TY**, noting what it said about the Certificate of Eligibility process and the ability of that process to inform the decision on the application for entry clearance and that such a certificate had not been obtained. The First-tier Tribunal judge had also considered paragraph 316A, which is concerned with the requirements for limited leave to enter with a view to settlement as a child for adoption, but those provisions did not apply to a de facto adoption. Though the sponsors said their intention was to apply for an adoption in the United Kingdom they had not been granted a Certificate of Eligibility.

17. Submissions before Judge Allen included that had the mother been a single parent paragraph 309A would have been satisfied and it was absurd that in such a case there could be success but not in this case. It was acknowledged that paragraph 297 HC 395 was not a route available to the appellant as he was conceived through surrogacy and thus could only argue de facto adoption or Article 8. It was submitted that the point of a de facto adoption was to ensure protection of the child's best interests and the genuineness of the parents' intentions, which were not in issue, given the judge's findings.

18. It was also noted that the lack of a Certificate of Eligibility was essentially relevant to a formal rather than a de facto adoption and as the judge had found that a de facto adoption was not made out it was irrelevant to consider the Certificate of Eligibility issue. It was submitted that both parents were British, and the mother had been forced to abandon life in the United Kingdom to be in Nigeria for the child and had not been able to pursue her employment prospects in the UK.

19. In conclusion, Judge Allen found at [23] to [25] the following:

> *"23. As regards ground 1, as the judge noted at paragraph 19 of her decision, it is not a discretionary provision in paragraph 309A that during their time abroad the adoptive parents must have lived together for a minimum period of eighteen months of which the twelve months immediately preceding the application for entry clearance must have been spent living together with the child. The Tribunal did not have discretion to depart from this requirement of the Rules. The guidance in MK and the endorsement of that guidance in Mohamoud are in the different context of asylum cases. The facts in the instant case are undoubtedly unfortunate. In light of the judge's findings about the genuineness of the transfer of parental responsibility and the existence of family life and indeed the great deal of sympathy she expressed for the sponsors, in which I wholeheartedly concur, the fact is that the Rules set out specific terms and it is not for the Tribunal to look for the*

intention behind them and in some way depart from those requirements. The judge proceeded entirely properly to conclude that it was not a de facto adoption under the Immigration Rules for the reasons she gave.

24. *Also, it is the case that the appellants have not obtained a Certificate of Eligibility and as a consequence, that possible route, given that the requirements of a de facto adoption were not met, could not be proceeded with successfully. As the judge noted, that is an option which the sponsor could take up in light of the failure to satisfy the requirements of the Rules on de facto adoptions.*

25. *As regards the potential applicability of paragraph 310, Mr Fazli effectively withdrew reliance on that. I think he was right to do so, since the difficulty with this provision is that its applicability in the circumstances of this case depends on there having been a de facto adoption, which, as I have found above, the judge properly concluded was not the case."*

20. Nonetheless, Judge Allen considered there had been an inadequate evaluation of Article 8 outside the Rules. The findings in relation to the immigration rules were not set aside but the assessment in relation to Article 8 was considered overly brief and the decision on that part of the decision alone was set aside.

21. The remaking of the hearing was consequent on a resumed hearing before me (Upper Tribunal Judge Rimington) and at that hearing Mr OG attended and adopted his statement of 27th April 2022.

22. Mr OG confirmed in oral evidence that he had a mother in Nigeria and his wife also had a mother in Nigeria but stated they were elderly. In addition, his wife had two sisters and a brother there. Both he and his wife were Nigerian citizens as well as British citizens and he was an IT consultant with the Department of Education. He had last visited Nigeria at the end of January 2022 and had spent three months there and in total had been there 25 times since the child's transfer even during the period of the COVID pandemic. He confirmed that the child was registered for school in Nigeria and was currently at nursery school. He stated that if the child was not allowed to come to the UK there would be an emotional and financial impact because of their separation which would have to be continued. He maintained that he was the sole provider and there was a financial strain, albeit that he had only worked six months in the last year. On two occasions he had visited for a weekend and that was very strenuous.

23. He confirmed that he had lived in Nigeria for two years and although he had been educated in Nigeria he had not worked in Nigeria. His wife had worked in a Nigerian bank. However, he stated that he would be unable to live in Nigeria because the economic opportunities were virtually zero. He accepted he had not provided evidence of the economic situation in Nigeria but asserted that although he had "lots of IT qualifications" and he operated on 'Cloud-based systems', he would not be able to secure employment because unemployment was so very high although it was very straightforward to get a job in the UK. He stated he would not even think

about attempting to get a job in Nigeria because the environment was not conducive to wellbeing and he had no intention of living in Nigeria.

24. Mr OG confirmed that his late grandfather in Nigeria had eight wives and fourteen children and that he had seen his extended family in Nigeria in the last six months and indeed he had half-siblings in Nigeria which he supported.

25. He then confirmed that his wife had looked for a job in Nigeria in the previous week but added that she had not found anything. He and his wife rented an apartment in Lekki in Lagos which was a three bedroom flat which was good accommodation with water and security in a nice neighbourhood and environment and his wife lived with him, their son and a house help who did all things such as taking care of the child, cooking, cleaning and washing and the security guards also helped with the washing. His son was settled in school at present, and he could afford to pay for it.

26. He also confirmed that neither he nor his wife nor the appellant had medical conditions.

27. Mr OG denied he could undertake IT remote work in Nigeria even though he was working remotely in the UK. No independent documentary evidence to that effect was provided.

28. At first, he stated that neither he nor his wife had made an application for a Certificate of Eligibility because the child was not here. He then stated that his lawyer did make an application for a Certificate of Eligibility, but it had not been forthcoming.

29. In final submissions Ms Isherwood submitted that there was minimal evidence of the circumstances in Nigeria and what there was was contradictory. The real reason that the appellant did not wish to comply with the rules or live in Nigeria was because of cost. He had more family in Nigeria than in the UK and there were no circumstances which brought him within GEN.3.2 of Appendix FM. They had not met the Immigration Rules and there was little evidence of any obstacles or difficulties at this point.

30. Ms Amin submitted that there were very significant obstacles to the appellant's staying in Nigeria and the question was whether he could sustain that lifestyle. It was in the interests of the welfare of the child to be with both parents and the father was the sole provider. The visits were very costly and at the moment they experienced a disintegrated family life. It was impossible to get a job and it was impossible to get a job in Nigeria. The appellant was a credible witness and he had stated that he would not be able to get any other job.

Analysis

31. I have rehearsed many of the facts found above by the First-tier Tribunal Judge and as confirmed by Upper Tribunal Judge Allen, the judge's approach and findings in relation to the Immigration Rules were not tainted by any error of law.

32. Specifically, there was no recognised Adoption Order and the appellant had not met the requirements of paragraph 309A (de facto adoption) because it requires that during their time abroad *both* adoptive parents must have lived together for a minimum period of eighteen months of which the twelve months immediately preceding the application for entry clearance must have been spent living with the child. As emphasised by the First-tier Tribunal judge, there had been no Certificate of Eligibility and indeed to date, as the sponsor confirmed, there had been no successful application for a Certificate of Eligibility to support any entry clearance adoption application under paragraphs 310 to 316. It would appear that such an application for a Certificate of Eligibility had been refused in 2016.

33. Simply, the sponsors have not followed the procedures for adoption to fulfil the Immigration Rules and there is a restriction under Section 83 of the Adoption Act on bringing in children to the UK as follows:

> *"**83 Restriction on bringing children in***
>
> *(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*
>
> *(b) at any time brings, or causes another to bring, into the United Kingdom a child adopted by the British resident under an external adoption effected within the period of [F1twelve] months ending with that time.*
>
> *The references to adoption, or to a child adopted, by the British resident include a reference to adoption, or to a child adopted, by the British resident and another person.*
>
> *…"*

34. The Certificate of Eligibility is only required where Section 83 of the Adoption and Children Act 2002 England or Wales applies. Cases for which a Certificate of Eligibility is required under paragraph 309B of the Immigration Rules are those where an adoptive parent or parents habitually resident in the UK intend to bring a child who is habitually resident outside the UK to the UK for the purpose of adoption.

35. Although de facto adoptions do not necessarily require a Certificate of Eligibility it is required if the parents intend to adopt in the UK. Indeed, it was indicated here that this is the approach to be taken by the sponsor.

36. In his second statement the sponsor husband stated:

> *"We have been advised [by] UK solicitors that, following our son's arrival in the UK, we can apply for and go through the full adoption process in the UK to secure an Adoption Order for our son, thereby fully regularising his status. … We have resolved to prioritise going through the full adoption process in the UK for our son, as we have*

also been advised that we qualify to make the application and would meet all the requirements for obtaining a grant an Adoption Order in respect of our son."

37. That may be the case but it is clear that the appellant via the sponsors must obtain a Certificate of Eligibility first for a formal adoption. The First-tier Tribunal found no de facto adoption.

38. For the purposes of Article 8 I accept that there is family life between the appellant and sponsors. The First-tier Tribunal accepted that there had been a genuine transfer of parental responsibility to them since the surrogate and biological mother had no contact with the child. Clearly, the child is not living in an orphanage but said to live with the mother in Lagos. The First-tier Tribunal also accepted that the sponsors had established family life with the appellant. The intention of the sponsors was to enjoy family life with the appellant in the UK but as noted previously, the UK is not obliged to facilitate enjoyment of family life in whichever country the parties wish to live. When proceeding with the **Razgar v SSHD [2004] UKHL 27** five stage analysis it may be that the interference in the appellant's family life is sufficient to engage Article 8, but the decision was made in accordance with the Immigration Rules and in accordance with the law. The legitimate aim is to maintain a fair but firm immigration system of control for the protection of rights and freedoms of others.

39. Despite the **T (s.55 BCIA 2009 – entry clearance) Jamaica** UKUT 00483 (IAC), I still have had regard to the best interests of the child and note from **TY (Overseas Adoptions)** that the Certificate of Eligibility is the definitive outcome of the fact-finding and assessment that underlies it and the principle in **TY** was that although there is no exact correlation between the requirements that are to be met in the law of adoption and the requirements under the Immigration Rules, in order for a minor to be admitted, they should be seen as a unified whole where each plays its part in determining whether entry clearance should be granted. When assessing the best interests of the child the existence or absence of a Certificate of Eligibility is a relevant consideration, albeit it may not be an absolute requirement in de facto adoptions. There had been no compelling circumstances put forward which make the exclusion of the child undesirable.

40. The appellant is not a British citizen but a Nigerian citizen and being cared for by the sponsor wife in rented accommodation in a desirable area (as described by the sponsor at court) in Lekki in Lagos. The court was also told that the child attended nursery school and the sponsor wife was supported by a housekeeper who attended to the housework and cared for the child as required.

41. Critically, the Rules are designed to protect the interests of children in relation to adoption and the sponsors have failed to comply with paragraph 309A and have the option of making an application for a Certificate of Eligibility and approaching the adoption agencies in the UK to facilitate the appellant's adoption. The Rules set out the position of the Secretary of State.

42. I was not persuaded that I was given wholly accurate information by the sponsor at court because, for example, he told me initially he could not make an application for the Certificate of Eligibility because the child was not in the UK but that is contrary to the Regulations and guidance and secondly, he had in 2016 made such an application but they were told that they had not supplied the requisite documentation.

43. Further, the sponsor told me that he could not relocate to Nigeria to comply with the requirements of a de facto adoption because he would not be able to obtain work. He was currently working for a government department in the UK and was born in 1967. I accept that unemployment might be high in Lagos although I was provided with no statistics thereon, but the sponsor confirmed that he worked in information technology and that there was absolutely no prospect of work in Nigeria. I cannot accept that.

44. Despite this assertion of an inability to obtain employment there was no independent written information on the job market in Nigeria and I simply do not accept there is no IT development in Lagos, which is a modern city of which I take judicial notice, and that the sponsor with his qualifications and experience as he assured me, could not find either work in Lagos or work remotely via computer. I accept that he may not be able to work remotely for his current employer, but I was supplied with no information on the lack of availability of work in the IT sector in Lagos overall either working for companies in Nigeria or abroad remotely. I note that the sponsor stated that he would not even attempt to gain work in Lagos. The sponsor was educated in Nigeria as was his wife and he spent between 1970 and 1999 there. His wife was educated in Nigeria and worked in a bank there. She was, he told the court, currently seeking work in Lagos and evidence was given that there was a home help whose duties included childcare. When asked if he could get a job in Lagos the sponsor simply said he "would not even think about it" and he had no intention of living in Nigeria. It was put to me in submissions that he would not be able to maintain the family's lifestyle but that is not the test.

45. He is a Nigerian citizen as is the wife of the sponsor and he informed me that he had only worked for a limited number of months in 2021 because he spent so much time in Lagos and indeed had saved up money to do so. He was still despite only having worked six months able to afford the rent on an apartment in a good area (as described by him) of Lagos, send the child to a nursery school and provide the finance for a house help or carer who undertook all tasks including cooking and cleaning. The accommodation was described as a three bedroom flat in a good area with water and security in a nice environment. Apparently the appellant was registered at school and receiving an excellent education. I acknowledge that the wife has lived with the child for eighteen months but that is not the case with the husband sponsor, and this is not an asylum case. I acknowledge that he may need to work to support his wife and the appellant, but it was not demonstrated to me that in his experience he could not find work. I was told that formerly the wife had worked in Nigeria and clearly, the appellant had been cared for by both the wife sponsor and an assistant. It is open to the wife to find work to supplement the income if the Mr

OG cannot and it is even more inconceivable, bearing in mind they do have childcare, that one or the other one of them cannot find work to support themselves.

46. Bearing in mind the child has access to education (albeit private) because he attends nursery and has healthcare, I am not persuaded that it is automatically the case that his standard of living would be improved in the UK. Indeed, culturally the appellant is a Nigerian citizen and not a British citizen and thus his best interests are not necessarily determined by removing to the United Kingdom. The child has his apparently extended family in Nigeria.

47. The point of de facto adoption is to ensure protection of the child's best interests and the genuineness of the parents' intentions. There has been no investigation into the circumstances of the child as normally undertaken by a Certificate of Eligibility and the underlying factors have not thoroughly been explored by those best to ascertain the interests of the child. The absence of a Certificate of Eligibility, although not clearly fatal to a de facto adoption or an Article 8 claim, is a relevant factor.

48. The best interests of the child are ideally, in my view, to be assessed by the process for the Certificate of Eligibility and requisite in a formal prospective adoption process. That would identify where this child should be located, his needs and how they can best be fulfilled. In the absence of such assessment which **TY** identified as the definitive outcome of the fact-finding and assessment that underlies the legal process and is capable of informing the decision on entry clearance and one from which the Tribunal should be slow to depart from the underlying circumstances, the best interests of the child are not clearly identifiable. The best interests in the absence of further information would be to remain with his parent or parents but in the absence of any such certificate it is arguable that to remove the appellant from Nigeria would remove him in part from his cultural heritage, his nursery school and education and any links he has made through nursery school which would be inimical to his best interests. As I have identified, he is apparently safely cared for and is currently settled. Additionally, the husband sponsor has relatives in Nigeria. His mother lives there as does his wife's mother, and the sponsor also has a brother in Nigeria. The appellant will be deprived of his grandmother should he be brought here and his extended family. His grandfather had eight wives and fourteen children, and the sponsor husband stated he had two half-siblings in Nigeria which he supported and thus he is evidently in contact with them. The sponsor husband stated he had two sisters in the UK, but they do not live closely. His best interests would appear to be determined by the status quo and remaining in Nigeria.

49. I am not persuaded that the application was made under Appendix FM and thus that GEN.3.1 or 3.2 applies but I have nonetheless considered **R (Agyarko) [2017] UKSC 11 and** whether there would be unjustifiably harsh consequences on the denial of entry clearance.

50. I acknowledge that there is the emotional cost of separation and that there are compassionate factors such as the separation of the two sponsors which may be

taken into account further to **Beoku-Betts v SSHD** [2008] UKHL 9 but there have been regular visits by the father, and these can continue.

51. I am not persuaded that the father, who assured me that he was very well qualified in his field, would not be in a position either to apply for a formal adoption or relocate to Nigeria for a temporary period. The fact is that the appellant and sponsors do not meet the Immigration Rules and that must be weighed in the balance when undertaking the proportionality exercise. That the appellant meets all but one requirement under paragraph 309A does not make this a "near miss" case. Paragraph 309A is not a discretionary provision. In the case of a child I consider that the requirements are a significant factor and need to be given due weight because the public interest demands that children be protected. Simply, there was nothing to show that the public interest was outweighed.

52. I have taken into account the circumstances of the sponsors. I appreciate that the sponsors underwent fertility treatment for ten years and have been financially inconvenienced since the child was born and the husband sponsor has been separated from his wife for lengthy periods. I find that is a matter of choice. The sponsor husband described it as an emotional and financial strain but as he told me, he earned sufficiently last year to be able to only work for six months of last year. They can comply with the de facto adoption provisions or go through the process of adoption in the UK and obtain a Certificate of Eligibility which would fully identify the best interests of the child. If they intend to adopt in the UK, it is likely that this would need to be obtained in any event. In the alternative, the sponsors are familiar with the way of life in Nigeria and although it was submitted that the wife was forced to abandon life in the UK, she has dual citizenship, and she has now lived in Nigeria for five years. I accept she has not been able to pursue her employment in the UK, but she has the option of doing so in Nigeria.

53. In my view the inability to meet the particular requirement of the de facto adoptions is remediable and within the ability of this resourceful couple to do. The child is young, not at a critical point of education, has no significant medical needs, is settled and there are no unjustifiably harsh consequences on refusal.

54. There were simply no very significant obstacles put to me let alone unjustifiably harsh consequences to resuming life in Nigeria for a period of time to satisfy the de facto adoption provisions. The emphasis was merely on cost and inconvenience.

55. Conducting a balancing exercise I find that the decision of the Entry Clearance Officer to refuse the application was proportionate in all the circumstances and I dismiss the appeal under Article 8.

Notice of Decision

The appeal is dismissed on Article 8 grounds.

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 his 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 *Helen Rimington* Date 9th September 2022

Upper Tribunal Judge Rimington

FEE AWARD

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

Signed *Helen Rimington* Date 9th September 2022

Upper Tribunal Judge Rimington