IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002389
UI-2023-002390

First-tier Tribunal No: HU/50018/2023
HU/50019/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

30th October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

ENTRY CLEARANCE OFFICER

Appellant

and

B.T.
M.T.
(ANONYMITY ORDERS MADE)

Respondents

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr M Fazli of Counsel instructed by Gerald UK Immigration & Legal Services

Heard at Field House on 1 September 2023

DECISION AND REASONS

Introduction and Background

1. The Entry Clearance Officer challenges a decision of First-tier Tribunal Judge Cole dated 5 June 2023 allowing the appeals of BT and MT against respective decisions

dated 14 December 2022 to refuse to grant human rights based applications for entry clearance.

2. Although before me the appellant is the ECO and BT and MT are the respondents, for the sake of consistency with the proceedings before the First-tier Tribunal I shall continue to refer to BT and MT as the Appellants and the ECO as the Respondent.

3. The Appellants, citizens of Eritrea living in Uganda, are siblings born on 1 May 2014 and 7 January 2016 respectively.

4. On 27 June 2022 the Appellants made applications for entry clearance to join their elder sister, GT (d.o.b. 26 August 1988), ('the Sponsor'), in the UK. The Sponsor has indefinite leave to remain in the UK.

5. On the visa application forms under the heading 'Type of Visa/Application' it was written, seemingly by means of selecting from a pull-down menu:

> "*Non-British child of a parent who has permission to be in the UK as a partner or spouse of a British citizen or person settled in the UK granted permission under the Rules in place before 9 July 2012 Non-British child of a parent, parent or relative who are British citizens or settled in the UK Non-British child of a relative who has limited leave in the UK as a refugee or receiving humanitarian protection Non-British adopted child or child for adoption in the UK of a parent or parents who are British citizens or settled in the UK.*"

It may be seen that this does not identify the nature of the application with significant specificity: it encompasses relationships of parent/child, relative/child, adopted child, child to be adopted.

6. In support of the applications the Sponsor provided a statement (Respondent's bundle before the First-tier Tribunal, Annex C), in which something of the family history and the Appellants' circumstances were set out. It was said that the Appellants' mother died giving birth to MT, the Sponsor had had a role in bringing up the Appellants until 19 months after their mother's death when she travelled to the UK to join her husband, and thereafter the children had been cared for by a 'babysitter' and their father until the arrest of their father in September 2020. In October 2020 the Appellants left Eritrea for Ethiopia where they were looked after in a camp by a distant relative, then relocating to Uganda with the distant relative after an outbreak of fighting in Ethiopia.

7. DNA evidence was provided establishing the sibling relationship between the Appellants and the Sponsor.

8. Notwithstanding that the Sponsor's statement was silent on any issue of adoption, the application was also supported by a document from a court in Eritrea headed 'Re: Adoption Order' (Respondent's bundle Annex L), pursuant to which an adoption order was made in favour of the Sponsor in respect of both of the Appellants on 24 January 2021. (I pause to note that this would have been at a time when the children were living in Uganda; on the face of the order the application appears to be made pursuant to evidence provided by other relatives that appeared before the court in Eritrea; beyond a vague and unspecified reference to "*background checks*" in a later document pursuant to which the Sponsor was permitted to appoint

a named individual as a temporary guardian of the Appellants, there is no specific or particularised evidence of any direct contact by any officer of the court with either the children or the Sponsor prior to the Adoption Order being made.)

9. The applications were refused in similar terms for reasons set out in respective decision notices.

10. The 'reasons for refusal' indicate that the Respondent characterised the applications as having been made "*under paragraphs 309-316 to the Immigration Rules*", further stating "*You have applied for entry clearance in order to settle permanently with your stated adoptive parent*". (The 'reasons' do subsequently acknowledge that the 'adoptive mother' "*is also your biological sister*".) The focus of the reasons for refusal is on paragraph 310 (which relates to the requirements for indefinite leave to enter the UK as the adopted child of a parent or parents present and settled, or being admitted for settlement, in the UK). Amongst other things, the decision-maker noted that adoptions in Eritrea after 3 January 2014 are not recognised in the UK, and moreover that no Certificate of Eligibility had been issued by a relevant department in the UK. Yet further the circumstances did not meet the requirements of a de facto adoption because the Sponsor had not lived with the Appellants for a minimum period of 12 months immediately preceding the applications for entry clearance. The applications were refused with specific reference to paragraph 310(i)(g), (iv), (ix), (x), and (xi), and 316A(i)(g), (iv), (vi), (vii), and (viii); the decision-maker did not otherwise consider that there was any breach of Article 8 involved in refusing the applications.

11. The Appellants appealed to the IAC.

12. The appeals were allowed for reasons set out in the 'Decision and Reasons' of Judge Cole. (See further below.)

13. The Respondent applied for permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge Boyes on 4 July 2023.

Analysis

14. As is apparent from the matters set out above, the exact legal basis of the Appellants' entry clearance applications was not articulated by them, or on their behalf, in the application process. The clearest articulation of the factual basis of the application is set out in the Sponsor's supporting witness statement: in that statement she repeatedly refers to the Appellants as her siblings (as opposed to her children or adopted children) and makes no reference to the adoption proceedings in Eritrea.

15. The uncertainty over the legal basis of the application is not rectified - and indeed is perhaps further obscured - by the Appellants' Skeleton Argument before the First-tier Tribunal which asserted that the applications were made with reference to paragraph 319X of the Immigration Rules, which relates to applications for leave to enter as a child or relative of a person with limited leave to enter or remain as a refugee or beneficiary of humanitarian protection. The Sponsor was neither a refugee nor a person with humanitarian protection, and neither did she have only limited leave.

16. Further to the above, it is to be noted that it is apparent on the face of the 'Decision and Reasons' of the First-tier Tribunal that the Judge sought to clarify the issues at the outset, during which it was acknowledged on their behalf that the Appellants could not succeed under paragraphs 309-316, and that paragraph 319X was not relevant – (see Decision at paragraphs 10-12).

17. Instead, at the hearing, the Appellants sought to place reliance on paragraph 297 ('Requirements for indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom'): see paragraph 13.

18. This precipitated a discussion in which the Respondent's representative asserted that the Respondent had considered the applications under the correct Immigration Rules, arguing that the Appellant had relied upon the 'adopted children route' (paragraph 14), and the reliance upon paragraph 297 constituted a 'new matter' to which the Respondent did not give consent (paragraph 15).

19. The First-tier Tribunal addressed this issue as follows:

> "*16. I could see force in [the HOPO's] argument that the issues under paragraph 297 would probably amount to a 'new matter' if the Appellants had actually applied solely under the adoption route as a different factual matrix would have to be considered under this Rule.*
>
> *17. Ultimately, there was not a fundamental difference between the parties and a consensus was agreed upon which allowed the case to proceed.*
>
> *18. [Counsel for the Appellants] indicated that under paragraph 297 she would have been arguing on behalf of the Appellants that "there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care." It was accepted by both parties that the issues for consideration under that part of the Immigration Rules were essentially the same issues that would be relevant to assessing the appeals under Article 8 outside of the Rules.*
>
> *19. Thus, it was agreed that this case would be assessed under Article 8 outside of the Immigration Rules. I would be required to consider the best interests of the Appellants as a primary consideration. The Respondent accepts that there is a protected family life between the Appellants and the Sponsor.*
>
> *20. Thus, I need to assess, on the balance of probabilities, whether there are exceptional circumstances which would render the refusal of entry clearance a breach of Article 8 because the refusal would result in unjustifiably harsh consequences for the Appellants.*"

20. The Judge then went on to consider the evidence and make findings, before setting those findings within the framework of an Article 8 proportionality analysis. It is pertinent to note the following features of the findings of fact:

> (i) The Judge found the Sponsor to have "*provided consistent, credible, and honest evidence that can be relied upon in totality*" (paragraph 28).
>
> (ii) The sibling relationships were proved by DNA evidence (paragraph 29).

(iii) The Judge acknowledged the limited evidence of the Appellants' current carer's application to resettle in Canada, but found that this did not undermine the overall reliability of the evidence (paragraph 38). The Judge accepted that the current care arrangements were "*only a temporary measure*" (paragraph 39).

(iv) The Judge expressly recognised that the adoption order had no legal force in the UK, but – sustainably and unchallenged before me – accepted that it was evidence of the Sponsor having undertaken responsibility for the Appellants (paragraph 40). The Judge was also satisfied that the Sponsor provided financial support and was in almost daily contact with the Appellants – "*It is clear to me that the Sponsor is very close to the Appellants and that she feels wholly responsible for their well-being*" (paragraph 41). The Judge found that the Sponsor had in substance taken on a parental role (paragraph 45).

(v) The Appellant's circumstances were summarised in these terms: "*… I find that the Appellants are young children aged nine and seven. They have had a very troubled childhood. The mother died in January 2016 and their father was arrested and disappeared in September 2020. They fled Eritrea to Ethiopia but were caught up in conflict and had to flee to Uganda. The Appellants remain in Uganda as asylum-seekers in temporary care of a distant relative who may well be resettled to Canada any time soon.*" (paragraph 42). It was noted that the Respondent accepted that there was family life between the Sponsor and the Appellants; the Judge endorsed this concession (paragraph 44).

(vi) "*I have no hesitation in finding that, on balance, it is not in the best interests of the Appellants to remain in Uganda as asylum-seeking children but it is in their best interests to be reunited with the Sponsor in the UK. I find that the situation for them in Uganda is temporary and uncertain and does not offer them any form of stability. The Sponsor is able to provide a loving family environment for the Appellants in the UK where she will be able to maintain, accommodate and care for them.*" (paragraph 46).

21. Having made these primary findings of fact, the Judge went on to consider the concept of 'unjustifiably harsh consequences' in these terms:

> "*47. I note that unjustifiably harsh consequences is an elevated threshold. However, these are young children who have already suffered considerably and who are in an unstable and uncertain situation where their needs cannot be adequately met. I find that, on balance, there would be unjustifiably harsh consequences if the Appellants were forced to remain in Uganda in their current situation.*
>
> *48. Drawing all the threads together and considering all the evidence in the round, I find that there are exceptional circumstances in this case. I find that the evidence in this case is overwhelming, and that the combination of circumstances are more than sufficiently serious and compelling to require the admission of the Appellants to the UK.*
>
> *49. I find that the best interests of the Appellants are for them to join the Sponsor in the UK. I find that the emotional needs of the Appellants can only be properly served by being with the Sponsor in the UK. I find that the Appellants' situation in Uganda is unacceptable.*

> *50. In summary, I find that the evidence overwhelmingly proves that the refusal of entry clearance would result in unjustifiably harsh consequences for the Appellants. I find that the circumstances of the Appellants are exceptional and that their situation demonstrates such compelling circumstances that the refusal of entry clearance cannot be justified by the Respondent as necessary and proportionate.*"

22. The Judge then concluded under a sub-heading 'Article 8 Summary' in these terms:

> "*51. Based on the evidence and on the conclusions reached, I find that the Appellants have a family life with the Sponsor and that the decision significantly interferes with that family life. I find that the decision is in accordance with the law and is for the purposes of maintaining immigration control as an aspect of the economic well-being of the country. However, for the reasons set out, I find that the Respondent is not able to justify that interference as being proportionate and necessary in a democratic society.*
>
> *52. I therefore find that the decision of the Respondent breaches of the Appellants' Article 8 right to respect for family life, and thus the decision to refuse entry clearance is unlawful under section 6 of the Human Rights Act 1998.*"

23. The Respondent's grounds of challenge plead "*that there is nothing in [the Judge's] consideration to show that he has conducted a balancing exercise*", and that "*no reasons [are] given for ignoring the importance of the immigration rules and adoption*". It is submitted that the Judge "*has used Article 8 as a general dispensing power without considering the importance of the sponsor's failure to engage with the safeguards embedded in the statutory requirements to ensure safety and future of adoptive children brought to the UK*".

24. It may be seen that the Respondent's challenge is, in substance, that the Judge's approach to the proportionality balance under Article 8 is flawed because no regard has been given to the public interest in ensuring due and proper processes in respect of adoption.

25. I accept in principal that in an application for entry clearance based solely on adoption, both the best interests of a minor applicant, and the public interest, would be served by following due and proper processes in respect of adoption. The checks and balances of satisfactory formal adoption proceedings – either domestically or in foreign proceedings duly recognised by inclusion in the list of countries in the Schedule of the Adoption (Recognition of Overseas Adoptions) Order 2013 – and, as appropriate, the certificate of eligibility process - are the mechanisms by which best interests are to be ascertained, evaluated, protected, and promoted, further to examination by agencies with relevant expertise. These mechanisms are designed to protect the individual child, and also seek to serve the public interest by guarding against international trafficking and/or exploitation of minors. Absent such procedures best interests are not duly and properly safeguarded. It is not in the best interests of a child to allow international migration to live as the child of non-birth 'parents' without scrutiny of the arrangement by duly recognised agencies experienced in protecting and promoting the best interests of children.

26. However, the Appellant applications were not, in my judgement, presented only as adoption cases: the simple reality is that they were seeking to join their sister – whom it was recognised, at the hearing, was not within domestic law recognised as an adoptive parent.

27. In such circumstances much of the argument before me focused on the framework of the appeal as explored in the preliminary discussion before the First-tier Tribunal (paragraphs 10-20 of the 'Decision and Reasons' – quoted in part above).

28. In substance Mr Clarke argued on behalf of the Respondent that the First-tier Tribunal had disregarded the mechanisms of protection in respect of adoption by seemingly having had regard to paragraph 297 of the Immigration Rules which was – as had been asserted by the Presenting Officer before the First-tier Tribunal – a 'new matter' in respect of which consent had been withheld. In contrast Mr Fazli submitted that the Judge was not confined to considering the appeal on the basis of adoption and had appropriately had regard to a wider context in determining the Article 8 ground of appeal – which permitted a consideration of aspects of paragraph 297, and the Judge had adequately set out reasons on proportionality within such a framework.

29. I do not accept that reliance upon paragraph 297 of the Immigration Rules as relevant to informing a consideration of the Article 8 ground of appeal can be characterised as a 'new matter' within the contemplation and meaning of section 85(5) and (6) of the Nationality, Immigration and Asylum Act 2002.

30. The definition of a new matter is set out in section 85(6):

> "*A matter is a 'new matter' if –*
>
> *(a) it constitutes a ground of appeal of the kind listed in section 84, and*
>
> *(b) the Secretary of State has not previously considered the matter in the context of –*
>
> *(i) the decision mentioned in section 82 (1), or*
>
> *(ii) a statement made by the appellant under section 120.*"

31. It is be noted that both (a) and (b) are to be satisfied. In my judgement invocation of paragraph 297 of the Immigration Rules does not constitute a ground of appeal of the kind listed in section 84. There is no available ground of appeal that a decision is not in accordance with the Immigration Rules. The relevant ground of appeal herein was "*that the decision is unlawful under section 6 of the Human Rights Act 1998*". The Appellant's appeals were brought on the basis that the Respondent's decisions were unlawful under section 6 of the 1998 Act with particular reference to Article 8 of the ECHR. Invocation of paragraph 297 does not alter the essential legal basis of the appeal. Moreover the factual matrix is not advanced in any different terms either: see **Mahmud (S. 85 NIAA 2002 – 'new matters') [2017] UKUT 00488 (IAC)**. It is pertinent to note that there was no suggestion on the part of the Respondent's representative before the First-tier Tribunal that the Appellants were seeking to rely on any new facts or evidence.

32. Indeed, the sole basis of the Respondent's submission on paragraph 297 being a 'new matter' was the assertion that the Appellants had only relied upon the 'adopted children route' in their applications.

33. In my judgement it is manifest that the Judge was not impressed with this submission. See the choice of words of paragraph 14 – "*despite it being entirely unclear*

from the application forms included in the Respondent's bundle"; and the qualification expressed at paragraph 16 in respect of the Presenting Officer's submission – "*I could see force in [the HOPO's] argument that the issues under paragraph 297 would probably amount to a 'new matter' if the Appellants had actually applied solely under the adoption route as a different factual matrix would have to be considered under this Rule*".

34. It seems to me that if any criticism is to be made of the First-tier Tribunal Judge it is that he did not make an express ruling in respect of the 'new matter' issue, but rather approached it on the basis of a compromise pursuant to which he perceived a consensus had been reached that would allow the substance of the key passage in paragraph 297 to inform the evaluation of Article 8: see paragraph 17-19. Those words – "*there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care*" – are reflected in the favourable conclusions expressed at paragraphs 46, 47, and in particular paragraph 48.

35. Significantly, the Respondent's grounds of challenge do not seek to dispute the Judge's identification and description of the 'agreed consensus' at paragraphs 17-19.

36. In so far as it might be said that the Judge was in error in not making a clear ruling on the 'new matter' issue, in my judgement this was not ultimately material to the outcome. I note the following: the failure to make a clear ruling is not raised as a ground of appeal by either party; the bypassing of making a ruling by approaching the matter on the basis of an agreed consensus is not the subject of a challenge by the Respondent; whether pursuant to the agreed consensus – or otherwise if it had been pursuant to making the appropriate ruling – the Judge was entitled to have regard to the key identified wording in paragraph 297 in evaluating proportionality.

37. Accordingly, in substance, because the Appellants were minor siblings of the Sponsor the scheme of immigration control did not require there to have been any formal recognised adoption proceedings for them to be able to join the Sponsor in the UK. The primary premise of the Respondent's grounds of challenge before me - that safeguards in respect of adoption were not in place - were not a prerequisite to securing entry clearance. The application form included – albeit in a scattergun approach – a reference to an application being made as a child relative rather than being confined only to parent/child, or adoptive parent/adopted child relationships. The factual matrix of the application – and the sibling relationship – was made plain in the Sponsor's supporting statement (which did not refer to adoption at all). No new facts were introduced at the appeal stage.

38. In all the circumstances I find that it was not incumbent upon the Judge to have regard to - and factor in against the Appellants - the usual safeguards in respect of adoption. In circumstances where paragraph 297 was in play, I can see no justification for permitting an unrecognised adoption order to frustrate an application for entry clearance that might otherwise satisfy all the requirements of paragraph 297.

39. The Judge's approach to Article 8, and in particular the proportionality test is not impugned in the grounds of challenge in any particularised manner save with reference to the adoption safeguards. I am not able to identify any other material

issues or problems in respect of the Judge's approach to proportionality. Accordingly I find the Respondent's challenge fails.

40. Finally, for completeness: the hearing was conducted as a hybrid hearing - I was present at the Field House hearing centre as was Mr Clarke, whilst Mr Fazli joined the hearing by remote video connection. The connection was adequate and no issues were raised to suggest a fair hearing had not taken place.

Notice of Decisions

41. The decisions of the First-tier Tribunal in respect of both BT and MT contained no material errors of law and stand accordingly.

42. The appeal of BT in HU/50018/2023 and the appeal of MT in HU/50019/2023 remain allowed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

18 October 2023