

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Birmingham

Date of Hearing:
19 May 2006

Date of promulgation: 12 February 2007
Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Designated Immigration Judge O'Malley
Immigration Judge R A Cox

Between

Appellant

and

THE ENTRY CLEARANCE OFFICER, NEW DELHI

Respondent

Representation

For the Appellant: Mr R de Mello & Mr T Muman, both instructed by UKIC

For the Respondent: Mr J Singh, Home Office Presenting Officer

The law and Immigration Rules distinguishing between (i) adoptions in those countries whose adoptions are recognised in the United Kingdom under the Adoption (Designation of Overseas Adoptions) Order 1973 and (ii) other adoptions have a sound objective basis and are not unlawfully discriminatory under the Race Relations Act 1976 (as amended) or Article 14.

DETERMINATION AND REASONS

1. This is the reconsideration of the appeal of the appellant, a citizen of India, against the decision of the respondent on 12 March 2004 refusing her entry clearance to the United Kingdom as an adoptive child.
2. The following statement of facts is adapted from the Immigration Judge's careful determination. The sponsor was born on 15 May 1954. He married in November 1976. That marriage was dissolved by decree absolute on 10 April 2003. The sponsor and his first wife had lived apart since 2000. There were three children of the marriage, all of whom are now adults. Although the sponsor lives and works in the United Kingdom

he visits India on a regular basis. His family in India employed a servant, who was married and who had a daughter born 19 May 1994, who is the appellant. Her father, the servant's husband, died on 2 June 2002. The servant herself did not enjoy good health but she and the appellant were assisted financially by the sponsor, who paid her school fees, including the cost of boarding at a hostel linked to her school and also paid for medical attention for her mother.

3. In about 2000 the person who is now the sponsor's wife met the appellant; the acquaintance deepened after she met the sponsor. Sometimes the appellant came to the sponsor's present wife's house when her mother was ill.
4. On 2 September 2002 there was a formal ceremony in which the appellant's mother agreed to the sponsor adopting the appellant. By then the sponsor had been separated from his first wife for two years; he no longer had any contact with his children. In evidence before the Immigration Judge, the sponsor said that from September 2002 the appellant lived under his care, but at the school, apart from school holidays when she would live in his home whenever he was in India. By then the sponsor's present wife had become more involved in the appellant's care and would care for the appellant if the sponsor was in the United Kingdom. She obtained entry clearance to the United Kingdom as the sponsor's fiancée and married him in the United Kingdom on 15 March 2003. After the marriage she returned to India on several occasions specifically to care for the appellant and has a power of attorney to deal with the sponsor's affairs in India including the appellant's care.
5. On 31 July 2003 the sponsor and his present wife executed an Indian adoption deed showing them to be the joint adoptive parents of the appellant. The appellant's mother also signed the deed and it was subsequently registered with the court in Ludhiana, which is the sponsor's and the appellant's home. On 4 April 2004 the appellant's mother died.
6. The present application had been made on 12 January 2004. It was refused, as we have said, on 12 March 2004. The appellant appealed. The Explanatory Statement was prepared on 24 February 2005.
7. Following a concession made in the Explanatory Statement, the reasons for the respondent's refusal of the application stand as follows:

*"I am not satisfied that the adoption was in accordance with a decision taken by the competent administrative authority or court in the child's country of origin;
I am not satisfied that the child has lost or broken ties with her family or origin;
I am further not satisfied that the adoption was not one of convenience arranged to facilitate the child's admission to the United Kingdom."*

8. Those reasons have to be read in the context of the fact that India is not a country whose adoption orders are recognised in the United Kingdom, a matter which we discuss further below. It is in that context also that the Explanatory Statement has to be read, directed as it is largely to considering whether the requirements of paragraph 309A of the Immigration Rules (*de facto* adoption) could be met in the appellant's case.
9. The Immigration Judge found as a fact on the evidence before her that the sponsor and his wife had complied with the requirements of Indian law and that their adoption of the appellant was valid in India. She found that at the date of the decision the appellant's mother was in ill health and that her death or complete inability to continue to care for the appellant was reasonably foreseeable at that date. The evidence before her indicated that the sponsor and his present wife had gone to great lengths to ensure the appellant's happiness and well-being and had recently spent a holiday with her in Thailand. The Immigration Judge found that paragraphs 310(ix), (x) and (xi) were met. She dismissed the appeal because the appellant had been subject to neither an adoption recognised in the United Kingdom, as required by paragraph 310(vi), nor a *de facto* adoption as required by paragraph 309A.
10. The Immigration Judge also considered arguments put before her under Article 8 of the European Convention on Human Rights, on which she wrote as follows:

"I am satisfied that [the appellant] has established the start of a family life with both the sponsor and with [his wife] but that to interfere with those rights in all the circumstances of this case would not be disproportionate. [The appellant] has not lived with her adoptive parents on a full-time basis and they have already demonstrated their willingness and ability to make arrangements for her care and education in India. There is nothing to prevent the adoptive parents from making a formal application to adopt [the appellant] in the United Kingdom by firstly having a home study report completed. If they choose to follow this path they are free to refer to the positive findings in this determination which has failed for technical reasons. On this basis I cannot find that [the appellant's] circumstances are 'truly exceptional'."
11. The Immigration Judge accordingly dismissed the appeal. The "technical reasons" to which she refers in the paragraph we have cited, are, of course, the fact that the appellant did not meet the requirements of the Immigration Rules.
12. Reconsideration was sought on the grounds that the Immigration Rules should be read down in order to regard the sponsor and his wife as the appellant's parents for these purposes; that the refusal to recognise an Indian adoption is discriminatory under Article 14 taken with Article 8; that the Immigration Judge erred in failing to "import a degree of flexibility" to the requirements of paragraph 309A; that the refusal of the

appellant's application was a matter of racial discrimination; that in that context the Entry Clearance Officer had power under the Prerogative to depart from the requirements of the Immigration Rules; and that the Immigration Judge had erred in her assessment of Article 8.1 [sic] and had contradicted herself in "recommending that the appellant's adoptive parents seek a 'home study report' and make a formal application in the UK to adopt the appellant". Reconsideration was ordered on all those grounds. A further issue became apparent during the hearing, relating to the UK government's published information on those seeking to bring adopted children and children for adoption to the United Kingdom. We heard submissions from both parties at the hearing; subsequent to the hearing the respondent forwarded copies of some of the material provided by the Secretary of State, and the appellants responded in writing with further submissions. No further submissions have been received from the respondent.

13. We do not need to set out the relevant Immigration Rules in full. Paragraph 310 provides for the admission of a child who has already been adopted, provided that the adoption is one recognised in the United Kingdom. The appellant's Indian adoption is not recognised in the United Kingdom, so she cannot meet the requirements of paragraph 310. It is the lack of recognition of her adoption which is in some respects at the heart of her case before us. Paragraph 309A makes provision for those who have lived as part of a family abroad. As we remarked at the hearing, paragraph 309A is probably not intended to facilitate the entry of children by themselves: it is probably intended to ensure that, if a number of members of the family are to come to the United Kingdom together, a child who has been living as a child of the family with the parents for some time is not left behind. In the appellant's most recent submissions it is acknowledged on her behalf that she did not meet the requirements of paragraph 309A. Paragraph 316A sets out the requirements to be satisfied in the case of a child seeking to enter the United Kingdom for the purpose of being adopted. One of the requirements is that the child:

“(vii) *will be adopted in the United Kingdom by his prospective parent or parents in accordance with the law relating to adoption in the United Kingdom, but the proposed adoption is not one of convenience to facilitate his admission to the United Kingdom.*”

14. Thus, a child who has been through a process that would be recognised in law in the United Kingdom as adoption may enter under paragraph 310, a child who has lived abroad as part of a family for a sufficient length of time may be admitted under paragraph 309A; and a child who falls within neither of those categories can be admitted for adoption. In the last case, however, the adoption has to be in accordance with United Kingdom law, which requires a number of investigations, of which the production of a "home study report" forms part.

15. The submissions made on behalf of the appellant before us go in part to questions relating to discrimination and in part to questions relating to Article 8. Before considering them in any detail, we must remind ourselves of the relationship between adoption and immigration, and of the relationship between the various provisions to which reference is here made. Nothing that was said in the present appeal causes us to doubt what we said in SK ("Adoption" not recognised in UK) India [2006] UKAIT 0068, as follows:

"19. ... The rules relating to adoption cannot be governed by considerations of immigration law. Indeed, the rules of adoption are no more part of immigration law than the rules of nature relating to the generation of children are part of immigration law. They are merely part of the background to the law of status.

...

21. *Adoption appears to be regulated everywhere. The greater the effects of the adoption, the more likely the regulation is to be intense. In English law, as in many other countries, the legal consequences of adoption are very substantial, affecting status, marriage, succession and social security benefits. Any country asked to attribute legal consequences to a private arrangement is entitled to enquire into the process of their acquisition, simply because the arrangement is not a natural, but purely a legal process.*
22. *There is no jus gentium or natural law right to adopt or be adopted, and no jus gentium or natural law right to have the rights which in a particular state accrue from adoption. There can be no "human right" to enjoy in any particular state the consequences of adoption, unless the adoption is one recognised as such in that state.*
23. *[The] argument that the Immigration Rules and other provisions relating to immigration law should be read as if they permitted an Indian adoption to be recognised as an adoption for immigration purposes would not necessarily do applicants any favours, precisely because adoption is not a matter of immigration law and has effects which go well beyond immigration law. As the title of the Adoption (Designation of Overseas Adoptions) Order 1973 indicates, it is not legislation about immigration: it is legislation about adoption. If [the] arguments were to be accepted, and the appellant were to be granted a visa as the adopted child of the sponsors, she would have her visa, and would no doubt be granted admission: but that would not be sufficient to make her the adopted child of the sponsors. On arrival she would not be treated as their child, because India is not a designated country. Although she had obtained her visa, she would be the sponsors' child for no other purposes unless and until they adopted her in a form recognised in English law. The Immigration Rules cannot properly be segregated from the general law for the purpose of attack on their rules on adoption: on the contrary, the Immigration Rules are, so far as we can see, constructed in such a*

way as to be consistent with the rest of English and United Kingdom law on the effects of overseas adoptions. They need to be coherent, because otherwise the person might be treated as a child of the family for immigration law purposes but not otherwise; or vice versa. [It is asserted on the appellant's behalf] that there is no rational basis for treating India differently from the countries that are on the list of designated countries: he provided no arguments in support of that assertion. As we understand it, the position in India, Pakistan and Bangladesh is that adoption is regarded as a private arrangement between families, with no public effects or need for public scrutiny. In the absence of evidence we can take no firm view on the issue, but we incline to the view that, if that is so, it would be a proper reason for exclusion from designation.

24. *It follows from what we have said above that nobody is entitled to say that an adoption is entitled to worldwide recognition in each individual state simply because it is an adoption recognised by the laws of some other state or the customs of some other culture. As the effects of adoption vary from state to state, there is nothing surprising, or wrong, or disproportionate, or irrational in saying that the legal requirements for adoption in the state in which the adoption is asserted must be met before the adoption will be recognised there. Nobody is entitled to say "I have adopted (or been adopted) according to my rules; therefore you are obliged to recognise the adoption as entirely valid under your rules". Unless an Indian adoption can be found to be subject to the same requirements and the same intentions, and to have the same effects as an adoption in the United Kingdom, there would appear to be no reason why it should be treated as though it were a United Kingdom adoption. And if it is not to be treated in general as a United Kingdom adoption, there is no reason why it should be treated as a United Kingdom adoption for the purposes of the Immigration Rules. The truth of the matter is that adoption means different things in different countries. The fact that the same word is used does not mean that the effects are, or ought to be, the same.*
25. *Paragraph 316A ... is the complement to paragraph 310. ... The limited leave obtained under that paragraph can mature into indefinite leave to remain under paragraph 311 in due course. The purpose of paragraph 316A is in part to make provision for claimants coming from countries whose adoptions are not recognised in the United Kingdom. Paragraph 316A enables such individuals to be brought to the United Kingdom with a view to being adopted according to United Kingdom law. The requirements are more onerous than those of paragraph 310 appear to be on their face: but there is no reason at all to suppose that the requirements for securing an adoption in a country whose adoptions are recognised by the United Kingdom are in substance more onerous than those for securing an adoption in the United Kingdom. Paragraph 316A was introduced on 2 October 2000, no doubt in the light of the coming into force of the Human Rights Act 1998 on that day; but it has subsequently been amended in order to comply with The Hague Convention on Protection of Children and Cooperation in Respect of*

Inter-Country Adoption, to which both the United Kingdom and India are parties.

26. *If the effect of the Immigration Rules' incorporation of the Adoption (Designation of Overseas Adoptions) Order had been that a person from a country not designated in that Order had no access to adoption recognised in the United Kingdom (because an adoption in his own country would not have effect as such for any United Kingdom purpose) that would be a serious matter. ... the Immigration Rules were described as "hopeless" in that they offered nothing to the claimants, who in that case were from Pakistan. The Immigration Rules have, however, been amended a number of times since the decision in Re J. One of the amendments is the introduction of paragraph 316A. It may well be that paragraph 310 taken on its own would offer the appellant nothing: but there is no reason to take it on its own. The Immigration Rules must be seen as a whole."*
16. The considerations we set out there must provide a context and starting point for our response to the arguments put to us on the appellant's behalf in this appeal. If the appellant comes to the United Kingdom, it will not be as the adopted child of the sponsor and his wife. She is (unlike the appellant in SK) not related by blood to either the sponsor or his wife. She is not in English law their daughter and she would not become their daughter by being admitted to the United Kingdom. We cannot properly be asked to interpret the Immigration Rules in order to provide a route to adoption without any of the safeguards provided either by adoption in the United Kingdom or by adoption in one of the countries specified in the Adoption (Designation of Overseas Adoptions) Order, which operate adoption legislation, procedures and social work practices to standards similar to those operated in the United Kingdom.
17. Two arguments based on discrimination are advanced on behalf of the appellant. Each of them can succeed only if there is no justification for the alleged differentiation. It is not entirely easy to see what that differentiation is in the argument based on Article 14. Looking at the Immigration Rules as a whole, there is ample provision for the adoption of the appellant in a manner appropriate for protecting her rights as a child whose interests and whose protection ought to take precedence in any such arrangement. The argument based on the Race Relations Act 1976 as amended focuses on an allegation of direct discrimination against the appellant as a person of Indian nationality. It does not seem to us that that is quite accurate. There is no direct discrimination against Indians. The discrimination, if it exists, is in relation to Indian adoptions. It would therefore be indirect discrimination: a person of Indian nationality finds it more difficult to fulfil the rules as to adoption which apply equally to everybody.
18. Neither of the discrimination arguments can succeed if there is a sound objective basis for the difference in treatment. The difference in treatment, we remind ourselves, is not a difference between people of different nationalities who are adopted in what is broadly speaking the

same mode: it is between people who have been subject to different legal processes, who happen to be of different nationality.

19. It is in our view difficult to imagine an area of law where it is more obviously right to treat personal choices with the greatest of caution, and to impose legal restrictions on them, than in relation to the passage of children from the care and control of one adult to another. That, with the greatest respect to the way in which complex arguments were put to us, is a complete answer to them. We are not dealing here with an unjustifiable discrimination between the treatment of comparable individuals: we are dealing instead with individuals whose status is not comparable, and who are therefore treated in different ways for a reason which is obviously justifiable on any ground of public policy. We do not need to consider whether the Secretary of State or the Entry Clearance Officer has a statutory defence to a claim of racial discrimination, for there is no racial discrimination. The appellant is treated differently from a person who was adopted in a country whose adoptions are recognised in the United Kingdom because, for very good reasons, United Kingdom law does not regard her as having acquired the status of the sponsor's daughter. She is at liberty to acquire that status by an adoption in a country which treats the process of adoption in a manner comparable to that in which it is treated in the United Kingdom, and whose adoption orders are accordingly recognised here. She is not at liberty to acquire that status in any other way, and the refusal to allow her to do so is not unlawful discrimination.
20. That is sufficient to deal with the matters raised in the grounds for reconsideration. As we said earlier, an additional point emerged at the hearing. The Presenting Officer referred to Home Office guidance which, he submitted, ought to have drawn the sponsor's attention to the fact that there was no realistic prospect of the appellant's admission to the United Kingdom as his daughter on the basis of the process which she had undergone. Certain government documents were forwarded to us after the hearing. One is a Home Office leaflet, effective from 16 April 2004, headed "Inter-Country Adoption and the Immigration Rules". The other is an odd collection of five pages apparently emanating from the DfES, headed "The Inter-country Adoption Procedures". Although the text runs seamlessly from page to page, page 1 is described as "page 1 of 5, March 2005", page 2 is "page 2 of 4, First Revision June 1999", and the other pages are pages 3, 4 and 5 of 5, dated March 2002. Further, page 2 is headed with the logo of the Department of Health, whereas the other pages have that of the DfES. The additional submissions on behalf of the appellant are not directed to those documents specifically, but instead make reference to the Immigration Directorate's Instructions of September 2001 and September 2004. They assert that "the ECO was required to inform" the appellant and the intending adopters of the need to comply with the documentary requirements set out in what is described as "Section 8 of the Inter-country Adoption Procedures submitted by the HOPO". It is said that the Entry Clearance Officer's

failure to pass Home Office leaflets to the appellant or the sponsor or to draw their attention to the need to show that they could and would comply with the requirements for adoption in the United Kingdom is a circumstance rendering the present case exceptional. It is pointed out that ss56 and 56A of the Adoption Act 1976 impose criminal penalties on those bringing children to the United Kingdom for adoption; those penalties do not apply if the child is being brought to the United Kingdom with a view to adoption recognised by the Hague Convention and it is submitted that the failure to enable the parties to prepare properly for such an eventuality is an additional argument in the appellant's favour under Article 8.

21. We reject the submissions based on the Home Office and DfES documents. There is no reason at all to suppose that the appellant and the sponsor have not had the benefit of proper legal advice from an early stage. The Immigration Judge refers to, and accepts, a legal opinion given by an Indian lawyer. Whilst of course it could not be assumed that the Indian lawyer was an expert on the United Kingdom law of adoption, it is clear that the sponsor and his wife were prepared to involve lawyers in their affairs and no doubt pay for them. Nobody could conceivably imagine that bringing somebody else's child to the United Kingdom on the basis of an adoption purportedly undertaken abroad would be a simple matter. It was for the appellant (or, more realistically the sponsor) to inform herself or himself about the law. It was not the Entry Clearance Officer's duty to advise either the appellant or the sponsor. Certainly the Entry Clearance Officer could have no duty imposed on him by the Immigration Directorate's Instructions, which do not apply to Entry Clearance Officers, but to Immigration Officers. In any event, the sponsor's most recent witness statement indicates that he would have great difficulty in paying for a home study report. There is no suggestion that he has been more able to afford such an expense at any time since the date of the decision. There is no indication in that witness statement that the sponsor was able to meet the other requirements for adopting a child in the United Kingdom, at the date of the application, at the date of the decision, or subsequently. Even if there were such a duty on the Entry Clearance Officer as is alleged, therefore, the appellant and the sponsor are not shown to have suffered in any way by the Entry Clearance Officer's failure to advise them of the terms of paragraph 316A.
22. What then of the appellant's Article 8 argument? In order to show that she should be admitted despite the terms of the Immigration Rules, she needs to show that her case is truly exceptional. We accept that the Immigration Judge may have assumed too casually that the sponsor and his wife could realistically live with the appellant in India: but there is no doubt at all that they have been able to make satisfactory arrangements for her whilst being based in the United Kingdom and visiting her from time to time. That was sufficient when she was younger: it is difficult to see that it would not also have been sufficient at the date of the decision

(and even more so today). That the appellant meets some of the requirements of paragraph 310 is not a truly exceptional circumstance. We have rejected the arguments based on the allegation that the Entry Clearance Officer failed to give advice that he should have given. There is no element of discrimination that could count in the appellant's favour under Article 8. The lapse of time since the appellant's application was made is no doubt regrettable, but it cannot of itself show that, at the date of the decision, she should have been granted entry clearance. Against anything that could be said on the appellant's behalf under Article 8, however, we have to accept the fact that if she were admitted there could be no assurance that she would be allowed to live as part of the sponsor's family, until he had satisfied the United Kingdom authorities that he was a proper person to adopt her. As we understand his position, he was not at the date of the decision and has never been in a position to do so.

23. Looking at the matter as a whole as we do we are unable to say that the appellant's circumstances are such that the refusal to allow her entry clearance to the United Kingdom is a disproportionate interference with the rights she has as a person who in India, but not in the United Kingdom, is regarded as the daughter of the sponsor resident in the United Kingdom.
24. For the foregoing reasons we consider that the Immigration Judge made no material error of law. We accordingly affirm her determination dismissing this appeal.

C M G OCKELTON
DEPUTY PRESIDENT
Date: