



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003564
On appeal from: EA/00263/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 15 July 2023

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

ADEEL HUSSAIN
(NO ANONYMITY ORDER MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Mark Symes of Counsel, appearing by Direct Access
For the Respondent: Ms Arifa Ahmed, a Senior Home Office Presenting Officer

Heard at Field House on 27 June 2023

DECISION AND REASONS

Introduction

1. The appellant challenges the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 26 November 2021 to refuse him a family permit under the EU Settlement Scheme (EUSS). He brings this appeal pursuant to Regulation 3 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. He is a citizen of Pakistan.
2. For the reasons set out in this decision, I have come to the conclusion that the First-tier Tribunal decision must be set aside and remade. I do not

consider it necessary for there to be a further hearing as the grounds of appeal do not challenge the factual matrix against which the appeal was decided: the challenge is to the legal effect of a Deed entered into in 2015 between the sponsor and the appellant's birth mother, and a putative earlier document in 1989, which is said to have been lost in a flood.

3. Having considered the evidence and arguments, I have concluded that the appeal should be dismissed.
4. **Mode of hearing.** The hearing today took place face to face.

Background

5. The sponsor, Mr Afzal Ahmed, has limited leave (EUSS pre-settled status), granted on 14 December 2020. He is a Norwegian citizen. The main basis of the appellant's case is that he is the adopted son of the sponsor, and is thus a family member of a relevant EEA citizen as required by paragraph FP6 of Appendix EU (family permit). The respondent therefore considered that the appellant, who is no longer a child but a man, now 40 years old, married with children of his own and in employment, was not a family member of a relevant EEA citizen.
6. The appellant claimed to have been adopted by the sponsor in 1989, following the death of the appellant's father. The original adoption papers were lost in a flood in 1992, but the appellant relied on a Deed signed in 2015 between his mother and the sponsor. However, Pakistan is not a country recognised under the Adoption (Recognition of Overseas Adoptions) Order 2013 S.I. 2013/1801 and accordingly the appellant cannot bring himself within the provisions of Appendix EU (Family Permit).
7. The appellant relied on the EU Withdrawal Agreement. The First-tier Judge dismissed the appeal on the basis that the appellant had not shown that the sponsor was a Union citizen, and therefore, the appellant could not rely on the sponsor's status, even if he were his adopted son.

The Withdrawal Agreements

8. It is common ground that the post-Exit arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the UK are governed, not by the EU Withdrawal Agreement, but by the EEA EFTA Separation Agreement (the Separation Agreement) and that the First-tier Judge misdirected himself and erred in law in applying the EU Withdrawal Agreement rather than the Separation Agreement to the factual matrix of this appeal.
9. This issue was not argued before the First-tier Judge: it appears from the appellant's skeleton that the appellant relied on the EU Withdrawal Agreement and that nobody raised the issue of there being an EEA EFTA Agreement which contains the provisions applicable to this appellant's circumstances.

Grounds of appeal

10. The First-tier Judge dismissed the appeal, on the basis that Norway was not included in the EU Withdrawal Agreement. The appellant appealed to the Upper Tribunal, raising for what appears to have been the first time the existence and relevance of the Separation Agreement.
11. He argued, applying *SM (Algeria) v Entry Clearance Officer* [2018] 1 WLR 1035, *SM (Enfant place sous kafala algerienne)* (Citizenship of the European Union - 'Direct descendant' - Judgment) [2019] EUECJ C-129/18 (26 March 2019), that he was entitled to be treated as a direct descendant of the sponsor, notwithstanding the UK's adoption recognition provisions which exclude Pakistan.

Permission to appeal

12. Permission to appeal to the Upper Tribunal was granted in the following terms:

“2. The grounds of appeal assert, amongst other issues, that the judge erred in his consideration of the scope of the Withdrawal Agreement. The grounds disclose an arguable error of law. The grant of appeal is not limited.”

13. On 13 February 2023, UTJ Hanson directed the respondent to confirm whether, in the light of the identified failure of the First-tier Tribunal to consider the Separation Agreement, and failure adequately to consider and apply the guidance provided by the Court of Justice of the European Union in *SM (Algeria)*, she accepted that there was an error of law for which the decision should be set aside and remitted to the First-tier Tribunal to be considered afresh.

Respondent's position

14. The respondent accepted that the First-tier Tribunal should have considered the Separation Agreement not the EU Withdrawal Agreement. However, she argued that the error was not material, and the decision should not be set aside. The UK did not recognise an adoption from Pakistan, and the appellant was now an adult, and had been so at the date of application and the date of decision.
15. The appellant was not a family member within the meaning of the Separation Agreement. He was living, and leading a life with his wife in Pakistan, and had never left his country of origin. His income might be modest, but there was no evidence that it did not meet his essential needs, and dependency was not established. He could not succeed, on that basis, as he was not a 'family member' in EEA EFTA terms.
16. As regards the *SM (Algeria)* point, the relationship relied upon was not a parent-child relationship and the decision of the Court of Justice of the European Union in *SM's* case did not avail him.

17. The respondent also filed a Rule 24 Reply, the core of which is at [3]-[4]:

“3. The grounds fail to address how the appellant’s case differs from that within *SM (Algeria) v Entry Clearance Officer* [2018] 1 WLR 1035 which is relied upon. The court in *SM* found that the sponsor’s guardianship of the appellant did not amount to a parent-child relationship (adoption was illegal in Algeria) and therefore the appellant could not be deemed to be a direct-descendent under the Directive. It is noted that the arrangement/deed between the sponsor and the appellant’s mother is not a lawful adoption recognised by the UK and there was no expert evidence put before the judge to substantiate this point in terms of the law in Pakistan, the burden being on the appellant to establish the same. It is notable that the deed states that the sponsor could apply for a guardianship order from the Indian courts on the basis of the document (Respondent’s bundle annex C29) – which would seem to imply that the arrangements amounted to a guardianship arrangement rather than a legal adoption. Given the arrangement did not meet the requirements of The Adoption (Recognition of Overseas Adoptions) Order 2013 S.I. 2013 No. 1801 or Annex 1 of Appendix EU (FP), the grounds fail to establish how the appellant meets the relevant test set out in *SM* establishing a parent-child relationship which would amount to a direct family member. The appellant has therefore failed to adequately establish that they have an automatic right of residence as ‘family member’ as defined within the Appendix EU or otherwise.

4. Taken at its highest, if it were found that the appellant should have been treated as an extended family member in light of *SM* (although this is not accepted), this would not have any impact on the overall outcome of the appeal in any event. The EUSS does not have a route for extended family members, therefore the appellant would be unable to derive any rights or leave in any event. The grounds do not address whether the appellant could succeed as an extended family member and therefore, there is nothing to indicate that a material error has been established.”

18. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

19. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. For the respondent, Ms Ahmed relied on the Rule 24 Reply and the respondent’s response, as set out above.

20. For the appellant, Mr Symes argued that, in the light of *SM* at [50]-[54], the appellant was entitled to be regarded as a direct descendant, on the principle of the uniform application of EU law. The respondent had made two further points, the first being that even if the document produced was a qualifying legal agreement, it was for guardianship not adoption, and the second, that there was little, if any, evidence of dependency. Mr Symes contended that there were no findings on dependency in the First-tier Tribunal decision and that if this was relevant, evidence would need to be heard and the appeal should be remitted to the First-tier Tribunal for further evidence to be taken.

21. I reserved my decision, which I now give.

Error of law decision

22. There is a plain and uncontested error of law in this appeal. The judge applied the wrong law. In fact, it seems that the case was argued by him on the basis of the EU Withdrawal Agreement and that nobody appreciated the need to consider Article 9 of the Separation Agreement instead.
23. I consider that I cannot simply uphold the decision of the First-tier Judge on that basis. I set aside the decision, and will remake it on the basis of the facts found and the arguments before me today.

Remaking the decision

The 2015 Deed

24. The appellant relies on what is described as a deed of adoption dated 17 August 2015 (the 2015 Deed). He was born on 18 November 1983, so he would have been 31 years old then. The 2015 Deed was signed by the appellant's birth mother, who was still living, and asserted that there had been an earlier adoption agreement, subsequently lost in a flood, on 16 December 1989, when the appellant would have been 6 years old.
25. The 2015 Deed refers throughout to the 31 year old appellant as a child, and purports to record that:

“Whereas the welfare and the bright future of the child is of utmost importance, the adoptive parent, Mr Afzal Ahmed, has no issue (male or female) and they want to adopt the child as his son named Adeel Hussain date of birth is 18/11/1983. Therefore, the biological parent has consented to her said child being given in adoption. The ceremony of giving and taking in adoption has been duly performed along with other religious ceremonies on 16/12/1989.

The adoptive parent has rights of submission of form B, CNIC, admission in cover schools/colleges/universities; apply for a visa and to get guardianship certificate from the honourable court.

The parties considered it expedient and necessary that a proper deed of adoption be executed as an authentic record of adoption.”

Dependency

26. The unchallenged factual findings of the First-tier Judge on dependency are at [13] of his decision:

“13. Mr Ahmed left Pakistan for Norway in July 1989 and claimed that the Appellant was cared for by Mr Ahmed's mother and sister. Mr Ahmed would visit Pakistan regularly but made a home and life in Norway (eventually

attaining citizenship). However, he claimed that he has financially supported the Appellant throughout. Mr Ahmed came to the UK in 2020 and has since been joined by his mother and his sister.

He informed the Tribunal, apparently for the first time, that the Appellant has been married for two years, lives in Mr Ahmed's house and tends his land, from which he earns a modest income. The couple are allegedly supported financially by Mr Ahmed and it is proposed that the Appellant will settle in the UK without his wife (who, Mr Ahmad claimed in his oral evidence, he would continue to support financially in Pakistan)."

[Emphasis added]

27. There is no evidence before me or the First-tier Tribunal to show the extent to which the appellant can meet his essential needs, and those of his spouse and any family, from the income from the sponsor's land which he tends. Nor, apart from two money transfers made after the application but before the respondent's decision, is there any reliable evidence as to how much the appellant now receives from the sponsor to assist him financially.

Article 9 of the Separation Agreement

28. The relevant provision of the Separation Agreement is Article 9(e), which mirrors Article 10 of the EU Withdrawal Agreement:

"Article 9 - Personal scope

1. Without prejudice to Title III, this Part shall apply to the following persons:

...

- (e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:

(i) they resided in the host State in accordance with the EEA Agreement before the end of the transition period and continue to reside there thereafter;

(ii) they were directly related to a person referred to in points (a) to (d) and resided outside the host State before the end of the transition period, provided that they fulfil the conditions set out in point (2) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph;

(iii) they were born to, or legally adopted by, persons referred to in points (a) to (d) after the end of the transition period, whether inside or outside the host State, and fulfil the conditions set out in point (2)(c) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph and fulfil one of the following conditions:

- both parents are persons referred to in points (a) to (d);
- one parent is a person referred to in points (a) to (d) and the other is a national of the host State; or
- one parent is a person referred to in points (a) to (d) and has sole or joint rights of custody of the child, in accordance with the applicable rules of family law of an EEA EFTA State or of the United Kingdom, including applicable rules of private international

law under which rights of custody established under the law of a third State are recognised in the EEA EFTA State or in the United Kingdom, in particular as regards the best interests of the child and without prejudice to the normal operation of such applicable rules of private international law; ...”

29. In order to qualify under Article 9(e)(ii), the appellant must also fulfil the conditions set out in Article 2(2) of Directive 2004/38/EC which defines ‘family member’:

“‘ family member ’ means:

- (a) the spouse;
- (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
- (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
- (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b); ...”

SM (Enfant place sous kafala algérienne) (Citizenship of the European Union - 'Direct descendant' - Judgment) [2019] EUECJ C-129/18 (26 March 2019)

30. SM was born in 2010 in Algeria and was undoubtedly still a child at all material times, unlike this appellant. SM’s parents abandoned her at birth and following proper legal proceedings, and an opportunity for her birth parents to object, she was placed under the *kafala* guardianship of two French citizens by the Tribunal de Boufarik on 22 March 2011, when she would have been 10 years old.

31. The guardians then separated, with the husband returning to the UK for professional reasons and the wife remaining in Algeria to raise SM. When SM applied for entry clearance as the adopted child of an EEA national, she was refused because the *kafala* system was not recognised as a legal adoption under UK law, and there had been no application for intercountry adoption.

32. The passage relied upon by Mr Symes is at [50]-[54]. The Court of Justice of the European Union held that there must normally be an independent and uniform interpretation throughout the EU of the concept of ‘direct descendant’, which would normally refer to a direct parent-child relationship. However, the provisions of Directive 2004/38 should be construed broadly. At [54]-[57], the court said this:

“54. Therefore it must be considered that the concept of a ‘parent-child relationship’ as referred to in paragraph 52 above must be construed broadly, so that it covers any parent-child relationship, whether biological or legal. It follows that the concept of a ‘direct descendant’ of a citizen of the

Union referred to in Article 2(2)(c) of Directive 2004/38 must be understood as including both the biological and the adopted child of such a citizen, since it is established that adoption creates a legal parent-child relationship between the child and the citizen of the Union concerned.

55 By contrast, that requirement for a broad interpretation cannot justify an interpretation, such as that which is apparent from point 2.1.2 of Communication COM(2009) 313 final, whereby a child placed in the legal guardianship of a citizen of the Union is included in the definition of a 'direct descendant' for the purposes of Article 2(2)(c) of Directive 2004/38.

56 Given that the placing of a child under the Algerian *kafala* system does not create a parent-child relationship between the child and its guardian, a child, such as SM, who is placed in the legal guardianship of citizens of the Union under that system cannot be regarded as a 'direct descendant' of a citizen of the Union for the purposes of Article 2(2)(c) of Directive 2004/38.

57 That being said, such a child does fall, as was emphasised by the referring court, under the definition of one of the 'other family members' referred to in Article 3(2)(a) of Directive 2004/38."

Remaking the decision

33. The appellant cannot meet Article 9(e)(i) of the EEA EFTA Agreement. He has never resided here. Nor can he meet Article 9(e)(iii). He was neither born to nor legally adopted by an EEA EFTA parent or parents after the end of the transition period.
34. An adoption in Pakistan (if this was one) is not a legal adoption in UK law. Nor are this appellant's circumstances on all fours with those of SM. In the present appeal, there was no parent-child relationship in 2015. The appellant was not a child then.
35. Even if the 2015 Deed reflects a genuine arrangement, I am not satisfied that SM (*Algeria*) avails the appellant. It concerned a style of legal guardianship under Algerian law called '*kafala*'. *Kafala* was different from a lawful adoption and was a permanent guardianship order by an Algerian court. The language of the 2015 Deed refers to the ability to register guardianship with the Court, as was done with SM. At best, it seems that like SM, the appellant if still a child would fall to be treated as an 'other family member' of the sponsor, and neither the EU Withdrawal Agreement nor the Separation Agreement gives rights to such extended family members.
36. The appellant's contention is that, applying Article 9(e)(ii), the 2015 Deed makes him directly related to the sponsor. My primary finding is that the 2015 Deed is an unreliable document to the *Tanveer Ahmed* standard, and that I can place no weight upon it. There is no other reliable evidence (apart from the appellant's witness statement, and the sponsor's oral evidence) to show how the sponsor was involved in the appellant's life

from the age of 6 to 31, which I would have expected to see, if there really was an earlier deed which was lost in a flood.

37. Even the 2015 Deed is a reliable document, and *SM*'s case assists him, the appellant must also bring himself within the categories in Article 2(2) of Directive 2004/38/EC (the definition of 'family member'). In this case, only Article 2(2)(c) could avail him. The appellant is not a spouse or partner of the sponsor, nor is he a dependant in the ascendant line of the sponsor, the sponsor's wife or his partner.
38. If the appellant is a direct descendant, he is over 21 and must demonstrate dependency on the sponsor. The evidence of dependency is sparse. I bear in mind that the appellant did not disclose that he had a wife and an income, and that these matters came to light only in the sponsor's oral evidence to the First-tier Tribunal.
39. The evidence of dependency in this appeal is insufficient to bring the appellant within Article 2(2)(c) of Directive 2004/38/EC as a 'family member' of the sponsor. On any analysis, this appeal cannot succeed and I dismiss it.

Notice of Decision

40. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the appellant's appeal.

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 3 July 2023

