



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2022-006163

First-tier Tribunal No: EA/11642/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 23 August 2023**

**Before**

**UPPER TRIBUNAL JUDGE McWILLIAM**

**Between**

**NK**  
**(ANONYMITY ORDER MADE)**

Appellant

**and**

**The Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: Mr A Chohan of Counsel, instructed by Charles Simmons  
Immigration Solicitors

For the Respondent: Mrs A Ahmed, Home Office Presenting Officer

**Heard at Field House on 10 August 2023**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.**

**DECISION AND REASONS**

1. The Appellant is a child. She is a citizen of India. Her date of birth is 30 September 2007. The panel determining the error of law decision, anonymised the Appellant, having regard to Guidance Note 2022 No 2 of the Upper Tribunal's Immigration and Asylum Chamber. It is the norm for children not to be identified.
2. A panel comprising Upper Tribunal Judge McWilliam and Deputy Upper Tribunal Judge Holmes decided that the First-tier Tribunal (Judge Cary) materially erred in dismissing the Appellant's appeal against the decision of the ECO on 12 June 2021 to refuse her application on 20 March 2021 for a family permit under the EU Settlement Scheme (EUSS) as the family member of an EEA national with settled status. The panel set aside the decision of Judge Carey.
3. The Appellant is the adopted child of an Indian citizen mother and an Italian citizen father who reside together in the United Kingdom. The adoptive father has pre-settled status which was granted to him on 22 September 2019 under the EUSS. The Appellant's adoptive mother was granted ILR until 11 February 2020 under the EUSS. The Appellant's biological mother is the sister of her adoptive mother. Her adoptive parents do not have children of their own and it was agreed by the family that they would adopt the Appellant. An adoption took place in India in accordance with Indian law on 11 November 2020.
4. I do not intend to set out the legislative framework which is set out in the panel's error of law decision; however, the Adoption and Children Act 2002 together with the Adoptions with a Foreign Element Regulations 2005 ("the 2005 Regulations") apply to this case in the following way:
  - (1) The adoption is recognised in the United Kingdom as an adoption.
  - (2) It is an external adoption which at the date of the application and decision came within s.83(1)(b) of the Adoption and Children Act 2002 and therefore the Appellant's adoptive parents were subject to restrictions when bringing her into the United Kingdom.
  - (3) In accordance with s. 83(4) of the 2002 Act, the Adoptions with the 2005 Regulations require them to apply for a certificate of eligibility.
  - (4) To attempt to bring the Appellant into the United Kingdom without complying with this is a criminal offence.

### **The Error of Law**

5. It was argued by the Respondent at the error of law hearing that the First-tier Tribunal correctly applied the Respondent's guidance relating to adoptions under other parts of the IR. The IR (para 309B) and the Respondent's own guidance requires adoptive parents in some circumstances to produce evidence of a certificate of eligibility. There is no such requirement in Appendix EU. The panel did not agree with the Respondent. The panel's error of law decision reads as follows:

"27. It is clear that the guidance does not apply to applications under Appendix EU. It applies specifically to applications made under part 8 of the IR which this application is not. There is direct reference to the requirements of Section 83 in the IR at 309B

which makes it clear that evidence of the issue of a certificate is required. Our attention was not drawn to any reference to the guidance (or Section 83) in Appendix EU or mention of Appendix EU in the guidance. We find that the judge relied on this guidance in concluding that the appeal should be dismissed which we find to be an error of law. We also note that there is EU Settlement Scheme Family Permit and Travel Permit Guidance. Our attention was not drawn to this by the parties. However, from the title of the guidance, we reasonably infer that it relates to this kind of application.<sup>4</sup> We also note the position of the ECO was that the Appellant was not a family member with reference to “eligibility requirements”. Our attention was not drawn to eligibility requirements of the IR which the Appellant was unable to meet.

28. It seems to us that the First-tier Tribunal’s jurisdiction to allow the appeal was limited to the decision being not in accordance with the IR or in breach of the Withdrawal Agreement.<sup>5</sup> The judge accepted that the Appellant met the requirements of Appendix EU and did not consider the appeal under the Withdrawal Agreement.
29. The judge materially erred. He relied on guidance that had no application and it is not clear to us on what basis the appeal was dismissed. We set aside the decision of the judge to dismiss the appeal.
30. It is not clear to us on what basis on which the Secretary of State is asking this Tribunal to dismiss the appeal notwithstanding the restrictions under Section 83 and the potential for the commission of a criminal offence with reference to the applicable statutory framework. We are mindful that primary legislation is in place to protect the best interests of children who are at risk of being trafficked.
31. We note that in his skeleton argument Mr Ahmed stated that [the adoptive parents] took the necessary steps to apply for a certificate of eligibility from the Department of Education but that was not until 22 October 2021 a few months after their application had been refused.
32. While we note that Appendix EU contains provisions relating to exclusion on grounds of public policy, this is not something that the Secretary of State has relied upon when refusing the application.
33. The remaking of the appeal should proceed on the basis of submissions only. The facts are not in dispute. The matter will be relisted for submissions only in the UT.
34. We are mindful that the case involves a minor. As far as we are aware she was still living with her biological parents in India at the time of the decision and the hearing before us.”

<sup>4</sup> This guidance (EU Settlement Scheme Family Permit and Travel Permit version 15.0) was updated on 12 April 2023. We have not seen earlier versions which may have been applicable at the material time.

<sup>5</sup>. Regulation 8 The Immigration( Citizens Rights Appeals) EU Exit Regulations 2020 “

6. Prior to the hearing the parties sent to me a draft consent order wherein the Respondent conceded the appeal on the basis that the Appellant met the requirements of Appendix EU; however, the consent order did not explain to the Tribunal how the Respondent intended to discharge its function under s.55 of the Borders, Citizenship and Immigration Act 2009. I raised this with the parties and indicated that I was not content to sign the consent order without this being addressed. It was always a matter for the Respondent to withdraw the decision, but as the matter stood the case would remain in the list.

### **Re-making**

7. The appeal must be allowed. It is conceded by the Respondent the Appellant meets the requirements of Appendix EU. The appeal is allowed under Appendix EU. The outcome of this is that the Respondent should provide a family permit to the Appellant. On entering the United Kingdom she will comply with the United Kingdom's immigration law. The problem that the appeal highlighted is that while she may comply with immigration law, bringing her into the United Kingdom may involve her adoptive parents committing a criminal offence.

### **Section 55 of the Borders, Citizenship and Immigration Act 2009**

8. In carrying out the duty imposed by s.55 it is incumbent on the Tribunal to have regard to the need to safeguard and promote the welfare of the Appellant, a child. In order to carry out the duty imposed on the Tribunal, it must be satisfied that the respondent will discharge its duty under s.55 where, in circumstances like here, the IR are not compliant with s.55. This was the focus of the resumed hearing. I asked Ms Ahmed how the Respondent intended to discharge its duty under s.55 in this case.
9. I was given assurances by both representatives. Ms Ahmed, who had clearly put a lot of thought into the matter in response to communication I sent to the parties the day before the hearing, assured me that; (1) an internal safeguarding referral would be made by the Respondent; (2) my decision and the adoptive parents' address would be forwarded by the Respondent to the Head of the Legal Department at the relevant child services, which the parties agreed was the City of Wolverhampton; (3) the Respondent would make a referral to the local authority; and (4) the matter will be flagged up on the Home Office's internal database concerning the adoptive father's data. (She confirmed, however, that the information at present shows that there are no concerns in the form of "alerts" on the database.)
10. Mr Chohan assured the Tribunal that the Appellant's solicitors will similarly email the relevant Social Services and the head of Legal Services at Wolverhampton City Council. They will send to them my decision copying the Respondent into the communication.
11. I make the following observations; (1) Appendix EU is not compliant with s.55 of the 2009 Act and the SSHD's own guidance (Every Child Matters – Statutory Guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children issued under Section 55 of the Borders,

Citizenship and Immigration Act 2009 - November 2009); and (2) The adoptive parents are aware of their responsibility and the potential commission of a criminal offence should they bring the Appellant into the United Kingdom without complying with the 2005 Regulations. I was told at the error of law hearing by the Appellant's representative that they had applied for a certificate of eligibility, after the decision of the ECO, but had not pursued it because of the cost. Mr Chohan was not able to expand on this.

**Notice of Decision**

12. The appeal is allowed.

**Joanna McWilliam**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**22 August 2023**