IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003501

First-tier Tribunal No:
EA/52464/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 10 January 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Secretary of State for the Home Department

Appellant

and

Gilbert Amoako
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr C Bates, Senior Home Office Presenting Officer
For the Respondent: Mr M Karnik, counsel, instructed by Dickinsons Solicitors

Heard at Birmingham Civil Justice Centre on 4 July 2023

DECISION AND REASONS

INTRODUCTION

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Mr Gilbert Amoako. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to Mr Amoako as the appellant, and the Secretary of State as the respondent.

2. On 23 June 2021 the respondent refused the appellant's application for n EEA Family Permit as the 'direct family member' of an EEA national. The appellant claims his father is Joseph Amoako Atta ("the sponsor"), an Italian national living in the UK. The respondent did not accept that the appellant is related to his sponsor as claimed. The respondent said the documents provided in support of the application are contradictory and the respondent did not therefore accept that the appellant is a direct family member of Joseph Amoako Atta. The appellant's appeal against that decision was allowed by First-tier Tribunal Judge Malik for reasons set out in a decision dated 13 June 2022.

THE DECISION OF JUDGE MALIK

3. The judge noted, at paragraph [9] of her decision that on 29 November 2017, the appellant and his twin sister previously made an application for an EEA family permit to join the sponsor in the UK. She noted that those applications were refused by the respondent on 2 January 2018 because the respondent did not accept the appellant and his sister were related to the sponsor as claimed.

4. The judge noted that DNA evidence was obtained and at paragraphs [10] and [11] she said:

> "10. The DNA evidence proved the appellant's twin was the biological child of the sponsor - however, the appellant, was not the sponsor's biological son. It is possible for fraternal twins to have two different biological fathers.
>
> 11. Despite the DNA evidence, the sponsor regards the appellant as his son, having raised him from birth and not previously having suspected he was not biologically his."

5. At paragraphs [20] and [21] of her decision, the judge said:

> "20. Having considered the respondent's guidance, 'Free Movement Rights: direct family members of European Economic Area (EEA) nationals Version 9.0' published 21/03/20, reference is made to child or stepchild. In SM (Algeria), the Supreme Court was also clear that that "family member" in the Directive had a wider connotation than "relative" and so the category of extended family members included those who were not related by blood or affinity. In Alarape and anr (Article 12 EC Teg 1612/68) Nigeria [2011] UKUT 00413 (IAC) the Tribunal also held that the term "child" in Article 12 of Regulation (EEC) no. 1612/68 (which guarantees a right of access to education) should be read to include "stepchild".
>
> 21. Therefore, I find the appellant does meet the requirements of the regulations to be issued with a family permit under Regulation 7."

6. The judge went on to consider the alternative claim advanced by the appellant that he is in any event, 'an extended family member' for the purposes of Regulation 8 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). At paragraphs [24] and [25] of her decision, the judge referred to some of the difficulties with the evidence relied upon by the appellant but went on to say:

> "25. I do though accept, on balance, that the sponsor raised the appellant on the basis he considered him to be his biological son, and as such, I find there is emotional dependency between the parties. This did not end with the DNA results. There is evidence of the parties maintaining contact with one another. The appellant does not need to be wholly financially dependent on the sponsor. There are money transfer receipts to the appellant from the sponsor - one in 2018, in 2019 and between January-December 2020 and January, February, March and June 2021. This on balance causes me to find, even in the absence of receipts, that the appellant does rely on the sponsor to meet his essential needs.
>
> 26. Consequently, I find, the appellant is an extended family member of the sponsor; he lives in Ghana and is dependent on the sponsor for his essential needs. Therefore, I find the appellant does meet the requirements of the regulations to be issued with a family permit under Regulation 8 also."

7. The judge therefore found that the appellant is in any event, an extended family member of his sponsor for the purposes of Regulation 8. The appeal was allowed.

THE GROUNDS OF APPEAL

8. The respondent claims that the judge made material errors of law in allowing the appeal for the reasons given. Three grounds are advanced.

9. First, the DNA evidence was that the sponsor is not the biological father of the appellant. At paragraph [10], the judge noted that *"It is possible for fraternal twins to have two different biological fathers"*. The judge proceeds upon the premise that that is accepted without any further reasons and without having proper regard to the documents before the Tribunal that undermine the appellant's claim regarding his relationship with the sponsor. *(Ground 1)*

10. Second, the judge erred in treating the sponsor as the 'step-parent' of the appellant so that the appellant is to be treated as a 'direct descendant' for the purposes of Regulation 7of the 2016 Regulations. The respondent refers to the decision of the Supreme Court in *SM (Algeria) v ECO* [2018] UKSC 9 *("SM (Algeria)")*in which the court held that direct descendancy does not extend to situations of *de facto* or other unrecognised adoption proceedings. *(Ground 2)*

11. Finally, the respondent claims the judge referred to the decision of the Supreme Court in *SM (Algeria)*, but failed to acknowledge that in that case, there had been proceedings which had strengthened the family ties such that even though they could not effect a transfer of parental responsibility, they did open up the possibility of meeting regulation 8(2) in its transposition of Article 3.2(a) of the 2004 Directive. Here there have never been any proceedings that strengthen the sponsor's ties to the appellant. In any event, the judge erroneously proceeds upon the premise that the condition set out in Regulation 8(2) of the 2016 Regulations is met without carrying out the required 'extensive examination of the personal circumstances' of the appellant. *(Ground 3)*

12. Permission to appeal was granted by First-tier Tribunal Judge Kudhail on 15 July 2022.

THE HEARING OF THE APPEAL BEFORE ME

13. Mr Bates submits the appellant cannot establish that he is a 'Family Member' of an EEA national as a 'direct descendant' of his sponsor in the face of clear DNA evidence that the sponsor is not his biological father. He refers to the decision of the Court of Appeal in *Latayan v SSHD* [2020] EWCA Civ 191 in which the Court of Appeal confirmed that on a natural reading of Regulation 7 of the 2016 EEA Regulations, a person who is not a biological descendant or an adopted child, is not a direct descendant and thus not a "family member". Jackson LJ (*with whom Singh LJ and the Senior President of Tribunals agreed)* said:

> "20. … a step-child of an EU citizen (meaning a child of a person who is in a relationship with an EU citizen, not being a marriage or a civil partnership) is not a direct descendant of the citizen within the meaning of the Regulations that give effect to the Citizens Directive…"

14. Mr Bates submits that in *Latayan*, the biological parent *(mother)* of the applicant was in a relationship with an Irish national *(the step-father)* who was resident in England and the applicant claimed she had been financially dependent on her step-father. Mr Bates submits that here, the appellant's mother and his step-father are no longer in a relationship and in effect, any relationship the appellant enjoyed with his step-father, ended when they separated. On any view, contrary to what the judge found, the appellant is not a 'Family member' for the purposes of Regulation 7 of the EEA Regulations.

15. Mr Bates submits the judge's decision that the appellant is an 'extended family member' of his sponsor is similarly flawed. The appellant is not 'a relative' of his sponsor. The sponsor is not his biological father and neither is he the appellant's step-father in the sense that he has assumed some legal responsibility for the appellant, even after the DNA test confirmed they are not biologically related. The evidence before the FtT was that the sponsor moved to Italy about six months before the appellant was born and it is difficult to see how the appellant has played an active role in the appellant's upbringing, or that the appellant has been dependent upon the sponsor as claimed. The judge noted, at [16] that the sponsor said the appellant had been living "with a family friend" since 2015, in a property that was owned by a family friend. The sponsor did not know who the tenant for the property (Mr A) was. Mr Bates submits the evidence before the Tribunal pointed to the relationship between the appellant and sponsor having ended at or about the time that the sponsor and his wife separated and then divorced in or around 2015 and March 2016.

16. Mr Bates submits the appellant's claim appeared to be that he has a twin sister, Nana Akua Amoako. The judge said, at [10], that notwithstanding the DNA evidence it is possible for fraternal twins to have two different biological fathers. Mr Bates submits the DNA evidence establishes that the sponsor is the biological father of the child 'Nana Akua Amoako'. It also

establishes that the sponsor is not the biological father of the appellant. However, there is no evidence that the appellant and 'Nano Akua Amoako' have a biological relationship (i.e. that they are twins or share the same mother). Mr Bates submits the evidence of the sponsor recorded at paragraph [13] was that when a child is born, they did not automatically have a birth certificate, but a 'weight chart'; that chart bore the biological parents' names; and a birth certificate could be acquired later. At paragraph [17] the judge noted that looking at the 'weight card', nothing is filled in for the section for 'brother and sister', and the sponsor was unable to explain why there was no mention of the appellant being a twin.

17. Mr Karnik has filed and served a rule 24 response dated 2 July 2023. He reminds the Tribunal of the restraint that an appellate body must exercise when considering an appeal against the decision of a specialist judge at first instance. In *UT (Sri Lanka) v The Secretary of State for the Home Department* [2019] EWCA Civ 1095 the Court of Appeal reminded appellate courts:

> "It is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in *AH (Sudan) v Secretary of State for the Home Department* at [30]:
>
> > "Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently.""

18. Mr Karnik submits the issue between the parties, now that the DNA evidence establishes that the appellant is not the biological son of the sponsor, was whether the appellant can nevertheless be treated in law as his direct descendent for the purposes of Regulation 7 of the 2016 Regulations. He submits the judge reached a decision that was open to her and the respondent is unfairly seeking to have a second bite at the cherry. The respondent cannot properly complain that the judge failed to address a point the respondent never made, and the first ground of appeal amounts to no more than a disagreement with findings properly made.

19. As far as the second and third grounds of appeal are concerned, Mr Karnik submits the FtT found that the appellant is the sponsor's stepchild with a parent-child relationship between the two. That was a conclusion that was open to the judge. He submits the European Court of Justice in *SM v Entry Clearance Officer* (C-129/18) did not limit 'direct descendants' to those with a biological relationship, but left the door open, to non-biological parent-child relationships being recognised. Mr Karnik submits that *SM* is not to be read as a specific factual precedent, but established a wider legal principle that in some circumstances, a parent-child relationship may exist, even though there is no biological relationship. Here, the judge found that the sponsor had raised the appellant on the basis that he considered the appellant to be his biological son, and as such there was emotional dependency between them. That was a finding that

was open to the judge and the respondent simply disagrees with the conclusion reached by the judge.

ERROR OF LAW DECISION

20. There is a considerable overlap in the grounds of appeal and the submissions made before me and I take all the grounds together. The judge found that the appellant is a 'Family member' of the sponsor as defined in Regulation 7 of the Immigration (European Economic Area) Regulations 2016. In the alternative, the judge found the appellant is an 'Extended family member' of the sponsor as defined in Regulation 8. As far as material to this appeal, Regulations 7 and provided:

> **'Family Member'**
>
> (1) In these Regulations, *"family member"* means, in relation to a person ("A")—
>
> …
>
> (b) A's direct descendants, or the direct descendants of A's spouse or civil partner who are either—
>
> (i) aged under 21; or
>
> (ii) dependants of A, or of A's spouse or civil partner;
>
> …
>
> **8.— "Extended family member"**
>
> (1) In these Regulations *"extended family member"* means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies a condition in paragraph [(1A),][1] (2), (3), (4) or (5) .
>
> …
>
> (2) The condition in this paragraph is that the person is—
>
> (a) a relative of an EEA national; and
>
> (b) residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national's household; and either—
>
> (i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or
>
> (ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national's household.

21. It is uncontroversial that the DNA evidence that is now available establishes that the sponsor is not the biological father of the appellant.

22. In *SM (Aleria) v Entry Clearance Officer* [2018] UKSC 9, the Supreme Court referred questions to the Court of Justice of the European Union concerning the scope of a Member State's responsibilities under Directive 2004/38 in relation to children who were third country nationals and who were in the permanent legal guardianship of an EU citizen under the law of their country of origin. There, an Algerian court had placed an abandoned

child under the kefalah guardianship of married EU citizens. The Supreme Court sought clarification about whether such children should be recognised as "direct descendants" within the meaning of Article 2(2)(c).

23. In *SM v Entry Clearance Officer,* (-129/18) the European Court of Justice said that a child could not be classed as a 'direct descendant' of an EU citizen within the meaning of Directive 2004/38 art.2(2)(c) where the child was only in the legal guardianship of that citizen under the 'kafala' system that applied in Algeria. The ruling of the CJEU was that the child was an extended family member but not a direct descendant of the EU citizens because the relationship created by kefalah was not a parent-child relationship.

24. In *Latayan v SSHD* [2020] EWCA Civ 191, [2020] 1 All E.R 684, the Court of Appeal confirmed that the step-child of an EU citizen is not a direct descendant of the citizen within the meaning of Regulation 7 of the 2016 Regulations. There, the appellant was a 46 year old Philippine national, whose parents had divorced in 1986. Her mother came to the UK in 1990 and subsequently became a British citizen. In 1998 her mother began to live with an Irish national (Mr E) who was resident in England. The appellant claimed that she had been financially dependent on Mr E, who she described as her stepfather, between 1998 and the time she entered the UK in 2004. Her case was that her stepfather had given her mother money to send to her in the Philippines. The FtT dismissed her appeal against the refusal to grant her a residence card and found that she was not a direct descendant of her stepfather and that she had not established her dependency upon him before entering the UK, although it was accepted that she had been a member of his household thereafter. The Upper Tribunal agreed with those conclusions and found that a *de facto* stepchild of an EU citizen was not a direct descendant, and that the FtT's conclusions on dependency were not irrational.

25. On appeal, the Court of Appeal considered the decision of the CJEU in *SM v Entry Clearance Officer* (C-129/18). The CJEU noted that the meaning and scope of the concept of a 'direct descendant' is an autonomous concept of EU law and that it is not defined in the Directive. As Mr Bates submits, having referred to the decision of the CJEU Jackson LJ said:

> "15. The concept of a 'direct descendant' therefore requires the existence of a direct parent-child relationship, meaning any parent-child relationship, whether biological or legal. A legal parent-child relationship includes adoption but it does not include legal guardianship such as kefalah.

26. Jackson LJ went on to address the claim made on behalf of the appellant that the CJEU should not be taken to have limited parent-child relationships so as to exclude social or *de facto* relationships. Similar to the submission made before me by Mr Karnik, there, it was submitted that a 'real-world' parental relationship existed between the appellant and her *de facto* stepfather on the basis that society has evolved one should look to the substance of a relationship that is functionally equivalent to a biological or legal relationship. Jackson LJ said:

> "19. In my view the Appellant's case on this issue cannot succeed for these reasons:
>
> (1) On a natural reading of the words of the regulation, a person who is not a biological descendant or an adopted child is not a direct descendant.
>
> (2) The decision of the CJEU in *SM* places it beyond doubt that the autonomous EU meaning of the words 'direct descendant' conforms to their natural meaning. By specifying 'any parent-child relationship, whether biological or legal' the Court was defining the concept, not giving examples.
>
> (3) It would be anomalous for the Appellant, an adult with no legal relationship of any kind with Mr E, to be considered to be a direct descendant, when the child in *SM*, an infant subject to formal legal guardianship, is not.
>
> (4) The drafting of Article 2(2)(c) is inconsistent with an argument that *de facto* step-children should be treated as direct descendants of an EU citizen. If that were so, the second limb of the clause, which provides that children of spouses and registered partners also qualify as direct descendants, would be unnecessary.
>
> (5) The Appellant's argument, if correct, would give rise to serious problems of definition. The recitals to the Directive show that Article 2 and 3, as reflected in Regulations 7 and 8, are designed to distinguish between 'family members' and 'extended family members' and to provide for the former, but not the latter, to enjoy an automatic right of entry and residence. It would be contrary to the intention of the Directive to blur that distinction. Clarity and predictability about who is and who is not a direct descendant would be replaced by the need for a qualitative assessment of the substance of a wide range of social or *de facto* relationships. Under this approach, any step-child could argue that they were a direct descendant, and indeed that they were a direct descendant of more than one family. There is no good reason to accept an approach that comes at such a high cost to legal certainty in order to accommodate relationships that are in reality extended family relationships if they are anything."

27. It is clear therefore that the appellant cannot on any view be a 'direct descendant' of his sponsor for the purposes of Regulation 7 of the 2016 Regulations and the judge erred in law in finding that the appellant meets the requirements set out in that Regulation. The question then is whether that error is material to the outcome of the appeal since the judge also found, in the alternative, that the appellant is an 'extended family member' for the purposes of Regulation 8.

28. Although the CJEU *SM v Entry Clearance Officer,* (-129/18) said that a child could not be classed as a 'direct descendant' where the child was only in the legal guardianship of that citizen under the 'kafala' system that applied in Algeria, the Court confirmed the child was an 'extended family member'.

29. In summary, Regulation 8 requires the appellant to first establish that he is the relative of an EEA national. Provided, the relationship is established, there are two separate routes to qualification. The appellant must demonstrate he is either: (i) dependent on the EEA national in a country other than the UK, or (ii) a member of the EEA national's household in a country other than the UK. Although 'dependence' and 'membership of the EEA national's household' are alternative routes, there is often some overlap in the evidence.

30. The first issue to be addressed is whether the appellant is a relative of the sponsor. At paragraph [20] of her decision, the judge noted, when considering Regulation 7, that that "family member" in the Directive has a wider connotation than "relative" and so the category of extended family members included those who were not related by blood or affinity. I accept "extended family members" may include those who are not related biologically. At paragraph [25], the judge accepted the sponsor raised the appellant on the basis he considers him to be his biological son and found that there is emotional dependency between them. The judge did not make a clear finding that the appellant is therefore a relative of the sponsor for the purposes of Regulation 8. If such a finding is to be inferred, there are no reasons given for such a finding.

31. As I have said, the DNA evidence that is now available establishes that the sponsor is not the biological father of the appellant. There are, as Mr Bates submits, a number of factors that point to a finding that the appellant is not a relative of her sponsor even in the wider sense;

a. The appellant was born in April 1999, prior to the registration of the sponsor's marriage to the appellant's mother – A traditional marriage is said to have taken place *(on a date that is not set out)* and was then registered before the Court officially on 22 August 2005.

b. The sponsor had left Ghana in November 1998 *(five months before the appellant was born)*.

c. The sponsor's evidence, as set out in paragraph [16] of the FtT decision was that the appellant had been living 'with a family friend' since 2015

d. The sponsor was divorced from the appellant's mother on 30 March 2016.

e. The sponsor last visited Ghana in 2018.

32. I accept as Mr Bates submits that the current application for an EEA Family Permit was made on 18 December 2018 after the sponsor and the appellant's mother were divorced and after the appellant had been living with a family friend for several years. It is clear from what is said by the judge at paragraphs [23] to [25] of her decision, albeit in the context of the judge considering the issue of dependency, that there were a number of

anomalies in the evidence before the FtT regarding the extent to which, if any, any relationship between the appellant and sponsor may have continued in the years leading up to the application for an EEA family permit, and thus whether the appellant can in context, be considered to be a relative of his sponsor.

33. In the end, standing back and reading the decision as a whole, I cannot be satisfied that the judge would have reached the same conclusion had she addressed the issues that arise in the appeal. It follows that I am satisfied that the decision of the FtT is vitiated by material errors of law such that the decision must be set aside with no findings preserved.

34. As to disposal, I am conscious of the Court of Appeal's decision in *AEB v SSHD* [2022] EWCA Civ 1512, *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC) and §7.2 of the Senior President's Practice Statements. Sub-paragraph (a) deals with where the effect of the error has been to deprive a party before the Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the FtT, whereas sub-paragraph (b) directs me to consider whether I am satisfied that the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

35. Mr Karnik submits the appropriate course is for the appellant to have an opportunity to have his appeal considered by the FtT adopting the correct legal framework. As the appeal must be heard *de novo*, with no findings preserved, I accept the appropriate course, in fairness to the appellant, is for the appeal to be remitted for rehearing before the FtT.

NOTICE OF DECISION

36. The decision of First-tier Tribunal Judge Malik dated 13 June 2022 is set aside with no findings preserved.

37. The appeal is remitted to the FtT for hearing afresh with no findings preserved.

38. The parties will be notified of a hearing date in due course.

V. L Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

22 December 2023