



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003838

First-tier Tribunal No:
EA/10658/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

8th January 2024

Before
UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

ANAS UR REHMAN
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr A Muhammad, Sponsor

For the Respondent: Mr M Parvar, Senior Presenting Officer

Heard at Field House on 4 December 2023

DECISION AND REASONS

Introduction

1. The appellant enjoys permission to appeal a decision of the First-tier Tribunal (Judge of the First-tier Tribunal Kudhail) sent to the parties on 27 June 2023.
2. The appellant, a minor, applied for a Family Permit under the EU Settlement Scheme ('EUSS') as a family member of an EEA citizen. The respondent refused his application by a decision dated 12 October 2022.

3. He is supported in these proceedings by his sponsor and paternal uncle, Mr Abdullah Muhammad, a national of Belgium.

Brief Facts

4. The appellant is a national of Pakistan and is presently aged 15. He resides in Pakistan. The appellant's mother died when giving birth to him in 2008. His father remarried a short while later and he was not accepted by his stepmother. Whilst still a baby he commenced residing with his paternal grandparents. His father, who suffered mental health concerns, died in 2019.
5. The sponsor resides in the United Kingdom along with his wife and children, as well as with a brother and their mother, the appellant's paternal grandmother, Mrs Sabran Bibi.
6. In or around 2019 the appellant's grandfather, Mr Muhammad Afzal, was diagnosed with prostate cancer and later died. After her husband's death, Mrs Bibi relocated to the United Kingdom to reside with the sponsor.
7. The appellant applied for an EUSS Family Permit by means of an application dated 29 2022. The respondent considered the application under Appendix EU (Family Permit) to the Immigration Rules, and refused it by a decision dated 12 October 2022 detailing, *inter alia*:

"Your application has been refused because you have not provided adequate evidence to prove that you are a 'family member' - (a spouse; civil partner; durable partner; child, grandchild, great-grandchild under 21; dependent child, grandchild, great-grandchild over 21; or dependent parent, grandparent, great-grandparent) - of a relevant EEA or Swiss citizen or of their spouse or civil partner as claimed.

Whereas it is noted that you stated in your visa application form that your sponsor is also your guardian. You have provided no evidence to support this claim and therefore no further consideration to such family relationship has been given.

As your relationship to the sponsor does not come within the definition of 'family member of a relevant EEA citizen' as stated in Appendix EU (Family Permit) to the Immigration Rules, you do not meet the eligibility requirements.

Your application is therefore refused."

8. Following the respondent's decision, the sponsor applied for and was granted a Guardianship Order in respect of the appellant by Judge Muhammad Ajmal Khan, Civil Judge 1st Class, Judge Guardian Court, Tehsil Chichawatni, District Sahiwal. The Judge's Order, dated 18 October 2022, details, *inter alia*:

"... You are hereby authorized to take charge [of] the property of the minor, trust, collect pay all just debits, claims and liabilities due to or

by the state of the minors, to institute or defend suits connected with the stage and generally to do and perform all act which may be necessary to the due discharge of the trust vested in you, provided always that you shall not mortgage, or change, or transfer by sale, gift exchange or otherwise any part of immoveable property of your ward or lease any part of that property for a terms exceeding five years, or for any term extending more than one year beyond the date of which your ward will cease to be a minors, without the express sanction of this court previously obtained, and that you shall keep regular accounts of your receipts and disbursements, with all vouchers and other documents necessary to establish their correctness and carry out all order issued to you by this court under the aforesaid act.”

9. The Order is subject to the period of the appellant’s minority.
10. It is clear on the face of the Order that it authorises the sponsor to take action or make decisions on behalf of the appellant. It does not establish the appellant as a direct descendant, as would result through adoption. The Order is also time limited in respect of the authority granted to the sponsor.
11. A further Order was issued by Judge Muhammad Ajmal Khan on 8 December 2022, confirming, *inter alia*:

“... Today, the minor is present in person and he states that he wants to go abroad with his uncle Abdullah for his higher education. As per record the mother of the minor has been died and the father of the minor is missing from his house. So, for the welfare of minor, application in hand is accepted, subject to furnishing of surety bond to the tune of Rs. 25-Lac by the petitioner and the petitioner is allowed to take the minor abroad for his welfare and education. However, it is made clear that the petitioner/guardian is bound to return the minor back to Pakistan as and when required by the court. Instant application along with order be annexed with main file and main file be consigned to record room.”

Decision of the First-tier Tribunal

12. The appeal was heard by Judge Kudhail over two days: 5 May and 19 June 2023. The appellant’s sponsor and paternal grandmother attended on both days.
13. Mrs Bibi detailed by her witness statement that she has a weight of responsibility for the appellant’s well-being, having lived with him for most of his life and watched him grow up. She explained that the appellant bears the weight of being separated from his family in the United Kingdom, and he is deeply saddened by such separation.
14. We observe that the respondent did not cross-examine the sponsor and Mrs Bibi at either hearing. There was no challenge to the appellant’s personal circumstances: his parents are dead, shortly after his mother’s death in childbirth he went to live with his paternal grandparents and over several years the sponsor remitted funds to his parents and the appellant.

The latter was evidenced by documents accompanying the entry clearance application. The respondent is properly to be taken as accepting this history.

15. Unfortunately, on the first day of the hearing, a presenting officer was ill prepared, not having in her possession various documents relied upon by the appellant. The presenting officer proceeded to present the respondent's case by relying upon Appendix EU of the Immigration Rules, which is applicable to someone present in this country, and not the relevant Appendix EU (Family Permit) concerned with entry clearance cases under the EUSS. The Judge recorded the respondent's erroneous submissions at [10] of her decision:

“Upon resumption of the hearing, [the Presenting Officer] indicated that she had been informed that the guardianship order needed to be from a UK court. This Tribunal asked her to take it to the relevant legal provisions and she was unable to say where this was contained within the immigration rules. There was some discussion of the relevance of a guardianship order in the context of Appendix EU, annex 1 definition of dependant relative particularly as the appellant appeared to be *‘a person who is subject to a non-adoptive legal guardianship order in favour (solely or jointly with another party) of their sponsoring person’*”.

16. The definition referred to is located at paragraph (bb)(ii) of the ‘dependent relative’ definition in Annex 1 to Appendix EU.
17. We observe that there is no definition solely relating to ‘dependent relative’ in Annex 1 to Appendix EU (Family Permit). Both ‘dependent relative of a qualifying British citizen’ and ‘dependent relative of a specified relevant person of Northern Ireland’ are defined, but they are not applicable to the sponsor, who is a Belgian national enjoying settled status in this country.
18. The Judge reserved her decision, indicating that she “could” allow the appeal as the non-adoptive guardianship order met the requirements of Appendix EU: [11] of decision.
19. Four days after the conclusion of the initial hearing, the Judge appreciated that the respondent had advocated in respect of an incorrect legal framework, and that Appendix EU (Family Permit) should have been addressed. The Judge sent directions to the parties on 9 May 2023, detailing:

“1. Following the hearing on 05 May 2023, it has come to the Tribunals attention that Appendix EU(FP) is material in this appeal, specifically Appendix EU (FP) FP6 and the definition within Annex 1 as to (a) family member of a relevant EEA citizen and (b) child. Annex 1 requires in order to be accepted as a child of a relevant EEA Citizen, an adoption order recognized by the UK or a guardianship order within the meaning of The Children Act 1989. Accordingly, the Tribunal invites the parties to make written submissions on whether the appeal can succeed in the absence of such an order by 23 May 2023.

...”

20. On the second day of the hearing the respondent, now represented by counsel, properly addressed the Judge as to Appendix EU (Family Permit). The Judge noted the parties’ submissions at [21] and [22] of her decision:

“21. At the hearing on 19 June 2023, the respondent maintained her position that the appellant could not meet the definition of a family member. She argued despite the further evidence of a guardianship order from a Pakistani court, the definition of a child required a guardianship order obtained in a UK court. Ms Aziz referred the Tribunal to Annex 1 and the definition of child (as set out above) which she argued had the various examples which were permissible under the immigration rules. She argued the one obtained by the appellant was not one recognised in the UK. She argued there were several reasons for this requirement in particular safeguarding and to prevent child trafficking.

22. In submissions from the appellant, the sponsor was asked by this Tribunal to confirm if he has approached the UK courts for a guardianship order. He confirmed he had not and was not aware this was required. He explained that he is simply trying to bring his nephew who has been a part of his family to the UK so that he can be reunited with his grandmother who has always been his carer his entire life. He objected to Ms Aziz suggesting there was any trafficking or safeguarding issues as this was a family member. He argued that the only reason the appellant had been left in Pakistan was because his mother (the appellants grandmother) was at the very last point to come to the UK before her visa expired and she had no alternative but to leave the appellant in the care of a neighbour, whilst they pursued his appeal from the UK. He urged this Tribunal to take a logical and compassionate view of the evidence. He asked the Tribunal to consider the evidence of family relationship such as the birth certificates and witness statements.”

21. The Judge concluded at [23] to [24]:

“23. I have carefully considered the evidence the sponsor and the appellant have provided. I have no reason to doubt that the appellant grandmother has been looking after him since his mother died in child birth and that the family have looked after him as part of an extended family. I accept the evidence before me that Mr Abdullah has been sending money to his parents and this has financially supported the appellant. I also accept that the family have only been separated as the grandmother had to come to the UK before her family permit entry expired. This elderly lady appeared before me twice to attest to this. Her evidence was not challenged on two occasions despite her being ready and available to be cross examined. Ms Aziz argued within her submissions that the respondents position was that the appellant had been left in the care of his father. This was something the sponsor vehemently objected to. Whilst I sympathise with the family, the issue before me is whether the appellant is a child of a

relevant EEA family member. In view of the fact that the sponsor accepted there is no UK legal guardianship order as per the definition of Annex 1, child [...], I am unable to find the appellant is a child of relevant EEA Citizen. Thus he is unable to satisfy the requirement as per Appendix EU (FP) FP6. Accordingly, he is not a family member of relevant EEA Citizen. Whilst I have sympathy for the appellants position, this is determinative of the issue in dispute.

24. Accordingly, on balance I find the appellant is not a family member of a relevant EEA citizen. I dismiss this appeal.”

Grounds of Appeal

22. The grounds of appeal were drafted by the sponsor. The document primarily recites the personal history of the appellant with his family.
23. In granting permission to appeal, Upper Tribunal Judge Perkins reasoned by his decision dated 1 November 2023:

“I give permission on the remaining grounds suggesting, in summary, that the Judge was wrong to apply the rule only to guardianship orders made in the United Kingdom. I have reflected carefully before giving permission in this case because I am very doubtful that there is any merit in the Appellant’s case but it is arguable that the appeal was dismissed for the wrong reasons.

Encouraged by the Respondent, the Judge was satisfied that the phrase ‘subject to a non-adoptive legal guardianship order’ referred to an order made in the United Kingdom. That is arguably wrong. The phrase appears (inter alia) after the headings ‘dependant relative of a qualifying British citizen’ and ‘person who is subject to a non-adoptive legal guardianship order’ in Appendix EU (Family Permit). In the case of the second named reference there is an additional requirement that the order ‘is recognised under the national law of the state in which it was contracted’. Arguably this would make no sense if the guardianship order were made in the United Kingdom. Further I doubt that a ‘non-adoptive legal guardianship order’ has a sensible meaning in United Kingdom law and, elsewhere in the Appendix, where a guardianship order made in the United Kingdom is clearly meant, it is described with reference to the statute under which it is made.

That said, as far as I can see, a guardianship order of the kind identified here is only helpful to someone related to a British citizen.

It follows that although I give permission, the Appellant is not assured of eventual success but I find it unsatisfactory that a minor should be refused entry to the United Kingdom for what may be entirely wrong reasons”.

24. The respondent filed and served a ‘rule 24 response’ on 17 November 2023. At para. 6 the respondent confirmed that the definition “Child” under Appendix EU (Family Permit) is clear in respect of entry clearance applications under the EUSS. The appellant, not a direct descendant of the

sponsor, and not an adopted child, fails to meet any of the defined requirements to succeed under the EUSS.

Law

25. The EUSS is an immigration regime of the United Kingdom introduced by the respondent in 2019.

26. Appendix EU (Family Permit) sets out the basis on which a person will, if they apply under it, be granted an entry clearance:

(a) in the form of an EUSS Family Permit – to join a relevant EEA citizen or a qualifying British citizen in the United Kingdom or to accompany them to the United Kingdom, or

(b) in the form of an EUSS Travel Permit – to travel to the United Kingdom.

27. We observe the following rules of Appendix EU (Family Permit):

“FP3. The applicant will be granted an entry clearance under this Appendix, valid for **relevant period**, by an Entry Clearance Officer where:

(a) a valid application has been made in accordance with paragraph FP4;

(b) the applicant meets the eligibility requirements in paragraph FP6(1), (2) or (3); and

(c) the application is not to be refused on grounds of suitability in accordance with paragraph FP7.

...

FP6.

(1) The applicant meets the eligibility requirements for an entry clearance to be granted under this Appendix in the form of an EU Settlement Scheme Family Permit, where the Entry Clearance Officer is satisfied that at **the date of application**:

...;

(b) The applicant is a family member of a relevant EEA citizen;

..."

28. Annex 1 to Appendix EU (Family Permit) is concerned with definitions. Relevant to this appeal:

“Family member of a relevant EEA citizen

...

- (d) the child or dependent parent of a relevant EEA citizen, and the family relationship:
 - (i) existed before the specified date (unless, in the case of a child, the person was born after that date, was adopted after that date in accordance with a relevant adoption decision or after that date became a child within the meaning of that entry in this table on the basis of one of sub-paragraphs (a) (iii) to (a)(xi) of that entry); and
 - (ii) continues to exist at the date of application.”

29. As we address later in this decision, the term “child” is also defined in Annex 1.

Submissions

30. The sponsor filed written submissions dated 20 November 2023. It is clear to us that considerable time and effort was put into the preparation of these submissions, which are clearly focused upon the terms of the grant of permission. At their core, the sponsor submits that the appellant is inherently a family member, and that the Guardianship Order issued by Judge Khan is legally recognised under the domestic law of Pakistan.

Discussion

31. This matter is an unfortunate example of where a lack of adequate preparation, in this matter on the part of the respondent, can adversely hinder rather than aid justice.

32. A presenting officer attended the hearing before the First-tier Tribunal on 5 May 2023 on behalf of the respondent. She appears to us to have been unprepared, neither possessing various relevant documents served by the appellant, nor aware that the appeal concerned Appendix EU (Family Permit) of the Rules. The latter failure is very difficult to understand as this Appendix was placed front and centre of the respondent’s decision dated 12 October 2022. Having secured and considered the absent documents, the respondent’s submissions addressed Appendix EU alone. This provision of the Rules is irrelevant to the facts arising in this appeal. It is unfortunate the Judge did not address this failure at the hearing, but it was subsequently noted, and the Judge took steps to reconvene the hearing.

33. We are satisfied that the respondent amended her submissions at the hearing held on 19 June 2023, withdrew reliance upon Appendix EU and appropriately addressed Appendix EU (Family Permit).

34. The Judge included at [10] of her decision detailed reference to the erroneous submissions advanced at the hearing on 5 May 2023. Unfortunately, it is this submission that Judge Perkins focused upon when he granted permission to appeal to the Upper Tribunal.

35. We agree that upon inspection of [10] the submission addressed the definition of dependent relative under Appendix EU, and the reference to “a person who is subject to a non-adoptive legal guardianship order in favour (solely or jointly with another party) of their sponsoring person” clearly relates to the erroneous submission advanced on day one of the hearing.
36. We are satisfied that at [11] of her decision the Judge clearly observed that the respondent had “advocated” on the “incorrect legal framework”. She noted that the definition she was required to consider was to be found in Annex 1 to Appendix EU (Family Permit).
37. We therefore conclude that the concern identified as arguable by Judge Perkins did not arise in this matter. The Judge did not consider a definition to be found under “dependent relative of a qualifying British citizen” in an Annex to either Appendix EU or Appendix EU (Family Permit). Rather, the Judge properly considered whether a Guardianship Order issued by a court in Pakistan established the appellant to be a child of his sponsor for the purpose of Appendix EU (Family Permit).
38. Turning to the appeal before us, the short answer is that the appellant cannot succeed in relying upon a Guardianship Order issued after the respondent’s decision of 12 October 2022. The relevant Rule is clear: the appellant was required to meet the eligibility requirement at the date of application. At this stage he was the nephew of the sponsor, not a child or adopted child of the sponsor. Nor was the relevant Guardianship Order in existence. He could not succeed in his application, as he could not meet the defined requirements of “child”. It is unfortunate that neither the respondent nor the Judge identified this key requirement at the hearing before the First-tier Tribunal.
39. Our position is reinforced by the definition of “family member of a relevant EEA citizen” in Annex 1 to Appendix EU (Family Permit). The appellant was required to satisfy the respondent that he is the child of his sponsor, and the family relationship:

“existed before the specified date [23.00 GMT on 31 December 2020] unless, in the case of a child, the person was born after that date, was adopted after that date in accordance with a relevant adoption decision or after that date became a child within the meaning of their entry in this table on the basis of one of subparagraphs (a)(iii) to (a)(xi) of that entry, and continues to exist at the date of application.”
40. Turning to the definition of “child” the appellant is not a direct descendant of the sponsor, and so is required to fall within the “additional” categories. He has not been adopted by his sponsor, nor is he a surrogate child of his sponsor, so he is required to satisfy one of the requirements established by subparagraphs (a)(iii) to (xi).
41. As to (iii) the appellant is not a child in respect of whom a Special Guardianship Order is in force, within the meaning of section 14A(1) of the

Children Act 1989. A Special Guardianship Order is a private law order made under the 1989 Act and is intended for those children who cannot live with their birth parents and who would benefit from a legally secure placement. It is an Order issued domestically under the Act, and therefore cannot be established by means of an Order issued by a court in Pakistan.

42. He does not satisfy (iv). He is not a child in respect of whom an order has been made under section 5 of the Children Act 1989. This is an appointment by a domestic United Kingdom court under domestic legislation.
43. Nor does he succeed under (v). He is not a child subject to a permanence order made under section 80 of the Adoption and Children (Scotland) Act 2007 vesting parental responsibilities and parental rights in a person who is a relevant EEA citizen. This is an order of a Scottish court, not a court in Pakistan.
44. The same relates to (vi). The appellant is not a child who has a guardian appointed under section 7 of the Children (Scotland) Act 1995, or who is living with a person pursuant to an order made under section 11 of that Act, and that person is a relevant EEA citizen. Again, this is an order of a Scottish court.
45. The appellant is unable to meet the requirements of (vii) as this is concerned with an order of a Northern Irish court. The appellant is not a child in respect of whom an order made under article 139 of the Children (Northern Ireland) Order 1995, or in respect of whom an appointment has been made under article 160 of that Order, appointing as their guardian a person who is a relevant EEA citizen.
46. The appellant does not satisfy the requirements of (viii) and (ix) which are concerned with orders made by courts in Alderney, Guernsey, Jersey, and Sark, which are situated in the Channel Islands.
47. Finally, the appellant cannot satisfy the requirements of (x) and (xi) which relate to orders made by a court in the Isle of Man.
48. Ultimately, the appellant is not a 'child' of the sponsor for the purposes of domestic law.
49. As explained to the sponsor at the hearing the appellant is unable to meet the requirements of Appendix EU (Family Permit) and therefore his appeal must properly be dismissed.
50. Whilst not relevant to this appeal for the reasons addressed above, we observe that we have not been provided with any cogent evidence establishing that the appellant is a 'child' or direct family member of the sponsor consequent to Judge Khan's Orders. On their face, the Orders are consistent with the sponsor being permitted to enjoy decision-making responsibility in respect of his nephew. They do not establish on their face that the sponsor is the legal parent of the applicant.

Notice of Decision

51. The decision of the First-tier Tribunal sent to the parties on 27 June 2023 is not subject to material error of law.
52. The appellant's appeal is dismissed.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 December 2023