



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003984
EA/03638/2022**

THE IMMIGRATION ACTS

**Heard at Field House
On the 11 January 2023**

**Decision & Reasons Promulgated
On the 18th January 2023**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**Rimsha Malik
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the appellant: Ms Gilmour, Senior Home Office Presenting Officer

For the respondent: Mr Gajjar, Counsel instructed by Law Lane Solicitors

DECISION AND REASONS

1. This is an appeal against the decision issued on 21 July 2022 of First-tier Tribunal Judge Sweet which allowed the appellant's appeal.
2. For the purposes of this decision I refer to the Secretary of State for the Home Department as the respondent and to Ms Malik as the appellant, reflecting their positions before the First-tier Tribunal.

3. The appellant is a national of Pakistan and was born on 19 November 2012. It is undisputed that on 7 February 2013 an adoption decision was made in Pakistan showing her to have been adopted by the sponsors, Mr Khatoon and Ms Naz. Mr Khatoon is a Spanish national. Mrs Naz and her other children have been provided with family permits to join Mr Khatoon in the UK.
4. The appellant applied on 21 June 2021 for a family permit under the EU Settlement Scheme (EUSS) as set out in Appendix EU of the Immigration Rules. She maintained that she was an adopted child as defined in Annex 1 of Appendix EU. This provided that a child had to be adopted in accordance with a relevant adoption decision. A relevant adoption decision was defined as one made:
 - (a) by the competent administrative authority or court in the UK, or the Islands.
 - (b) by the competent administrative authority or court in the country whose adoption orders are recognised by the UK or the Islands ; or
 - (c) in a particular case in which that decision in another country has been recognised in the UK or the Islands as an adoption.

The appellant argued that she met the situation in (c) and accepted that she could not meet (a) or (b) as she had not been adopted in the UK and adoptions in Pakistan were not recognised in the UK.

5. The respondent refused the application as it was not accepted that the appellant met any of the definitions of an adopted child under Appendix EU.
6. Before the First-tier Tribunal, the appellant maintained that she came within the definition of an adopted child in Annex 1 to Appendix FM. She maintained that she was a “de facto adopted child” and should benefit from the respondent’s guidance “Adopted children and children coming to the United Kingdom for adoption” issued on 4 December 2021.
7. The reasoning of the First-tier Tribunal judge that led to the appeal being allowed is set out in paragraphs 8, 13 and 14 of the decision:
 - “8. I then heard submissions on behalf of the appellant, which were partly made orally, and partly, due to Counsel’s technological difficulties in remaining at the hearing, in his later written skeleton argument. In particular, he relied on the adoption guidance provided in the Adopted Children and Children coming to the UK for Adoption Guidance published for Home Office staff on 1 December 2021. Counsel referred in particular to page 23 of that guidance, which made reference to de facto adoptions. While de facto adoptions were not set out in Appendix EU, they were set out in the Immigration Rules. He relied on the fact that all her siblings were in the UK, or now eligible to come to the UK. In his later written skeleton argument he also relied on the impact of

Article 18(1)(r) of the Withdrawal Agreement (as already raised in the grounds of appeal) in respect of redress procedures to ensure that the decision was not disproportionate. At the conclusion of the hearing I reserved my decision.

...

13. I have had particular regard to the Home Office Guidance on Adopted Children, dated 1 December 2021. I am satisfied that the adoption which took place on 7 February 2013, was effectively a de facto adoption, which may arise where adoption orders in the country where the child was adopted are not recognised as valid in the UK. The Guidance states that the most common use of this provision is likely to involve British citizens working abroad for a period in a country whose adoption rules were not recognised by the UK. In any event, I am satisfied that now that her four siblings have been granted EUSS status, as well as her adoptive mother. It is a requirement (as submitted in the skeleton argument) for the Secretary of State to have regard to the duty to safeguard and promote the welfare of the appellant under Section 55 of the Borders, Citizenship and Immigration Act 2009. The Guidance to the EUSS scheme sets out that the spirit of the duty should apply to children overseas.
 14. In this case, I am satisfied that this appeal should be allowed for reasons of de facto adoption and the appellant's welfare under the 2009 Act."
8. The respondent was granted permission to appeal by the First-tier Tribunal on 2 September 2022. The respondent argued that the decision was in error on a jurisdictional basis. The appeal could only be allowed as not in accordance with Appendix EUSS or because the decision breached the appellant's rights under the Withdrawal Agreement. The statement in paragraph 14 did not show that the appeal had been allowed on either basis. Nothing in the Borders, Citizenship and Immigration Act 2009 provided a ground of appeal or a basis for the appeal being allowed.
 9. Further, the decision of the First-tier Tribunal was in error in finding that the definition of an adopted child as set out in Annex 1 to Appendix EU could be met here. The appellant had not been adopted in accordance with a relevant adoption decision as defined in Appendix EU.
 10. Ms Gilmour did not pursue a further ground set out in paragraph g) of the written grounds.
 11. I found that the respondent's grounds had merit. The appellant applied for a family permit as an adopted child under Appendix EU. She accepted that she could not meet definitions a) or b) of the definition of an adopted child as set out in Annex 1 to Appendix EU. She argued that she had been adopted in accordance with a decision taken in a particular case in which that decision in another country had been recognised in the UK as an adoption. There was nothing here showed that to be the case.

12. It was put to the First-tier Tribunal that the respondent's guidance on the definition of a de facto adopted child as set out in paragraphs 309 and 310 of the Immigration Rules could be applied and showed her to come within the definition of an adopted child for the purposes of Appendix EU. I did not find that proposition to be legally sound. The written submissions made to the First-tier Tribunal concede in paragraph 9 that this guidance does not apply to Appendix EU. Further, the appellant is not a de facto adopted child as set out in paragraphs 309 to 310. That was not disputed for the appellant before me. The guidance to those paragraphs is not relevant here, therefore. The guidance cannot create an alternative legal basis under Appendix EU for the appellant to be found to be an adopted child. It cannot show that the appellant is an adopted child for the purposes of Appendix EU. Where the appellant is not a de facto adopted child or adopted child on any of the bases set out in the Immigration Rules, the guidance concerning de facto adoptions under paragraphs 309 and 310 of the Immigration Rules cannot have any relevance here and the First-tier Tribunal in placing significant reliance on it; see paragraph 13 of the First-tier Tribunal decision.
13. The respondent is also correct in maintaining that the appeal was allowed on a jurisdictional basis not open to the First-tier Tribunal. The appeal could not be allowed on the basis that the appellant's best interests were to come to the UK to be with her adopted family which is presumably what is meant by "the appellant's welfare under the 2009 Act" in paragraph 14 of the decision. On the material before the First-tier Tribunal the appellant had not shown that she was an adopted child for the purpose of Appendix EU (or any of the other provisions of the Immigration Rules) or a de facto adopted child as suggested in paragraph 14. There was no basis for the appeal to be allowed on the ground that the respondent's decision was not in accordance with Appendix EU. As the appellant had not shown that she was adopted child for the purposes of Appendix EU she was not entitled to an assessment of the proportionality of the decision under the provision of Article 18 of the Withdrawal Agreement. There was therefore no legal basis upon which the appeal could have been allowed.
14. For these reasons I found that the decision of the First-tier Tribunal disclosed a material error on a point of law and that it had to be set aside to be remade.
15. I invited the parties to make submissions on any remaking. They accepted that the relevant submissions had been made in the course of argument as to the error of law.
16. The reasons for finding an error of law, set out above, show that the appeal must be dismissed. The appellant here has not shown that she is an adopted child as defined under Appendix EU. The respondent's guidance on how to assess whether someone is a de fact adopted child for the purposes of paragraphs 309-310 of the Immigration Rules is not relevant to that assessment. She cannot show, therefore, that the respondent's decision refusing a family permit was not in accordance with

Appendix EU or that she is entitled to any benefit of the proportionality provisions in Article 18 of the Withdrawal Agreement.

Notice of Decision

17. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade.
18. The appeal is refused as the decision was in accordance with Appendix EU and did not breach the Withdrawal Agreement.

Signed: S Pitt
Upper Tribunal Judge Pitt

Date: 11 January 2023