Upper Tribunal
(Immigration and Asylum Chamber) Case Number: UI-2022-003311
First-tier Tribunal number: EA/16112/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 19 March 2023

Before

UPPER TRIBUNAL JUDGE KAMARA
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

KAMRUN NAHAR
(No anonymity direction made)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr P Saini of Counsel instructed by Chancery Solicitors
For the Respondent: Ms H Gilmour, Senior Home Office Presenting Officer

Heard at Field House on 10 February 2023

DECISION AND REASONS

Background / Application(s)

1. This is an appeal against the decision of First-tier Tribunal Judge Bart-Stewart promulgated on 26 April 2022, further to permission to appeal granted on 10 June 2022 by First Tier Tribunal Judge Boyes.

2. The Appellant is a citizen of Bangladesh whose date of birth is given as 1 January 1971. On 11 June 2021 she made an application for a EUSS Family Permit to allow her to enter the UK to join Emon Rahman Khan Fatema (d.o.b. 7 February 2002), a national of Spain ('the Sponsor').

3. This was the third such application: previous applications made on 7 December 2020 and 3 March 2021 were refused respectively on 14 January 2021 and 24 April 2021. The full details of those applications are not before us and were not before the First-tier Tribunal. However the Notices of Immigration Decisions were included in the Appellant's bundle before the First-tier Tribunal (pages 5-6). It is apparent from those Notices – and is common ground before us – that the earlier applications were both for EUSS Family Permits pursuant to Appendix EU (Family Permits) of the Immigration Rules on the basis of being a 'family member of a relevant EEA citizen', and were premised on a claim of a parent-child relationship between the Appellant and the Sponsor. We were told that an appeal was made against the decision of 24 April 2021 refusing the application of 3 March 2021, but was subsequently withdrawn before it reached a hearing.

4. The application of 11 June 2021 was made on the basis that it was said that the Appellant was the adoptive mother of the Sponsor. The matter was put this way in the visa application form of 11 June 2021:

> "*Emon Rahman Khan Fatema is my adopted son whom I have adopted as a 4 years old boy. Due to his biological mother sudden death, I am the only mother he has ever known since his biological mother Kanom Fatema passed away when he was very young. I am very happy and proud of my son who is living and working full time. While studying in the UK, it is a great sorrow that I and my son barely manage to see each other. It will be an opportunity of my life and great joy to be reunited with my son and see him every day. My son is eagerly looking forward to being reunited with me. As a young man, it is very difficult for my son to live and manage his life himself in terms of mental health. He has been suffering from mental health issue due to loneliness. It was a relief to know, the well-being team from his college was assisting him to deal with his mental health. I am very concerned about his well being. We will be grateful to have the opportunity and live together as a happy family.*"

(We pause to note – as acknowledged in the Respondent's Rule 24 response - that both the Respondent's decision and, in places, the decision of the First-tier Tribunal confusedly refer to an adopted child seeking to join an adoptive parent in the UK. However, for present purposes it seems to us that nothing ultimately turns on such confusion: in this context we address below the First-tier Tribunal Judge's comment "*that the appellant was working and self-supporting*" (paragraph 15) - challenged in the Appellant's Grounds of Appeal at paragraph 48 – which might possibly arise from this confusion.)

5. By way of background, it is the case advanced by the Appellant and Sponsor: that at the time of the Sponsor's biological mother's death his father was living in Spain; the Sponsor continued to live in Bangladesh, apart from his father, and was cared for by the Appellant (who is his maternal aunt); subsequently, at the age of 13, the Sponsor moved to Spain to join his father; at some point the Sponsor's father had remarried; the Sponsor did not get on with his father's new partner and at the age of 17 he relocated to the UK on his own; after he turned 18 (and necessarily therefore some time after he had relocated from Spain to the UK) he began to provide financial support to the Appellant from his employment earnings in the UK.

6. In support of the application the Appellant provided a 'Relationship Certificate' dated 2 March 2010 (Respondent's bundle before the First-tier Tribunal, E1). It is written on the letterhead of the Beanibazar Municipality and is signed by the administrator of the municipality. It declares itself to be certification "*per the information provided by*" a local councillor and "*duly testified eyewitnesses from some local senior citizens*". In translation it states that the Appellant "*adopted/fostered*" the Sponsor, "*and she has been mothering from the age of four after his biological mother's death*". It concludes "*I wish him every success in life and issued this adoption/fosterage certificate*."

7. We note, parenthetically, that it is unclear on what authority the local administrator was empowered to 'certify' a relationship, or otherwise whether such a document has any legal standing in Bangladesh. Mr Saini was not able to assist in this regard. Be that as it may, it seems to us that it is a curious document to have relied upon in isolation in the application in circumstances where – as emerged later – there was in existence a local Family Court order from 2007 appointing the Appellant the guardian of the Sponsor.

8. In this latter context it is convenient to note at this juncture that amongst the supporting documentary evidence filed in the appeal it is only in the Family Court order that there is any overt reference to the Appellant being the maternal aunt of the Sponsor. There was no reference to this relationship in the application. Nor was there any overt reference to it in the Grounds of Appeal before the First-tier Tribunal (which refer only to "*a strong mom and son relationship*"), the Appellant's 'Summary of Arguments' (which in substance took the form of a statement by the Sponsor), or in the Appellant's own witness statement. The only written reference in the supporting documents to the aunt-nephew relationship that we have been able to identify is in the Schedule of the Family court order dated 13 September 2007, labelled in the Appellant's bundle before the First-tier Tribunal as 'Custodian guardianship certificate from the court' (page 24); the representatives were not able to direct us to any further reference. Mr Saini confirmed on instructions that the Family Court document had not been submitted with the application, reliance having been placed on the *soi-disant* 'Relationship Certificate' dated 2 March 2010 to establish the claimed parent-child relationship. There is nothing to

show that the Family Court order was introduced into the case prior to the lodging of the Appellant's First-tier Tribunal bundle in these proceedings. Just as it was not mentioned in the instant application, it seems to us a reasonable inference that the aunt-nephew relationship was not mentioned in either of the earlier applications which were advanced on a claimed parent-child relationship.

9. It is not apparent why the local administrator did not mention the Family Court order in the 'Relationship Certificate'.

10. The application of 11 June 2021 was refused on 10 November 2021 by way of a Notice of Immigration Decision. In material part the reasons for the refusal were given in these terms:

> "*You have stated that you are the adopted child of a relevant EEA citizen or their spouse or civil partner and provided your version of events, as evidence of family relationship.*
>
> *To be recognised, adoptions must meet the criteria defined in Annex 1 of Appendix EU (Family Permit). The criteria to qualify as an adopted child (and therefore as a family member) the child must be adopted in accordance with a decision taken by;*
>
> > *(a) by the competent administrative authority or court in the UK or the Islands; or*
> >
> > *(b) by the competent administrative authority or court in a 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.*
>
> *From the information and or evidence available to me in relation to the adoption do not show that the child was adopted in accordance with these criteria because it was not issued by a competent administrative authority or court in the UK or the Islands and Bangladesh is not a country listed within the Adoption (Recognition of Overseas Adoptions) Order 2013. The competent administrative authority or court in Bangladesh is not an administrative authority or court whose adoption orders are recognised within the UK or Islands, and the decision provided has not been recognised under domestic immigration rules in the UK or Islands. Therefore the adoption order provided is not recognised as valid under Appendix EU (Family Permit) to the Immigration Rules.*
>
> *Therefore, I am not satisfied that your application meets the eligibility requirements as the 'family member of a relevant EEA citizen', and your application has been refused.*"

(The reference to being "*the adopted child of a relevant EEA citizen*", rather than the adoptive mother, is an example of the acknowledged confusion to which we have referred above.)

11. The Appellant appealed to the IAC.

First-tier Tribunal

12. At the hearing on 11 April 2022, conducted remotely by video connection, the Respondent was unrepresented, and the Appellant appeared through the Sponsor without legal representation. (Although unrepresented at the hearing it is apparent that the Appellant – or perhaps more particularly the Sponsor on her behalf - had some legal assistance in preparing her appeal.)

13. The Appellant's appeal bundle before the First-tier Tribunal included further documents regarding the relationship between the Appellant and the Sponsor including the 'Custody guardianship certificate from the court' referred to above, and a 'Lawyer statement about local adoptions in Bangladesh' dated 12 November 2020 (page 25):

> (i) The former document is purportedly from the 'Court of Assistant Judge & Family Court' in Beanibazar, Sylhet and refers to the Appellant being "*appointed as the custodian Guardian of [the Sponsor] in the absence of his father who is living outside the country through the court until the minor attained the age of lawful period*".
>
> (ii) The latter document is on the letterhead of a Sylhet-based advocate, addressed to the Sponsor, and headed 'Re: Legal Opinion regarding the status of adoption system in Bangladesh'. (We pause to note that it does not contain the usual declarations that might be expected of an expert witness, and does not set out the writer's experience. Be that as it may, its content does not appear to have been contested at any point.) In material part it states the following:
>
> > "*… adoption is not permitted or does not have any legal effects as per the Muslim Law. Therefore, for Muslims, Bangladesh does not legally recognise the adoption… However, Bangladesh's law allows its citizens to take legal guardianship of the children under the Muslim Personal Law (Shariat) Application Act 1937 (for Muslims) and the Guardian and Wards Act 1890.*"
> >
> > and
> >
> > "*… instead of adoption, the fosterage system has been practised traditionally in Bangladesh, and the foster parents may take de facto guardianship and custody as may be required. … The foster care by a woman is allowed for the purpose of mother caring by the biological father for the child whose biological mother died, and it happens between the known families mostly. Even a caregiver woman is treated and respected as like a mother by*

> *the foster child in the society. Foster child does not acquire right to inheritance of the property of foster mother or father as per the Bangladesh legal system.*"

14. The First-tier Tribunal Judge dismissed the appeal for reasons set out in the 'Decision and Reasons' promulgated on 26 April 2022. We have noted above that there appears to be confusion in some places within the Decision as to whether it is the claimed 'adoptive mother' or the claimed 'adopted child' who is the Appellant. We also note that the Judge confusedly refers seemingly interchangeably to both Appendix EU and Appendix EU (Family Permit) without making any distinction. It was common ground before us that the applicable appendix was Appendix EU (Family Permit).

15. Nonetheless, for present purposes we note in particular the following matters from the Decision as being especially pertinent to the arguments raised before us:

> (i) The Judge refers to the definition of an adopted child set out in Annex 1 of Appendix EU (Family Permit), and specifically sets out the definition of "*a relevant adoption decision*" (paragraph 3). At paragraph 14, whilst referring to Appendix EU rather than Appendix EU (Family Permit), the Judge applies this definition to the circumstances of the case, concluding "*The evidence submitted by the appellant falls far short of showing that the sponsor was legally adopted by the appellant*".
>
> (ii) The Judge also found, in accordance with the evidence, "*The custodianship order relied on expired when [the Sponsor] attained his majority*"(paragraph 14).

16. Although it appears that no particular submissions were made in this regard, the Judge stated that in circumstances where the Appellant was unrepresented it was appropriate to consider whether the Respondent's decision "*is in breach of the appellant's EU rights under the Withdrawal Agreement*" (paragraph 16). The Judge concluded that the decision was proportionate (with reference to Article 18(1)(r) of the Withdrawal Agreement), and did not breach any rights under the Withdrawal Agreement (paragraphs 17-19).

Challenge

17. The Appellant sought permission to appeal in an application dated 22 May 2022 on the basis of Grounds of Appeal settled by Mr Saini (see further below).

18. The Grounds of Appeal included an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 by way of a further legal opinion in respect of legal guardianship in Bangladesh: see Grounds at

paragraphs 41-43. In the event it has been unnecessary for us to determine the application.

19. Permission to appeal was granted on 10 June 2022. The terms of the grant of permission is a matter of record.

20. The Respondent has filed a Rule 24 response dated 2 August 2022.

21. The principal ground of challenge is that the First-tier Tribunal was in error to conclude that there was not a relevant parent-child relationship between the Appellant and Sponsor, and indeed erred in its approach to this issue: see Grounds at paragraphs 10-40.

22. It is argued in the premises: that the Appellant was appointed as a guardian of the Sponsor pursuant to court order in Bangladesh; that per the opinion of the Bangladesh advocate, "*adoption is not permitted or does not have any legal effect as per the Muslim law. Therefore, for Muslims, Bangladesh does not legally recognise the [concept of] adoption*"; and therefore the Appellant could not 'adopt' the Sponsor – hence a 'guardianship' order. (Grounds at paragraphs 11-13.)

23. It may be seen that these premises of the Appellant's arguments raise difficulties for the Appellant when considered against the framework of the Rules. It is in substance acknowledged that the Appellant has never been, legally, an adoptive parent of the Sponsor – because such a concept does not exist for Muslims in Bangladesh. It would follow that the Appellant is not a direct relative in the ascending line, and so could not be a dependent parent within the meaning of Annex 1 of Appendix EU (Family Permit).

24. In this context it was submitted that the issue for the First-tier Tribunal was whether or not there was a "*parent–child relationship, whether biological or legal*", within the contemplation of the judgement of the Grand Chamber of the European Court of Justice in **SM (Enfant place sous kafala algerienne) (Citizenship of the European Union – 'Direct descendant' – judgement) [2019] EUECJ C-129/18**.

25. We had little hesitation in concluding that the Appellant submissions in this regard relied upon a misunderstanding of the decision in **SM**, and that there was otherwise no basis to distinguish the instant case on the facts.

26. In particular we note the following from the judgement of the Grand Chamber in **SM**:

> "*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."

27. Mr Saini's arguments were essentially premised on the notion that the Bangladesh guardian order established a 'parent-child relationship'. That submission runs directly contrary to the reasoning in **SM**, wherein whilst it was recognised that a legal adoption established such a relationship it was held that a legal guardianship order did not. To this extent Ground 1 of the challenge was misconceived.

28. Further, and in any event, we note that even if it were to be contended that the legal relationship established by reason of the guardianship order was sufficient to establish the requisite family relationship, under the definition of a "*family member of a relevant EEA citizen*" under Annex 1 of Appendix EU (Family Permit) in the case of a child or dependent parent of a relevant EEA citizen the family relationship must have existed at the specified date and continue to exist:

"*family member of a relevant EEA citizen:*

a person who has satisfied the entry clearance officer, including by the required evidence of family relationship, that they are:

…

(d) the child or dependent parent of a relevant EEA citizen, and the family relationship:

(i) existed before the specified date…; and

(ii) continues to exist at the date of application;"

29. In the instant case the guardianship order concluded when the Sponsor reached 18, and so it cannot be said that the definition was met, or continued to be met at the material times, even if the guardianship order established – which it does not - a parental relationship.

30. This latter feature of the case, the fact that the guardianship order had expired by the relevant time, also defeats the Appellant's second Ground of Appeal which is primarily based on the Appellant being an 'other family member' by reference to the guardianship. The guardianship order had expired even before the Appellant made the first application on 7 December 2020.

31. In any event both this argument, and any argument based on being an 'OFM' by reason of the aunt–nephew relationship (which as noted above was not overtly raised in any of the three applications, and furthermore was not pleaded as part of the 'OFM' Ground in the application for permission to appeal), cannot avail the Appellant in light of the decision in **Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC)** – with which we respectfully agree.

32. **Batool** also supplies a complete answer to the third ground of appeal which is based on 'proportionality' under the Withdrawal Agreement.

33. In such circumstances it becomes immaterial that the First-tier Tribunal Judge erroneously referred to the Appellant as "*working and self-supporting*".

34. The submissions articulated on behalf of the Appellant before us were not so presented to the First-tier Tribunal (where the Appellant was unrepresented except by the attendance of the Sponsor). To that extent no specific criticism attaches to the First-tier Tribunal Judge for not addressing such submissions – which in any event we find ultimately to be without merit. Whilst we have noted that there is limited scope for criticism of the Decision on the basis that there is some confusion between the different appendices of the Immigration Rules, and some mixing of whether it was the Appellant or the Sponsor who was the claimed 'adoptive parent' or 'adopted child', and a seemingly errant reference to the Appellant being self-supporting, such matters are ultimately immaterial to the outcome in the appeal.

Summary

35. At its highest there was a guardianship/fostering arrangement to formalise the Appellant's care of the Sponsor until such time as he went to join his father in Spain. In practical terms its purpose was exhausted when the Sponsor relocated to Spain; in legal terms it only extended to the Sponsor's 18th birthday (i.e. 7 February 2020). Even whilst the Sponsor remained with the Appellant in Bangladesh, there is no suggestion, and there was no evidence filed to demonstrate, that the Appellant, beyond undertaking the practical matters of caring for the Sponsor, did anything

other than act in accordance with the wishes of the Sponsor's surviving parent in respect of decision-making. The circumstances illustrate the essential difference between guardianship and adoption in that guardianship does not usurp the parental rights of biological parents in the same way that adoption does; nor does an adoptive parent cease to be a parent upon the majority of the child, whereas here the Appellant ceased to be the guardian of the Sponsor upon his majority. In line with **SM**, the guardianship relationship was not equivalent to a parent-child relationship; it had in any event expired by the relevant date; because it had expired it could not avail the Appellant as an OFM; in any event the 'OFM' route was not open to the Appellant – whether as guardian or aunt – in line with the reasoning in Batool.

Notice of Decision

36. The decision of the First-tier Tribunal contained no material error of law and stands.

37. The Appellant's appeal remains dismissed.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

6 March 2023