Case No: C5/2014/3105

Neutral Citation Number: [2015] EWCA Civ 1109
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(UTJ Allen and DUTJ Bruce)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2015

Before:

LORD JUSTICE LAWS
LORD JUSTICE KITCHIN
and
LORD JUSTICE CHRISTOPHER CLARKE

- -

Between:

SM (Algeria)	**Respondent**
- and -	
Entry Clearance Officer, UK Visa Section	**Appellant**

- -
- -

Mr R De Mello and Ms J Smeaton (instructed by **David Tang & Co**) for the **Appellant**
Mr B Lask (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates : 8 October 2015

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Judgmen

tLAWS LJ:

INTRODUCTION

1. This is the appeal of the Entry Clearance Officer, with permission granted by Richards LJ on 8 December 2014, against the decision of the Upper Tribunal (the UT: UTJ Allen and DUTJ Bruce) promulgated on 14 May 2014. The UT allowed the respondent's appeal against the determination of the First-tier Tribunal (the FTT) on 7 October 2013. The FTT had dismissed the respondent's appeal against the refusal of the ECO to issue her with an EEA family permit to enter the United Kingdom as a family member of an EEA national exercising free movement rights. The core of the ECO's appeal to this court as formulated in the Grounds and counsel's skeleton argument was directed at the UT's reliance on Article 8 of the European Convention on Human Rights (ECHR) in construing Regulation 8 of the Immigration (European Economic Area) Regulations 2006 (the Regulations) which led it to conclude at paragraph 21 that the respondent was an "extended family member" under Regulation 8(2) so that she might claim an EEA family permit under Regulation 12. But that issue disappeared, in effect by concession (at least by silence) on the respondent's part. The real questions in the case concerned the interpretation of Articles 2 and 3 of Directive 2004/38/EC (the Citizenship Directive). Paragraphs 7 and 8 of the Regulations give effect to Articles 2 and 3 of the Directive respectively. I will explain the background and set out the legislation directly. There is also a respondent's notice which I will introduce in due course.

2. The respondent is an Algerian national born on 27 June 2010. Her application for an entry clearance to come to the United Kingdom as a family member of an EEA national exercising free movement rights arose in circumstances described by the UT as follows:

> "2. The EEA nationals whom the Appellant [now the respondent] wishes to live with in the UK are Mr and Mrs M. They are both French, of Algerian origin, and have been living in the UK for many years. Mr M has a permanent right of residence in the UK. In 2009 the couple both travelled to Algeria in order to undergo assessment for their suitability to be legal guardians under the *kafalah* system, the Islamic alternative to adoption. Mr and Mrs M obtained the necessary approval and in June 2010 they were told that the Appellant had been born and abandoned by her birth mother at hospital. Mr and Mrs M applied to be her legal guardians and after the three month period stipulated by Algerian law (in which birth parents are able to reclaim their child) she was handed over to Mr and Mrs M. On the 28th September 2010 they attended court in order to sign the necessary papers, and on the 22nd March 2011 a Legal Custody Deed was issued by the Algerian Courts.
>
> 3. In October 2011, having lived with his wife and daughter for just over a year in Algeria, Mr M returned to the UK to resume his full time occupation as a chef. Attempts to bring the Appellant to the UK as a visitor failed and in May 2012 an

> application was made on her behalf for a family permit conferring a right of entry as the family member of Mr M."

3. The ECO refused the respondent's application for entry clearance, stating:

> "I am not satisfied that your adoption is legally recognised in the UK and therefore I am not satisfied that under UK law you are related as claimed or that the national of whom you claim to be a family member is a qualified person."

4. Accordingly the ECO concluded that the respondent was not a "family member" within paragraph 7 of the Regulations. The ECO also observed that no application for inter-country adoption had been made nor had a "Certificate of Eligibility to Adopt" been issued by the Department for Children, Schools and Families, so that the respondent was not eligible for entry clearance under paragraph 310 of the Immigration Rules.

5. ***THE DIRECTIVE, THE REGULATIONS AND THE IMMIGRATION RULES***

6. It is convenient to set out these materials at this stage before turning to the decisions of the FTT and the UT. I will start with the Citizenship Directive.

7. The Directive consolidated earlier regulations and directives. Mr Lask for the ECO first referred to a number of the Recitals. I will set out Recitals (3), (5) and (6):

> "(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.
>
> (5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of 'family member' should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.
>
> (6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and

> residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen."

8. Recitals (5) and (6) prefigure Articles 2 and 3 respectively. Those Articles provide so far as relevant:

> "2(2) 'family member' means:
>
> (a) (a) the spouse;
>
> (b) (b) the partner with whom the Union citizen has contracted a registered partnership…
>
> (c) (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
>
> (d) (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)…
>
> (e) 3(2) Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> (f) (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence…;
>
> (g) (b) the partner with whom the Union citizen has a durable relationship, duly attested.
>
> (h) The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

9. Now I may turn to the Regulation. Paragraph 7:

> "… [F]or the purposes of these Regulations the following persons shall be treated as the family members of another person—
>
> (a) his spouse or his civil partner;
>
> (b) direct descendants of his, his spouse or his civil partner who are—
>
> (i) under 21; or

(ii) dependants of his, his spouse or his civil partner…"

10. Paragraph 8 (in the form having effect at the material time):

> "(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 the conditions in paragraph (2), (3), (4) or (5).
>
> (2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and—
>
> (a) the person is residing in a country other than the United Kingdom in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;
>
> (b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or
>
> (c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household…"

11. Paragraph 12 provides (in essence) for the issue of an EEA family permit to persons who qualify under the Regulations.

12. I will next set out paragraphs 309A and 309B of the Immigration Rules. I need not recite the detail of paragraph 310, though it is referred to in the ECO's decision and I will have to refer to it again. It sets out a series of requirements to be met "in the case of a child seeking indefinite leave to enter the United Kingdom as the adopted child of a parent or parents present and settled or being admitted for settlement in the United Kingdom". Paragraphs 309A and 309B provide:

> "309A. For the purposes of adoption under paragraphs 310-316C a de facto adoption shall be regarded as having taken place if:
>
> (a) at the time immediately preceding the making of the application for entry clearance under these Rules the adoptive parent or parents have been living abroad (in applications involving two parents both must have lived abroad together) for at least a period of time equal to the first period mentioned in sub-paragraph (b)(i) and must have cared for the child for at least a period of time equal to the second period material in that sub-paragraph; and

(b) during their time abroad, the adoptive parent or parents have:

(i) lived together for a minimum period of 18 months, of which the 12 months immediately preceding the application for entry clearance must have been spent living together with the child; and

(ii) have assumed the role of the child's parents, since the beginning of the 18 month period, so that there has been a genuine transfer of parental responsibility.

309B. Inter-country adoptions which are not a de facto adoption under paragraph 309A are subject to the Adoption and Children Act 2002 and the Adoptions with a Foreign Element Regulations 2005. As such all prospective adopters must be assessed as suitable to adopt by a competent authority in the UK, and obtain a Certificate of Eligibility from the Department for Education, before travelling abroad to identify a child for adoption. This Certificate of Eligibility must be provided with all entry clearance adoption applications under paragraphs 310-316F."

13. There are further legal materials to which it will be necessary to refer, but I will address those in confronting counsel's arguments.

THE DECISIONS OF THE FTT AND THE UT

14. On appeal from the ECO's decision the FTT held (paragraph 37) that the respondent did not qualify for an EEA family permit as a family member, extended family member or adopted child of an EEA national. It proceeded to consider whether refusal of the permit would involve a violation of the respondent's right to respect for family life guaranteed by Article 8 of the European Convention on Human Rights. Given that the sponsor's wife could only join him in the UK if she left the child in Algeria, the FTT held that there was an interference with family life, and the real issue was one of proportionality (paragraph 38). Addressing that question, the FTT continued:

"39 The appellant [sc. the sponsor] said that the decision to adopt an Algerian child was due to heritage. The sponsor and his wife are of Algerian heritage. They have properties in Algeria. The [sponsor] is a chef and said that he was able to work as a chef in Algeria. He said his wife is a qualified psychologist and has been able to work as a psychologist in Algeria. The sponsor's parents live in the same building and it appears that there is a network of support in Algeria with little evidence of any such support in the United Kingdom. While the appellant is only 3 years old, she is said to be settled. She has her grandparents nearby. She no doubt speaks the language. The sponsor returned to the United Kingdom in October 2011. He lives in a one bedroomed flat. There is no

> evidence of any other family support in the United Kingdom. He no doubt retains cultural and linguistic ties to Algeria. Under Regulation 12(5) any family permit can be withheld if there are issues of public policy, public security or public health. The safety of a child is a matter of serious public policy and to be protected. Scant regard has been paid to the welfare and best interests of the appellant. It has been about what is convenient to the sponsor and his wife in getting around the strict rules and procedures in place to protect children and in exercising what the sponsor considers to be his right. There is nothing to prevent the sponsor complying with the authorities in the UK and obtaining a certificate of eligibility to adopt or obtaining approval from a UK adoption agency as to his suitability. I find that any interference with Article 8 is proportionate and lawful."

15. And so the appeal was dismissed. On further appeal to it, the UT agreed that the respondent was not a "family member" within the meaning of Regulation 7. They stated:

> "16… Regulation 7(1)(b) provides that a person shall be treated as the family member of another person if she is a 'direct descendant' of his. We do not find this provision to assist the Appellant. It is agreed that she has not been adopted and it cannot be shown that she is a direct descendant in any other capacity. Mr De Mello argues that all terms under the Regulations must be given a purposive interpretation, and we would agree, but not so as to strain the plain and ordinary meaning of the word beyond recognition. The term 'direct descendant' cannot apply to this child who has not been legally adopted: *FK and MK (EEA Regulations: 'Descendants' meaning) Sierra Leone* [2007] UKAIT 00038. Although we find that the [FTT] was right to have rejected any suggestion that the Appellant was a family member under Regulation 7, we are not satisfied that adequate consideration was given to whether she is an 'extended family member', and we will re-make the decision to that extent."

16. As I have said it is the UT's treatment of "extended family member" – Regulation 8 – that has provoked the ECO's appeal to this court. The UT stated:

> "19 The term must be read to comply with Article 8 ECHR. The [FTT] found, and we would accept, that the Appellant shares a family life with Mr and Mrs M… It is difficult to see how, in this instance, the Appellant can share a family life with Mr and Mrs M but not be considered a 'relative'. It may be that there are relationships within the scope of Article 8 whose parties are not 'relatives' in the ordinary understanding of the term… However on the facts of this case we are satisfied that the Appellant is a family member of the sponsors. She has no

> other family of whom she is aware and they, or at least Mrs M, are the central figures in her life."

THE ECO's GROUND OF APPEAL

17. Though no longer in contention, I should address the ECO's original appeal case. It is very straightforward. The UT had in effect accepted – had certainly not repudiated – the FTT's finding on Article 8, that Article 8 was not violated by refusal of the entry clearance: see paragraph 15 of the UT determination. That being so, the argument is that it was wrong in principle for the UT to adopt a construction of Regulation 8 which, in their view, was required to ensure its conformity with ECHR Article 8. That is an exercise which may be required by s.3(1) of the Human Rights Act, which as is well known provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

18. S.3 has been recognised as a strong provision (see for example *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, paragraph 30). It is clear however that it is only to be applied in a case where, without it, there would be a breach of the ECHR: see *Poplar Housing* [2002] QB 48 *per* Lord Woolf CJ at paragraph 75: *Ghaidan v Godin-Mendoza per* Lord Millett at paragraph 60. Here, says the ECO, the findings of the FTT (effectively accepted by the UT) demonstrate that the refusal of an EEA family permit involves no violation of ECHR Article 8. So recourse to a construction of Regulation 8 to bring it in line with Article 8 – the kind of construction which might be required by s.3 of the Human Rights Act – was unnecessary and inappropriate.

19. This argument is plainly good. There was no potential breach of Article 8, therefore no need for any special approach to the construction of Regulation 8.

THE TRUE ISSUES IN THE CASE

20. That, however, is by no means the end of the matter. By a respondent's notice Mr de Mello contends that, upon the proper construction of Article 2 of the Directive and Regulation 7, the respondent is on the facts a "family member" of the sponsor; in the alternative, in his skeleton argument responding to the ECO's appeal, Me de Mello submits that she is an "other family member" within Article 3 (and therefore an "extended family member" within Regulation 8 – a conclusion which, he says, requires no assistance from s.3 of the Human Rights Act). These contentions were precisely reflected in Mr Lask's formulation, at the outset of his argument for the ECO at the hearing, of two central issues: (1) Does Regulation 7 apply to the respondent? (2) If not, does Regulation 8 apply to her? The proceedings took a somewhat unusual course because we heard Mr Lask first on these two questions.

ARTICLE 2 AND REGULATION 7

21. The Regulation must of course be construed conformably with the proper interpretation of the Directive, which it implements. On this part of the case I will therefore focus on Article 2 of the Directive. The question is whether the respondent falls to be treated as a "direct descendant" of the sponsor within Article 2(2)(c). The

ordinary meaning of "direct descendant" is a natural descendant in the direct line: child, grandchild, etc. But it is accepted on all hands that the phrase extends to a person who is a descendant by adoption (in the United Kingdom, s.67(1) of the Adoption and Children Act 2002 provides that a legally adopted child is treated in law as a natural child of the adopters). Mr Lask submits, rightly I think, that such a reading is required by the purpose for which family members' rights are conferred by the Directive: to strengthen and support "the right of free movement and residence of all Union citizens" (Recital (3); see also Recital (5)).

22. At once, however, there is a difficulty. Very obviously there can be no doubt as to what is meant by a natural child. But adoption, or the creation of analogous relationships, is subject to different regimes in different States. The Directive contains no measure which stipulates what forms of adoption will count for the purposes of the "family member" provisions. There is therefore no rule of European Union law which on its face regulates or prescribes the cases in which a Member State should recognise a foreign adoption (or similar process) relied on to secure entry as a "family member" under Article 2 of the Directive. Accordingly the Member States have made their own arrangements. I will summarise the United Kingdom's arrangements shortly. It is beyond contest that the appellant cannot satisfy any of them. The question on this part of the case therefore is whether, despite the absence of any EU lexicon to determine what forms of adoption (or analogous relationship) will qualify a child as a "family member" within Article 2, there is some overriding principle of EU law which would nevertheless require that the respondent be accepted as such.

23. No such principle has been distinctly identified. No doubt a Member State's refusal to recognize *any* form of inter-country adoption would be repugnant to the purposes of the Directive; and I would incline to accept (albeit provisionally – this dimension was not explored in argument) that in theory a Member State might promulgate a rule for the recognition of adoptions that was so restrictive as to be likewise repugnant. In fact the arrangements made by the UK, and no doubt those of the other Member States, have been arrived at on a principled basis which could not, in my judgment, conceivably be held to violate EU law. I will explain what it is.

The Protection of Children

24. There is no doubt that some adoption regimes may involve abuse of the rights of the children in question. Amongst other materials the 1993 Hague Convention on the Protection of Children and Co-operation in respect of Inter-Country Adoption, to which all the Member States of the European Union (and many others) are party, is ample testimony to the fact. Its recitals include the following:

> "The States signatory to the present Convention…
>
> Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children…
>
> Have agreed upon the following provisions –"

25. Article 1 then provides:

> "The objects of the present Convention are -
>
> (a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;
>
> (b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
>
> (c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention."

26. There follow detailed provisions setting out requirements for inter-country adoptions; within these measures Articles 4 and 5 establish safeguards for the interests of the child. Mr Lask referred also to the United Nations Convention on the Rights of the Child (UNCRC) to which, again, all the EU Member States are party. Article 21 provides:

> "States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
>
> (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
>
> (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
>
> (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption…"

27. The UNCRC and the Hague Convention are unincorporated international treaties. They therefore form no part of our domestic law. But it is beyond argument that our municipal arrangements for the recognition of inter-country adoptions are intended to reflect and give effect to these obligations owed by the United Kingdom on the international plane.

28. In *MN (India)* [2008] EWCA Civ 38 Wilson LJ as he then was described four "avenues for entry to the UK provided by the Rules in respect of a child adopted or intended to be adopted" (paragraph 13). The first consists in the requirements of paragraph 310 of the Immigration Rules for the entry of a child who has been adopted by force of a decision of the competent authority in his country of origin or residence. Only certain countries are recognized for this purpose. They are now specified in the Adoption (Recognition of Overseas Adoptions) Regulations 2013. They are the States whose adoption arrangements are recognized by the UK as meeting international standards. They do not include Algeria. The second avenue is *de facto* adoptions within paragraph 309A of the Immigration Rules. The third arises under paragraph 316A of the Rules, which makes provision for a child to enter for the purpose of being adopted here "in accordance with the law relating to adoption in the United Kingdom". The prospective adopter must fulfil a series of requirements, one of which is to obtain a Certificate of Eligibility. The fourth avenue arises where adoption is sought under the Hague Convention, and is regulated by paragraph 316D of the Rules.

29. Article 3(5) of the Treaty on European Union commits the EU to contribute to "the protection of human rights, in particular the rights of the child". The "rights of the child" are also protected under Article 24 of the Charter of Fundamental Rights. The Commission has issued a "Communication to the European Parliament and the Council on guidance for better transposition and application of [the Citizenship Directive]". This document is not, of course, a source of law. But it is worth noting that after stating that family membership in the direct line "extends to adoptive relationships", paragraph 2.1.2 proceeds thus:

> "In implementing the Directive, Member States must always act in the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989."

30. Given these materials, I accept Mr Lask's submission that the European legislature cannot have intended that Member States should be required to recognize (for the purpose of the Directive) overseas adoptions as a matter of course, irrespective of the quality, in terms of the child's interests, of the procedures followed in any particular State. More than this: such a state of affairs would be likely to put Member States in breach of their obligations under the international instruments to which I have referred; and I greatly doubt whether the terms of the European Communities Act 1972 would have effect to give any such rule the least legal validity in the United Kingdom. There is, however, plainly no such rule.

Conclusion

31. The result, in my judgment, is that the European legislator has left it to Member States to decide on the terms upon which adopted children will be recognized as "direct descendants" within the meaning of Article 2 of the Directive, and has done so in the expectation that the international obligations relating to the welfare of children, which all the Member States have undertaken will be respected. The United Kingdom's rules regarding inter-country adoptions are a reasonable and proportionate means of giving effect to those arrangements. They are not remotely inconsistent with any prescription of EU law. Mr de Mello's appeal to provisions of the law of France and

of Algeria (and to the Strasbourg case of *Harroudj v France* (Application No 43631/09)) are, with respect to him, nothing to the contrary.

32. The respondent is not a "family member" within the meaning of Article 2 of the Directive and Regulation 7.

ARTICLE 3 AND REGULATION 8

33. But if the respondent is not a "family member" within the meaning of Article 2, her case cannot be saved by appeal to Article 3 and Regulation 8. In the context of Article 2, as I have shown, the Directive permits the Member States to restrict the forms of adoption which they will recognize by reference to their reasonable apprehension of their international obligations to protect the interests of children. It cannot be supposed that Article 3 then immediately proceeds to undermine or contradict that position by requiring other forms of adoption to be accepted for the purposes of the Directive.

34. Mr Lask was in my judgment right to submit that the distinction between "family member" in Article 2(2)(c) and "other family members" in Article 3(2)(a) is not a function of any legal formalities defining the relationship of either group to the EEA national in question, but of the relative *proximity* of the members of either group to the EEA sponsor. Thus collateral relatives may be included: note Recital (6) to the Directive which I have set out, and the remarks of A-G Bot at paragraph 52 in *Secretary of State v Rahman* (Case C-83/11).

35. Mr de Mello relies on the findings of the UT and the FTT that the respondent, the sponsor and the latter's wife shared a family life. The UT considered that the respondent must be a "relative" of the sponsor within Regulation 8(2) because she shared a family life with the sponsor and his wife. But that does not reflect, or confront, the structure of Articles 2 and 3 of the Directive. Nor does it give weight to the Directive's distinct purpose, which is not to promote family life as a self-standing value but, as I have said, to strengthen and support "the right of free movement and residence of all Union citizens".

OVERALL CONCLUSION

36. I should note that Mr de Mello made some reference to the ECHR. It is important to have in mind that there is no issue in this appeal as to the Convention rights of the respondent, the sponsor or his wife. Paragraph 39 of the FTT's determination is unappealed and unappealable. Nor, in my judgment, is there any force whatever in Mr de Mello's residual suggestion that this court might make a reference to the Court of Justice of the European Union upon the meaning of "family member".

37. For all the reasons I have given, I would allow the ECO's appeal.

38. LORD JUSTICE KITCHIN:

39. I agree.

40. LORD JUSTICE CHRISTOPHER CLARK:

41. I also agree.