The Court ordered that no one shall publish or reveal the name or address of the appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the appellant or any member of her family in connection with these proceedings.

14 February 2018

PRESS SUMMARY

SM (Algeria) (Appellant) v Entry Clearance Officer, UK Visa Section (Respondent)
[2018] UKSC 9
On appeal from [2015] EWCA Civ 1109

JUSTICES: Lady Hale (President), Lord Kerr, Lord Wilson, Lord Reed, Lord Hughes

BACKGROUND TO THE APPEAL

This appeal concerns the right under EU law for family members to move and reside with an EU citizen exercising the right of freedom of movement. The appellant SM, given the name Susana in the judgment, is a citizen of Algeria. She is a young child who has been placed into the legal guardianship of EU citizens under the Islamic 'kefalah' system.

Susana's guardians ('Mr and Mrs M') are French nationals of Algerian ethnicity, who married in the United Kingdom in 2001. In 2009 they travelled to Algeria, where they were assessed as suitable to become guardians. Susana was abandoned after her birth in June 2010. Mr and Mrs M applied to become her guardians and after three months Susana was placed under their guardianship. A legal custody deed was later issued in Algeria. Mr M returned to the UK in 2011 and resumed his work as a chef. Mrs M remained in Algeria with Susana.

In May 2012 Susana applied for entry clearance to the UK, as the adopted child of a EU national, under regulation 12(1) (as a family member) or 12(2) (as an extended family member) of the Immigration (European Economic Area) Regulations 2006 ('the Regulations'). The Regulations transposed Directive 2004/38/EC ('the Directive') into UK law. The respondent refused Susana's application on the basis that the Algerian guardianship was not recognised as an adoption in UK law.

Susana's appeal was refused by the First-tier Tribunal but allowed by the Upper Tribunal. The Court of Appeal, allowing the respondent's appeal, held that member states were permitted to restrict the forms of adoption which they would recognise as falling within the definition of 'family member', and that those restrictions could not be undermined by recognising the child as an extended family member.

Susana appealed to the Supreme Court. Before the hearing, the Upper Tribunal in another case (*Sala v Secretary of State for the Home Department* [2016] UKUT 00411) held that there was no statutory right of appeal against the refusal of a residence card to a person claiming to be an extended family member, as it was not an 'EEA decision' for the purposes of regulation 26(1) of the Regulations. A further issue therefore arose before the Supreme Court as to whether it had jurisdiction to hear the appeal.

JUDGMENT

The Supreme Court unanimously holds (1) that it does have jurisdiction to hear the appeal, *Sala* having been wrongly decided; and (2) refers three questions to the Court of Justice of the European Union for a preliminary ruling. Lady Hale, with whom all the other justices agree, gives the only judgment.

REASONS FOR THE JUDGMENT

It was submitted on behalf of Susana that she fell within the definition of 'family member' under article 2.2(c) of the Directive, which referred to 'direct descendants who are under the age of 21', and as such was entitled to move with and reside with Mr and Mrs M. Alternatively, she came within the discretionary provisions of article 3.2(a) as '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'.

The transposition of Article 3.2(a) into Regulation 8 of the Regulations dealing with 'extended family members' was inaccurate insofar as it imposed a requirement that the dependant or member of the household be a 'relative' of the EEA national **[7]**. The Supreme Court had little doubt that Susana would fall within article 3.2(c) if she did not fall within article 2.2(c). The term 'family member' is wide enough to include people who are not related by consanguinity or affinity, and is clearly capable of including a child for whom the Union citizen has parental responsibility under the law of the child's country of origin **[17]**.

UK legislation relating to foreign adoptions was relevant to the examination of whether to exercise the discretion to facilitate entry and residence. Refusal would in principle be justified if there were reason to believe the child was the victim of exploitation, abuse or trafficking, or that the claims of the birth family had not been respected **[18]**, but the fact that the arrangements did not comply in every respect with the stringent requirements of UK adoption law would not be determinative **[19]**. The best interests of the child were a primary consideration, and would depend on factors such as what would have happened to her if the kefalah arrangement had not been established, the background and how well integrated into the family and household she now was **[20]**. The purpose of the Directive to strengthen the right of free movement was a further consideration **[21]**.

There was also reason to consider that Susana qualified for automatic rights of entry and residence as a direct descendant. This was an autonomous term in EU law and required a uniform interpretation throughout the Union **[25]**. It was not clear from existing case law whether a child in Susana's position should fall within article 2.2. The procedural safeguards and provisions against 'abuse of rights' in the Directive might be ineffective to prevent a child being the victim of exploitation, abuse or trafficking **[31]**, whether that child was a third country national or a national of another member state **[32]**. Accordingly, the Supreme Court refers three questions to the CJEU for a preliminary ruling:

(1) Is a child who is in the permanent legal guardianship of a Union citizen or citizens, under 'kefalah' or some equivalent arrangement provided for in the law of his or her country of origin, a 'direct descendant' within the meaning of article 2.2(c) of the Directive?
(2) Can other provisions in the Directive, in particular articles 27 and 35, be interpreted so as to deny entry to such children if they are the victims of exploitation, abuse or trafficking or are at risk of such?
(3) Is a member state entitled to enquire, before recognising a child who is not the consanguineous descendant of the EEA national as a direct descendant under article 2.2(c), into whether the procedures for placing the child into the guardianship or custody of that EEA national was such as to give sufficient consideration to the best interests of that child?

On the question of jurisdiction, *Sala* had rightly been overruled by the Court of Appeal in a subsequent decision on the interpretation of regulation 26 of the Regulations. Susana did enjoy a right of appeal in respect of both articles 2.2 and 3.2 **[34-41]**.

References in square brackets are to paragraphs in the judgment