Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04194/2020**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 10th March 2022	**On the 23rd August 2022**

Before

UPPER TRIBUNAL JUDGE RIMMINGTON
and
UPPER TRIBUNAL JUDGE MANDALIA

Between

AA
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Cronin, instructed by EMAP
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. This appeal concerns the refusal of an application for entry clearance made by a child who, it is said, was an orphan but had been subject to a 'kafalah' process in favour of the sponsor in circumstances where it is not

culturally acceptable to give the parental rights to a non-family member and alternative long-term care options must be pursued. The appellant and sponsors refer to the arrangement as a 'kafila', a term that is often referred to as 'kafala' or 'kafalah'. In this decision we adopt the term 'kafalah'. In the grounds of appeal the appellant adopts the terms "kafil" (guardian) and "makful" (child). The term 'kafalah' in Islamic law is used to describe a situation similar to adoption, but without the severing of family ties. Lord Carnwath in A (Somalia) (FC) (Appellant) v Entry Clearance Officer (Addis Ababa) (Respondent) [2013] UKSC 81 observed that the term was described by the parties in an agreed statement of issues as "a process of legal guardianship akin to adoption".

2. The application for entry clearance was refused by the respondent for reasons set out in a decision dated 18th February 2020 which was maintained following a review by the Entry Clearance Manager on 20th July 2020. It is common ground between the parties that the appellant is unable to meet the requirements for indefinite leave to enter the United Kingdom as the adopted child of a parent or parents present and settled in the UK or with a view to settlement as a child for adoption under paragraphs 310 and 316F of the immigration rules. The respondent concluded that the application does not fall for a grant of entry clearance outside the rules on Article 8 grounds.

The decision of the First-tier Tribunal

3. The appellant's appeal to the First-tier Tribunal was dismissed for reasons set out in a decision of First-tier Tribunal Judge Rae-Reeves ("the judge") promulgated on 16th April 2021. The judge summarised the background as follows:

> "3. The sponsor travelled to Sudan in 2018 with the intention of adopting a child. She says she found the Appellant in an orphanage and instantly made a connection. She stayed with the Appellant for six weeks and has visited her twice since for similar periods. During these periods in Sudan she asserts that she has gone through a process similar to adoption whereby

she has been granted status of parent over the Appellant, a process known as Kafila.

4. The appellant child made an application for entry clearance on the 26/09/2019 to join her guardians. She was refused under the immigration rules and pursuant to Article 8. The appellant appealed by way of Form IAFT-6 dated 11/03/2020. Her application was refused by way of a reasons for refusal letter dated 18/02/2020. It was refused because the appellant was unable to comply with the Immigration Rules and also under Article 8. The appellant accepts that the application proceeds only under Article 8."

4. The judge sets out the evidence relied upon by the appellant in paragraphs [12] to [19] of the decision. The findings and conclusions are set out at paragraphs [36] to [58] of the decision. As far as is material, the judge said:

"36. The Appellant accepts that this appeal does not fall within the Immigration Rules and as such proceeds solely under Article 8. As such the consideration referred to at paragraph 6 above must start with the first question posed in *Razgar*. In asking whether the proposed removal would be an interference with the Appellant's right to her family life the central issue is whether such a family life exists in circumstances where she is and always has been in a separate entry to the sponsor. It is trite law that family life can exist despite such a geographical separation.

37. The sponsor's evidence is that she first met the Appellant child in 2018 and now has responsibility for her under the Kafila process. Based on the documentary evidence I accept that this process has taken place. The documents are comprehensive and demonstrate the sponsor's responsibility for the Appellant. However, the existence of a legal relationship does not, in itself, establish or prove the existence of family life.

…

48. To summarise I have found that the sponsor has gone through a process akin to guardianship in Sudan and is therefore registered in that country as guardian (or parent on the Birth Certificate) of the Appellant. I have not accepted that the child was provided by an orphanage and is without biological family; nor have I accepted that there is daily contact or regular financial assistance. On the Appellant's own evidence, she has spent 12 weeks living with the Appellant over the last three years (although I accept that she would have seen the Appellant over the first six weeks when she first met her). On the basis of the very specific facts of this case, I cannot find that there is a family life pursuant to the first question in *Razgar*.

49. I am familiar with the case law and have noted the cases in the skeleton. One of the leading cases on family life is *Kugathas [2003] EWCA Civ 31*. As quoted in paragraph 31 of the ASA I note the dicta of Lord Justice Sedley where he states that that if dependency is read as meaning "support" and if one adds that following the Strasburg jurisprudence, *"real"* or *"committed"* of *(sic) "effective"* to the word support, "*then it represents in my view the irreducible minimum of what family life implies.".* As he suggests this is the bare minimum that an Appellant must prove to demonstrate family life. In the same case Lady Justice Arden went onto *(sic)*

say that a possibility of a family existing between members of the same family in different countries *"will probably be exceptional"*. In the present case I do not consider that the Appellant has even reached that irreducible minimal level described by LJ Sedley. She has not demonstrated such support. One of the crucial differences in the present case is that before separating there had never been a family life between the Appellant and the sponsor. This makes the situation very different to cases such as *Kugathas* and the Gurkha case of *Rai* in which Lord Justice Lindblom emphasised LJ Sedley's definition of support.

50. On this basis I conclude that the answer to the first question set out above is negative. For this reason, I need not consider the other questions and in particular proportionality under question 5. However, in the interests of completeness I provide my conclusions. In doing so I have considered the child's best interests pursuant to section 55 as highlighted in the Appellant's skeleton and I have considered the cases set out therein including *SS Congo* and *Miao*. This provision applies to children within the United Kingdom but I have nevertheless applied the spirit of that provision to the appellant's case. As such the best interests of the child are my primary consideration when dealing with proportionality but her interests are not paramount and do not eclipse all other factors. I have conducted a balance sheet exercise weighing up the need for effective immigration control with the circumstances before me.

...

57. When considering the best interests of the child I am not in a position to make a finding on the suitability of the sponsor and her husband as I do not have adequate information that would be before the party responsible for clearing them for adoption (or guardianship) in the UK. Because I have no adequate evidence about the sponsor and her husband and their past histories (other than immigration histories), I can make no judgement on whether they would represent a safe or appropriate environment for a child. This would be assessed by those responsible under the Adoption and Children Act 2002 which is provided for *(sic)* the Immigration Rules. They would no doubt take into account all factors including age and living circumstances. It cannot be right that such safeguards are disregarded by virtue of the fact that the Appellant chooses to pursue her appeal outside of the rules.

58. Based on the evidence of the sponsor and her sister it is submitted that the child may be returned to the orphanage. However, I have no evidence to support the submission that this would have 'very serious consequences'. I am also mindful of not falling into the trap of trying to assess the child's best interests solely from the UK perspective. This *(sic)* is a growing body of thought that suggests is it *(sic)* no longer considered ethical to take a child away from her language, culture and customs to bring her to an entirely alien environment, in this case with the sponsor with whom she has only spent a matter of weeks with. Without such a formal adoption assessment I cannot say it is in the best interests of the child to join the sponsor. Her best interests have therefore has *(sic)* been considered in the balance sheet exercise but do not outweigh those aspects that militate against such interference not being proportionate. Having conducted this exercise and for these reasons I do not consider such interference to be proportionate pursuant to question 5.The appeal before us

5. Permission to appeal was granted by Upper Tribunal Judge Gill on 5th July 2021. She observed that it is arguable that the judge may have erred in law in reaching his conclusion that Article 8(1) was not engaged on the basis of his finding that family life does not exist. Arguably, family life intended to be enjoyed between adoptive parents and adoptive children falls within Article 8(1) if a *de facto adoption* has taken place. Prior to the hearing before us, the appellant applied for, and was granted permission to amend the grounds of appeal. The appellant advances four grounds of appeal;

(i) The judge accepted that the appellant was the subject of a 'Kafila order' made under and in accordance with Sudanese Law, but adopted the wrong approach in law as to the existence of family life between the appellant and her sponsor. It is said the test set out in Kugathas relates to relationships between parents and adult children, and not the relationship between parents and their minor children.

(ii) The judge considered the Appellant's best interests, but that consideration was one-sided and failed to have regard to, or adequate regard to other considerations that were plainly relevant. It is said the judge did not consider whether, on balance, the appellant joining the sponsor in the UK would be more conducive to her best interests, rather than being returned to the orphanage.

(iii) The judge accepted the sponsor has responsibility for the appellant under the Kafila process and said the documents are comprehensive. Thereafter, the judge found the Appellant did not meet the sponsor through the orphanage and did not accept the appellant has severed biological ties or that her parents are deceased. It is said the judge erred in failing to consider the 'Kefalah documents' which provided an explicit acknowledgement, issued by the competent authorities of a foreign state, and addressed to their senior administrators, that the appellant was an orphan given into the care of the sponsors in accordance with the law and with relevant Ministry approval. The evidence before the Tribunal was clearly capable of supporting a finding that the appellant is an orphan/abandoned child.

(iv) The judge erred in respect of key findings that cannot fairly or reasonably stand.

6. There is a considerable overlap in the grounds of appeal and the focus of the submissions before us was in respect of the overall approach adopted by the judge. Before us, Ms Cronin submits the judge accepted, at [37], that the 'kafila process' had taken place and went as far as to describe the documents before the Tribunal in that regard as "comprehensive" and as demonstrating the sponsors responsibility for the appellant. She submits

that is an important finding. She acknowledges that the judge was right to say that *"the existence of a legal relationship does not, in itself, establish or prove the existence of family life"*. Ms Cronin submits the judge placed extraordinary emphasis upon the sponsor's lack of knowledge of the orphanage and the lack of evidence from the orphanage itself, which had an impact upon the judge's consideration of the appeal. She submits all the arrangements in Sudan were handled by the Wedad Charity Foundation and then the relevant Ministries.

7. Ms Cronin submits that in reaching the decision, the judge omitted to give sufficient weight to the positions of those that signed the documents that were before the First-tier Tribunal. She submits the acceptance of the 'Kafila process' should have had a more active role in the judge's deliberations thereafter. She submits the judge placed undue emphasis on the lack of evidence when stating at [41], that:

> "Without approval from the orphanage, I do not accept that the appellant has severed biological ties or that her parents are deceased.."

8. In reply, Mr Melvin submits that in reaching the decision, the judge assessed the totality of the evidence that was before the Tribunal. He submits the documents relied upon by the appellant are at best vague. The Judge states that a process has taken place, but, as the appellant accepts, that does not mean there is family life. Mr Melvin submits the requirements of the immigration rules cannot be met and the appellant is seeking to circumvent the immigration rules, relying upon Article 8 outside the rules. Mr Melvin accepts that although Kugathas is one of the leading authorities on family life, the Court there was concerned with relationships between adults, rather than a parent/child relationship. However, he submits the reference to Kugathas in paragraph [49] is immaterial. It was open to the judge to conclude that the appellant does not have a family life with her sponsors and so the refusal of entry clearance will not be an interference with the exercise of the appellant's right to respect for her family life. In reaching that conclusion, the judge considered the appellant's relationship with her sponsor's, how it developed and the time

they spent together. Mr Melvin submits the opening sentence of paragraph [50] – "*On this basis I conclude …*", makes it clear that the reasons for the conclusion are set out in what precedes, and the reasons are set out at paragraphs [38] to [49].

9. In response Ms Cronin submits the reference to Kugathas in paragraph [49] was material because the judge states that in the present case the judge did not consider the appellant has even reached the irreducible minimum of what family life implies as described by Lord Justice Sedley. Ms Cronin submits the appellant is an orphaned young child and responsibility for her rested with the relevant Ministry in Sudan. The sponsor had provided a witness statement dated 6th March 2021 in which she claimed that the day after she first saw the appellant at an orphanage:

> "I stayed to breastfeed her. I was given medication to produce milk. In my religion in order for [the appellant] to be my daughter it was vital that I breastfed [the appellant]. I had to do this 5 times. I was given medication and I started producing milk and was fortunate that was able to breastfeed [the appellant]."

10. Ms Cronin submits the sponsor's account of breastfeeding the appellant was repeated in her supplementary statement dated 29th March 2021 and she added "By doing this [the appellant] could become a Mahram to me, as I have breastfed her". Ms Cronin submits the judge did not refer to that evidence at all and instead focused on risks for the child when she will be much older, such as the precarious income of the sponsors and whether the appellant would be able to live in the house of her sponsor's employer or whether that arrangement will be viable as the appellant reaches older/teenage years.

11. Ms Cronin submits the facts here are akin to the facts in Singh v Entry Clearance Officer (New Delhi) [2004] EWCA Civ 1075 in which the Court of Appeal held that "Family life" within the meaning of Article 8(1) could exist where a child seeks entry clearance to come and live with adoptive parents in the UK. At paragraph [25], Lord Justice Dyson said:

> "… the mere formal relationship of parent and child that is derived from a legal adoption recognised by the Indian court is not of itself sufficient to constitute family life. There must also be evidence of real close personal ties….The question whether the relationship between child and adoptive parent is sufficient to constitute family life will always be one of fact and degree. On the facts in *X and Y v UK* the Commission held that the links were insufficient. The Commission did not say what weight, if any, ought to be given to the fact of the adoption itself."

12. There does not need to be a formal process of adoption to found family life. Ms Cronin also submits the potential for the development of a family life is important. The evidence before the First-tier Tribunal was that the appellant is living with the sponsor's sister. Ms Cronin submits the appellant and sponsors are not seeking to circumvent the immigration rules. The appellant is a child. There is no provision within the immigration rules for entry to be granted to children where it is not culturally acceptable to give the parental rights to a non-family member, in a situation similar to adoption. The appellant and sponsors should not be penalised for adopting an approach that is consistent with their beliefs.

Error of Law

13. There are various different avenues under the Immigration Rules under which a child abroad who is alleged either to have been adopted abroad, whether *de iure* or *de facto*, or to be intended to be adopted in the UK, can apply to enter the UK. Although not referred to by either party before us, it is useful to note that the words 'Parent' and 'Adoption' are defined in paragraph 6 of the immigration rules, as far as relevant, as follows:

> **"Parent"** includes:
>
> …
>
> (d) an adoptive parent, where a child was adopted in accordance with a decision taken by the competent administrative authority or court in a country whose adoption orders are recognised by the UK or where a child is the subject of a de facto adoption in accordance with the requirements of paragraph 309A (except that an adopted child or a child who is the subject of a de facto adoption may not make an application for leave to enter or remain in order to accompany, join or remain with an adoptive parent under paragraphs 297 to 303); and
>
> …

> **"Adoption"** includes a de facto adoption in accordance with the requirements of paragraph 309A, and "adopted" and "adoptive parent" shall be construed accordingly.

14. It is accepted here that the test for a 'de facto adoption' referred to in paragraph 309A of the immigration rules is not met. The definition of 'parent' expressly excludes other forms of adoption outside the requirements of paragraph 309A and paragraph 309A requires that both adoptive parents have spent at least 18 months living with the child immediately prior to the child's application for entry clearance.

15. The central issue raised in this appeal, and which formed the focus of the submissions before us is the conclusion of the First-tier Tribunal Judge that Article 8(1) is not engaged on the basis of a finding that a 'family life' has not been established between the appellant, who is 3 years old, and her sponsors.

16. It is important to recognise that a 'kafalah' and 'adoption' are not the same, not least because adoption is in some countries that follow the Koranic tradition, forbidden, and a kafalah has no effect on the parent-child relationship. The child who benefits from it does not become a member of the family of the 'kafil' *(i.e. the adults who are his or her guardians).*

17. Kafalah has its roots in the Koran and is an institution in the family law of some countries that follow the Koranic tradition. Articles 20 and 21 of the United Nations Convention on the Rights of the Child ("CRC"), to which the UK is a signatory, states:

> "**Article 20**
>
> 1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
>
> 2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

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;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

18. Article 20 of the CRC therefore sets out a range of child protection measures for children who are temporarily or permanently deprived of their family environment, or who in their own best interests cannot be allowed to remain in that environment. It lists the various forms of protective measures that “could” be an appropriate way to provide a child with a safe and stable family environment. Article 20(3) makes express reference to care under “kafalah of Islamic law”. Article 21 highlights the particular characteristics of adoption as compared to other arrangements for the care of children.

19. In Harroudj v France, the ECtHR in its judgment of 4 October 2012, No 43631/09 addressed the problems posed by the relationship between kafalah and adoption, where a French national, Ms Harroudj, had been authorized by an Algerian court to take a child, Hind (then aged three months), into her legal care (kafalah). The court also authorised the child to leave Algeria with Ms Harroudj and settle in France; another Algerian court authorised the change of the child's name to Hind Harroudj. Two years later, Ms Harroudj applied in France for full adoption of the child, arguing that a full adoption was the solution most consistent with "the best interests of the child". This request was denied. Ms Harroudj subsequently brought an application against France alleging violation of Article 8. At paragraph [41], the ECtHR said:

> "… as the Court has previously found, the provisions of Article 8 do not guarantee either the right to found a family or the right to adopt (see E.B. v. France [GC], no. 43546/02, 22 January 2008). This does not, however, rule out the possibility that States parties to the Convention may nevertheless have, in certain circumstances, a positive obligation to enable the formation and development of family ties (see, to this effect, Keegan, cited above, § 50, and Pini and Others, cited above, §§ 150 et seq.). According to the principles set out by the Court in its caselaw, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and establish legal safeguards that render possible the child's integration in his family (see Wagner and J.M.W.L. v. Luxembourg, no. 76240/01, § 119, 28 June 2007)."

20. As to whether there was, in addition, a positive obligation for the French authorities to recognise a legal parent-child relationship by granting the applicant's request for full adoption of Hind, the ECtHR said, at [51]:

> "Furthermore, the Court notes that the judicial grant of kafala is fully recognised by the respondent State and that it produces effects in that country that are comparable in the present case to those of guardianship, since the child, Hind, had no known parentage when she was placed in care. In that connection, the domestic courts emphasised the fact that the applicant and the child had the same surname, as a result of the relevant legal procedure, and that the applicant exercised parental authority, entitling her to take any decision in the child's interest. Admittedly, as kafala does not create any legal parent-child relationship, it has no effects for inheritance and does not suffice to enable the child to acquire the foster parent's nationality. That being said, there are means of circumventing the restrictions that stem from the inability to adopt a child. In addition to the name-change procedure, to which the child was entitled in the present case on account of her unknown parentage in Algeria, it is also possible to draw

> up a will with the effect of allowing the child to inherit from the applicant and to appoint a legal guardian in the event of the foster parent's death.
>
> The various points examined above show that the respondent State, applying the international conventions that govern such matters, has put in place a flexible arrangement to accommodate the law of the child's State of origin and the national law…"

21. The ECtHR found that a refusal to equate kafalah with full adoption is not in breach of the right to family life, because the (French) legislation adopts a flexible approach towards the prohibition on adoption in Algerian law and alleviates the effects of that prohibition, based on the objective signs of a child's integration into French society.

22. There is no one, single, internationally accepted definition of the 'family'. We do not propose to reproduce Munby J's helpful distillation of the wide range of factual circumstances which have been construed as 'family life' as set out in his judgment in Singh v Entry Clearance Officer New Delhi [2004] EWCA Civ 1075 at [59]. They illustrate an increasing awareness of the need for a flexible approach to the concept of 'family life'. It is useful to cite his summary at [72]:

> "… such is the diversity of forms that the family takes in contemporary society that it is impossible to define, or even to describe at anything less than almost encyclopaedic length, what is meant by "family life" for the purposes of Article 8 . The Strasbourg court, as I have said, has never sought to define what is meant by family life. More importantly for present purposes, and this is a point that requires emphasis, the Strasbourg court has never sought to identify any minimum requirements that must be shown if family life is to be held to exist. That is because there are none. In my judgment there is no single factor whose existence is crucial to the existence of family life, either in the abstract or even in the context of any particular type of family relationship".

23. We accept that in the passage from the judgement in Singh v Entry Clearance Officer relied upon by Ms Cronin, Lord Justice Dyson stated the now well-established principle that a mere formal relationship of parent and child that is derived from a legal adoption is not, of itself, sufficient to constitute family life. The question whether the relationship between child and adoptive parent is sufficient to constitute family life will always be one of fact and degree. Although Lord Justice Dyson referred to 'adoption',

there is no reason why the principle does not have equal force in the context of a kafalah. Lord Justice Dyson referred to a number of relevant decisions concerning 'adoption' and 'family life' that are illustrative. At paragraph [23] he said:

> "The relevance of adoption to family life has been considered by the ECtHR on a number of occasions. It is well-established that, although the right to adopt is not one of the rights specifically guaranteed under the ECHR , "the relationship between an adoptive parent and an adopted person is in principle of the same nature as a family relationship protected by Article 8 of the Convention": see the important decision of the *ECtHR in Pini et al v Roumania, (unreported, decision of 22 June 2004)* at para 140…."

24. Lord Justice Dyson addressed the decision of the ECtHR in Pini v Romania (2005) 40 E.H.R.R 13 in which an Italian couple complained that the failure of the Romanian authorities to enforce an adoption order and allow their adopted daughter, F, to leave Romania breached *inter alia,* Articles 6 and Article 8 ECHR. He accepted that relevant international material should be taken into account in deciding whether there is family life but said that where an adoption does not satisfy the requirements of relevant international instruments, it does not follow that an adoption order made according to national law, should be given little weight.

25. At paragraphs [33] to [35] Lord Justice Dyson said:

> "33.. As a matter of principle, I do not see why the fact that an adoption does not meet the requirements of relevant international instruments should invariably be a reason for according little weight to it in determining whether family life exists or not. Such a rigid and formulaic approach is in my view not justified. The significance of the failure to satisfy the requirements of relevant international instruments will vary from case to case. Of considerable importance will be the nature of the departure from the provisions of a relevant instrument. If the departure is one of substance rather than procedure and it goes to the heart of the safeguards that the instrument is intended to promote, then it may well be appropriate to give the adoption order little weight. The Declaration of 1986 provides that the first priority for a child is to be cared for by his or her own parents (art 3). When care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute or an appropriate institution should be considered (art 4). In all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child should be the paramount consideration (art 5). The primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family (art 13). If a child cannot

be placed in a foster or an adoptive family or cannot be cared for in any suitable manner in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family (art 17). There are provisions to similar effect in the other instruments to which we were referred. Article 1 of the 1993 Convention identifies its objects as being:

> "(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 recognized 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".

34.. I would accept that an inter-country adoption which has come about in circumstances in which little or no regard has been had to the best interests of the child must be viewed with great caution. An adoption order made in those circumstances should not, of itself, be given much weight in deciding whether family life has been established. But, there will be cases in which, although the order was made without regard to the best interests of the child, it can be seen, with hindsight, that adoption was, in fact, in the child's best interests; and that the fact that the order was made, and has been recognised in the jurisdiction in which the child has been living, has enabled a family relationship to develop. In such circumstances the fact that the order was made without regard to the child's best interests is not a reason to refuse recognition to the family life which has, in fact, developed as a result of the order. All will depend on the circumstances of the case. The best interests of the child will, of course, be relevant — and may well be determinative — at the stage at which the court has to decide the extent to which respect should be given to family life (as demonstrated by the approach in *Pini*) or whether interference with family life is justified under article 8(2) .

35.. Apart from the question whether the adoption is in the child's best interests, the adjudicator should also have regard to the nature of the arrangement that underlies the adoption. There is a wide gulf between an adoption which is part of a child-trafficking transaction and an arrangement such as was made in the present case. And yet both adoptions may be valid according to the law of another jurisdiction but not recognised under UK law. It is difficult to see what principle dictates that the same meagre weight should be given to each of these adoptions when the adjudicator decides whether there is family life between the child and his or her adoptive parents, and yet, as I understand it, that is the effect of Mr Garnham's submission." *(our emphasis)*

26. At our invitation, Ms Cronin took us through the documents that were before the First-tier Tribunal relating to the kafalah arrangement under Islamic law;

a. A letter dated 29th April 2018 from "The Public Committee in the locality of 'Umdarman' in the state of Khartoum, which states that the Public Committee attests that "Fatma Saleh Farag Abu Raba … has a good personal and social character". [Appellant's bundle/page 75]

b. An undated letter from the "Office of Accommodation and Custody", of 'The Wedad Charity Foundation for Children Lacking Parental Care' certifying that "[the appellant] has completed her Guarantee by Mrs. Fatima Saleh Farag..". [Appellant's bundle/page 77]

c. A letter dated 13th March 2019 signed by the 'Director of Care of Orphans at the Ministry of Guidance & Social Development, in the City of Maikuma in Khartoum', addressed to the 'Director of Passports & Civil Register', confirming the sponsors "have taken care of the child [the appellant]" and asking for a passport to be issued to her. [Appellant's bundle/page 71]

d. A letter dated 13th March 2019 signed by the 'Director of Care of Orphans at the Ministry of Guidance & Social Development, in the City of Maikuma in Khartoum, addressed to the 'Director of Passports & Civil Register', confirming the sponsors "have taken care of the child [the appellant], who has been guaranteed on 13/05/2018AD as per approval of the Ministry of Social Promotion of the State of Khartoum as per the Child Law of 2010AD." The letter states "Kindly facilitate their transactions & to move freely with the Child". [Appellant's bundle/page 73]

e. An undated 'Lawyers Attestation' dated 20th August 2019 setting out a statement made by 'Asia Ibrahim Abdullah Mansour', the sponsor's sister in which she attests that she has *"sponsored the child [the appellant], while she is in the sponsorship of Mrs Fatma Salih Farag Abu Raba. I therefore state that I have brought her up and looked after her from the age of four months up to the age of one year and six months.."*. [Appellant's bundle/page 79]

f. An undated certificate from the Wedad Charity Foundation for Children Lacking Parental Care testifying that the appellant has been sponsored by Mrs Fatima Salih Farah. [Appellant's supplementary bundle/page 2]

27. We referred Ms Cronin to the document that appears at page 81 of the appellant's bundle which appears to be untranslated. Ms Cronin was unable to assist us with that document and accepted that a translation of that document did not appear to be before the First-tier Tribunal. We also

referred her to the reference on the letter that appears at page 73 of the appellant's bundle to the appellant "*who has been guaranteed on 13/05/2018 as per approval of the Ministry of Social Promotion of the State of Khartoum..".* Ms Cronin was unable to draw our attention to any 'approval' or other document issued by the Ministry of Social Promotion on 13th May 2018.

28. Ms Cronin accepted there was no particular document that she could draw our attention to, that demonstrated the completion of the Kafalah process. After the hearing we were provided with a manuscript note in which Ms Cronin clarified that having taken instructions, it is the documents that are at pages 77 and 78 of the appellant's bundle that show the completion of the Kafalah process. Page 77 is a translation of the document that appears at page 78. The document relied upon by the appellant is an undated letter from the 'Office of Accommodation and Custody', of 'The Wedad Charity Foundation for Children Lacking Parental Care' certifying that "[the appellant] has completed her Guarantee by Mrs. Fatima Saleh Farag..".

29. We accept, as Mr Melvin submits that the documents relating to the 'Kafalah process' although described by the First-tier Tribunal Judge as "comprehensive" are on closer analysis, unsatisfactory and vague. The documents relied upon provide no information whatsoever regarding the background of the appellant, how she came to be in the orphanage or of any checks or assessment of the sponsors' suitability to become guardians of the appellant under the Kafalah of Islamic law operated in Sudan. In fact there was no evidence before the Tribunal of the law and customs that operate in Sudan for the transfer of responsibility for the care of orphans. At it's highest, there is a letter dated 29th April 2018 from "The Public Committee in the locality of 'Umdarman' in the state of Khartoum", attesting to the sponsors as having a good personal and social character. That is a letter that appears to have been provided very soon after the sponsors had travelled to Sudan in March/April 2018. It was open to the judge to accept, prima facie, that the "process" had taken place and we

are prepared to accept that it was open to the judge to conclude that the documents 'demonstrate the sponsors' responsibility for the appellant. There was however, no evidence before the First-tier Tribunal that "the process" was completed having any proper regard to the best interests of the appellant or the nature of the arrangements that underlined the sponsors ability to take care of, and provide for the appellant or to provide her with a safe and secure environment and stability. There was scant evidence before the First-tier Tribunal regarding the sponsors' suitability to become guardians under the kafalah of Islamic law.

30. The judge here described the documents before the Tribunal as comprehensive, but, on closer analysis, they simply establish that a 'process has taken place' but not necessarily in accordance with the Kafalah of Islamic law operated in Sudan.

31. The kafalah, and its underlying arrangements, are relevant not only to the existence of family life but also to the question of proportionality in article 8 claims.

32. In SM (Algeria) v Entry Clearance Officer [2018] UKSC 9, the court was concerned with children who were third country nationals and who were in the permanent legal guardianship of an EU citizen under the law of their country of origin. Lady Hale said:

> "18. The obligation of the host member state is to facilitate entry and residence in accordance with its national legislation, to undertake an extensive examination of the personal circumstances, and to justify any denial of entry and residence. UK legislation relating to foreign adoptions is clearly relevant to that examination. A refusal of entry and residence would, in principle, be justified if there were reason to believe that the child was the victim of exploitation, abuse or trafficking, or that the claims of the birth family had not been respected.
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> 19. But the fact that the arrangements did not comply in every respect with the stringent requirements of UK adoption law would not be determinative. The Secretary of State and her officials are required by section 55 of the Borders, Citizenship and Immigration Act 2009 to discharge their functions in relation to immigration, asylum and nationality "having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom". This duty was imposed in the light of the UK's obligation under article 3.1 of the United Nations Convention on the Rights of the Child

> (1989) that "In all actions concerning children … the best interests of the child shall be a primary consideration". Under article 2.1 the rights set out in the Convention are to be secured to children within the jurisdiction, but the Secretary of State has made it clear that section 55 will also be observed in relation to children applying to enter this jurisdiction. The same obligation arises under article 24.2 of the Charter of Fundamental Rights of the European Union, which applies whenever a member state is implementing EU law.
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> 20. In a case such as this, the need to safeguard and promote children's welfare would obviously encompass the need to protect all children from the dangers of exploitation, abuse and trafficking. But the best interests of the individual child must also be a primary consideration. This would depend upon factors such as whether the child had been abandoned by her birth family; whether if she had not been the subject of a kefalah arrangement she would have continued to be brought up in an institution; whether her guardians had been assessed as suitable by the authorities in her birth country; whether they had gone through all the appropriate legal procedures in that country; their reasons for not going through the appropriate procedures for intercountry adoption here; the cultural and religious background of both the child and her guardians, including whether adoption in the UK sense is compatible with their religious beliefs; how well her guardians are fulfilling their legal obligations towards her; and perhaps above all how well integrated she is into their family and household and how close and beneficial their relationships are with one another." *(our emphasis)*

33. Although the Supreme Court was concerned with the scope of a Member State's responsibilities under Directive 2004/38, the Court's conclusions regarding the best interests of the child and the relevant factors apply with equal force here.

34. A kafalah of Islamic law is not treated in the same way in all countries. Where a kafalah arrangement is relied upon by the parties, in our judgement, evidence of the following will be necessary to enable the Tribunal properly to consider the Article 8 claim outside the immigration rules:

a) Expert evidence of the civil law of the child's country of origin (that is, of the country that permitted the guardianship);

b) Evidence sufficient for a Tribunal to determine whether, within the framework of that law, kafalah can take different legal forms and, if so, to analyse the legal effects of the form chosen by the kafil in assuming care of the child; and

c) Evidence to establish that those legal effects include the formation of a genuine parental (parent-child) tie between the kafil and the makful, which goes beyond the relationship inherent in a guardianship relationship. In the absence of such evidence the Tribunal will have to examine whether the relationship between the kafil and the makful could be considered functionally equivalent to an adoptive relationship.

d) Documentary evidence sufficient to establish a genuine parental tie between the kafil and makful.

35. Although the reference to the decision of the Court of Appeal in Kugathas at paragraph [49] of the decision of the First-tier Tribunal is unfortunate, that in our judgement is immaterial. We are quite satisfied that here the First-tier Judge had regard to all relevant factors when considering whether there exists a 'family life' between the appellant and sponsors. The judge accepted, at [37], that the 'Kafalah process' has taken place and the documents demonstrate the sponsors responsibility for the appellant. The judge also accepted, at [43], that the appellant has lived with the sponsor's sister since leaving the orphanage. The judge carefully considered the evidence before the Tribunal regarding the relationship established between the appellant and her sponsors. The judge rejected:

a. The claim that the sponsor met the appellant at or through the orphanage as claimed, for the reasons set out at paragraphs [38] to [41]

b. The claim that the appellant has severed biological ties, or that her parents are deceased; [41]

c. The claim that the sponsors speak to the appellant every day. The judge accepted the sponsor is in communication with the appellant and her half sister, but not at the frequency claimed; [45]

d. The claim that the sponsor is financially supporting the appellant by remittances of between £50 and £100 per month; [46]

e. The claim that the sponsor makes the decisions concerning the appellant's welfare and her sister executes her wishes.

36. Furthermore, the judge also considered the evidence before the Tribunal regarding the time spent by the sponsor with the appellant. The judge noted, at [42], the sponsor's claim that she met the appellant in April 2018 and lived with her *"for 1.4 months whilst the Kafila process was ongoing"*. The judge identified the internal inconsistencies in that evidence. The judge nonetheless noted the claim that the appellant lived with the sponsor from 8th March 2019 until 16th April 2019, when the kafalah process was formally completed and the Judge noted, at [43], the evidence of the sponsor that she later returned again between 11th December 2019 and 25th January 2020. Although we accept that the judge made no reference to the evidence of the sponsor of her breastfeeding the appellant, that is again immaterial. There was no evidence whatsoever before the First-tier Tribunal that either in Sudan or culturally, the breastfeeding of a child forms an integral part of the kafalah process in order for the care of a child under Sudanese or kafalah of Islamic law.

37. We reject the submission made by Ms Cronin that the facts here are similar to those in Singh v ECO such that the appeal should, as it was in that case, have been allowed. In Singh, the Court of Appeal set out the findings made by the Tribunal at paragraph [8] of its decision. The appellant there, the child, had been adopted when a baby, by the sponsors. The appellant had remained in the household of his natural parents in India. He called his natural parents, his uncle and aunt, and had been brought up to regard the sponsors as his real parents. The appellant did not know that he was adopted. The sponsors travelled to India regularly, at least once if not twice a year in order to see the appellant and when India, the appellant spent all his time with the sponsors, including sleeping in their room. The Tribunal accepted the sponsors were generally present on the appellant's

birthday and had always supported him financially and made decisions about his upbringing. He had started boarding school, as a result of a decision made by and paid for by the adoptive parents. The Tribunal accepted the sponsors and the appellant communicated frequently by telephone. The Tribunal found there had been a genuine transfer of parental responsibility and found that the adoptive parents supported the appellant financially and made all major decisions about his care and his future. That in our judgement, is in stark contrast to the findings made by the First-tier Tribunal Judge here.

38. In any event, the First-tier Tribunal Judge here concluded that the decision to refuse entry clearance is not disproportionate. We are quite satisfied that on no view of the facts could the respondent's decision be disproportionate on a proper approach, even if the judge was wrong to find that there is no 'family life' for the purposes of Article 8. In reaching the decision to dismiss the appeal for the reasons given, we are quite satisfied the judge had regard to the appellant's best interests as a primary consideration. As the judge noted, at [57], the Tribunal was not in a position to make a finding as to the suitability of the sponsor and her husband because there was quite simply inadequate evidence before the Tribunal. The judge was unable to consider whether the sponsors represent a safe and appropriate environment for a child in circumstances where there was no evidence before the Tribunal, of the type that would feature in an assessment completed under the Adoption and Children Act 2002. Although the return of the appellant to an orphanage may, on the face of it, be unlikely to be conducive to her best interests, the judge acknowledged, at [58], that he should not fall into the trap of trying to assess the child's interests solely from a UK perspective, and the risks associated with removing a child from her language culture and customs, by placing her with carers with whom she had spent a very limited period.

39. Although the appellant makes a number of criticisms and claims that the judge failed to take into account material evidence, and reached findings that cannot fairly stand, standing back and reading the decision as a

whole, it is in or judgement clear that in reaching his decision, the judge considered all the evidence before the Tribunal in the round, and reached findings and conclusions that were open to him on the evidence. A fact-sensitive analysis of the Article 8 claim was required. The findings made by the judge were findings that were properly open to him on the evidence before the Tribunal. The findings reached cannot be said to be perverse, irrational or findings that were not supported by the evidence. The grounds of appeal in the end amount to a disagreement with the findings and conclusions reached by the First-tier Tribunal.

40. It follows that in our judgment, there is no material error of law in the decision of Judge Rae-Reeves, and we dismiss the appeal.

NOTICE OF DECISION

41. The appeal is dismissed, and the decision of the First-tier Tribunal stands.

Signed **V. Mandalia** Date; 12th July 2022

Upper Tribunal Judge Mandalia