OUTER HOUSE, COURT OF SESSION

[2022] CSOH 37

P811/20

OPINION OF LORD ARTHURSON

In the Petition of

FATUMA MIREMBE (AP)

Petitioner

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: O'Neill QC, Caskie; Drummond Miller LLP
Respondent: Johnston QC, McKinlay; Office of the Advocate General

6 May 2022

[1] The petitioner is a citizen of Uganda. On 20 September 2004 she entered the United Kingdom on a student visa. In due course the petitioner married a French national who was living and working in the United Kingdom. On 5 December 2018 she was granted permanent residence as the spouse of a French national settled in the United Kingdom. The petitioner and her spouse had already separated by 5 December 2018 but had not yet divorced. The petitioner's son, CAK, was born in Uganda on 23 May 2004. He is also a citizen of Uganda. On 13 March 2020 the petitioner applied for a family permit on behalf of CAK. Prior to 13 March 2020 the petitioner had divorced from her former spouse. The respondent considered the petitioner's application for a family permit on behalf of CAK in

terms of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The 2016 Regulations give effect to the Citizens and Family Members Directive 2004/38/EC ("the 2004 Directive"). The 2004 Directive deals with the rights of citizens of the European Union ("EU citizens") and their family members to move and reside freely within the territory of the member states of the Union. The equivalent term used in the 2016 Regulations is European Economic Area national ("EEA national").

[2] The petitioner's application for a family permit on behalf of her son was refused by the respondent's decision-maker, the entry clearance officer ("the ECO"), in terms of a decision letter dated 7 July 2020. By virtue of the present petition the petitioner seeks the following remedies: first, reduction of the decision of 7 July 2020 that CAK be refused a family permit, and second, declarator that on 7 July 2020 CAK was entitled as a matter of EU law to enter the United Kingdom to join his mother, the petitioner, and that he continues to be entitled to a visa to enter the United Kingdom. These remedies were insisted upon by senior counsel in the course of the substantive hearing. That said, the position of senior counsel at the hearing evolved in such a way that it was alternatively contended on behalf of the petitioner that in the event of the court retaining any doubts in respect of the extent of the petitioner's EU law rights in the case, the court could and should make a reference to the Court of Justice of the European Union for an authoritative determination. Senior counsel for the respondent submitted that the petitioner's case was quite clearly not one in terms of which such a reference was required, the law on matters pertaining to the determination of the application for a family permit being clear, and that the court should in any event refuse the remedies sought by the petitioner.

[3] Against that uncontentious factual background, and having regard to the position of the parties in respect of the remedies sought, it is plain that there is a single issue only for

the court to determine in this case, namely whether the respondent erred in law in her decision dated 7 July 2020 to refuse to issue a family permit to allow CAK to join the petitioner in the United Kingdom.

Submissions for the petitioner

[4] Senior counsel contended at the outset of his submissions that the status of the petitioner as a third country national with a permanent right of residence in the United Kingdom allowed for further family rights to be derived from a family member who was not an EEA national. The 2016 Regulations required to be interpreted and applied by the respondent, and by the court, in a manner which would ensure the full effectiveness of the provisions of the 2004 Directive in the particular circumstances of the present case: *Litster* v *Forth Ports Authority* 1989 SC (HL) 96.

[5] Senior counsel submitted that the respondent's decision-maker had erred in ruling on 7 July 2020 that the petitioner's family permit application had not met all of the requirements of regulations 2 and 12 of the 2016 Regulations. Senior counsel observed that while the respondent had accepted that stepchildren of an EEA national fell within the relevant definition of family member, it appeared that the construction adopted by the decision-maker had been to the effect that ex-stepchildren were not so covered. It was submitted that no wording in the 2004 Directive justified such a reading. Further, in so far as it could be said that CAK would not be coming to the United Kingdom to accompany his stepfather, on the basis that it was clear on the facts that he would be seeking to come to the United Kingdom in order to live with the petitioner, his mother, in terms of the decision of the Court of Justice in *Ogieriakhi* v *Minister for Justice and Equality and Others* [2014] 1 WLR 3823 the true question for the purposes of consideration of a derived right of

residence in respect of a spouse was whether the marriage existed as a matter of law, rather than whether it subsisted in fact. The obligation on the court was to give the broadest possible interpretation of rights conferred under the 2004 Directive, that is to say to give a generous interpretation in a purposive manner in order to ensure not just that the rights of EEA nationals are protected but also the rights of those who derive them in respect of their status as a spouse. It was submitted that the term employed in article 2 of the 2004 Directive in respect of "family member", namely "the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner", encompassed the petitioner and CAK, and that the respondent's decision-maker had fallen into error in not so holding.

[6] Indeed, the approach adopted on behalf of the respondent had not been one which was in accordance with the appropriate purposive approach commended by senior counsel for the petitioner, namely the protection of the family members of third country nationals, including ex-spouses, and their direct descendants. Referring to *X* v *Belgian State* [2022] 1 WLR 594 at paragraphs 44, 73 and 74, senior counsel contended that such was the importance of the protection of third country nationals' rights, these should not be overturned, as he put it, by the adoption of a literalistic approach. Such rights of third country nationals were not autonomous, but were rights derived from the exercise of freedom of movement and residence. There was accordingly an available general jurisprudential justification for the broad approach to family residence rights contended for. The petitioner's rights were derived from the principle of the exercise of free movement of EU citizens in terms of the 2004 Directive. A generous and purposive interpretation of what constituted the class of family members, past or present, was appropriate.

[7] Senior counsel developed his submissions under reference to certain authorities. Referring to *SM (Algeria)* v *Entry Clearance Officer (Coram Children's Legal Centre*

Intervening) [2019] 1 WLR 5505 at paragraph 71 it was submitted that it was important for the court to have regard to provisions of the EU Charter of Fundamental Rights in cases specifically involving rights under EU law in respect of the exercise of the fundamental right to respect for family life between parent and child, and that in this exercise there was an obligation to take into account the best interests of the child. In the present case such Charter rights could be prayed in aid in a situation where the petitioner on behalf of CAK sought family reunification. Under reference to *R (Lounes)* v *Home Secretary* [2018] QB 1060, it was contended further that Treaty considerations could bolster eligible derived rights. Senior counsel referred additionally to *Metock* v *Minister for Justice, Equality and Law Reform* [2009] QB 318 at paragraph 83 as providing an example of the broad, purposive approach contended for, emphasising that the right of EU citizens to move and reside freely within the territory of member states should, if it was to be exercised under objective conditions of freedom and dignity, also be granted to the family members of such citizens.

[8] Turning to the distinction made in the 2004 Directive between chapter III rights of residence and chapter IV rights of permanent residence, it was of note that in chapter III article 13(2) provides that the right of residence of an EU citizen's family members who are not nationals of a member state was to be retained "exclusively on a personal basis". Articles 16 to 18, however, address the eligibility conditions which require to be satisfied for the acquisition of chapter IV rights of permanence residence. Senior counsel contended that the respondent had erred in failing to distinguish between what were very different kinds of rights. Reference was made to *RM (Zimbabwe)* v *Home Secretary* [2014] 1 WLR 2259, Gloster LJ at paragraphs 20 to 23. The petitioner fell within the territory of article 16 of the 2004 Directive, senior counsel submitted, which article, dealing as it did with chapter IV

permanent rights of residence, was not subject to the condition "exclusively on a personal basis", such as was provided for in article 13(2) in respect of chapter III rights.

[9] In this case the petitioner had an unconditional right of permanent residence, and, in the same way as any EU citizen who had an article 16 right, the petitioner could rely on other provisions of the 2004 Directive to allow rights of entry, which would specifically include CAK. This approach was consistent with the lack of any restriction in article 16(2) by way of wording such as "exclusively on a personal basis". Chapter IV rights were not subject to any conditionality, the chapter IV right holder having achieved permanent residence under article 16(2). Once the right of permanent residence had been obtained by an individual under the 2004 Directive, such associated rights involving the exercise of the fundamental right to family life, particularly between a mother and her minor child, would consequently arise. The right of the petitioner's family members to join her in the United Kingdom accrued because the petitioner herself held permanent resident status as a matter of EU law, the precise mechanism or route by which the status of permanent residency had been finally achieved being irrelevant. Once an EU law based permanent resident status had been achieved, it was that status which was the basis upon which the petitioner was able to continue to rely upon EU law in respect of the right of CAK to join her in the United Kingdom. Senior counsel in this way contended that a third country national such as the petitioner, having duly obtained a permanent residency right, now had the same EU law right to family joining her in the host member state as any lawfully resident EU citizen had, her permanent residency right not being retained "exclusively on a personal basis".

[10] Senior counsel advised that the phrase and concept of a residence right retained "exclusively on a personal basis" had been introduced late in the drafting history of the 2004 Directive. On that basis he submitted that the drafting exercise itself had provided and

allowed for an equivalence in rights of, and associated with, permanent residence between EU citizens and non-EU nationals, once that right of permanent residence had been duly attained in accordance with article 16 of the 2004 Directive. Senior counsel submitted that this conclusion was fortified by the application of the interpretative maxim *inclusio unius est exclusio alterius*, which maxim had been repeatedly recognised as a proper interpretative principle for EU law instruments. Drawing these arguments together, senior counsel submitted that the specific aim of the EU law permanent residency right being one of encouraging and facilitating the full social integration of migrants into the host member state, the purposive construction commended by him on behalf of the petitioner favoured the petitioner in the present case being able to rely on EU law in support of her family joining rights. Reference was further made to *CG* v *Department for Communities in Northern Ireland* [2021] 1 WLR 5919.

[11] Senior counsel proceeded to address general principles of non-discrimination and equal treatment. Although not a citizen of an EU member state, the petitioner in her own right held a right of permanent residence in the United Kingdom in terms of article 16(2) of the 2004 Directive. Recital (20) thereof applied the principles of non-discrimination and equal treatment. It was not open to the respondent to discriminate or deny equal treatment to the petitioner in respect of the approach taken to family members joining her in comparison with the approach which the respondent would adopt towards either EU citizens who had a permanent right of residence in the United Kingdom under article 16(1) of the 2004 Directive or to British citizens who had exercised their free movement rights. Indeed, any detriment or difference in treatment as regards the petitioner's family joining rights compared to individuals falling within these two classes would, it was submitted,

constitute unlawful discrimination in breach of EU law. Reference was again made to *X* v *Belgian State* and *SM (Algeria)*, both *supra*.

[12] At this point I should record that although my notes of the submissions indicate that this point was not advanced during the comprehensive oral submissions of senior counsel for the petitioner, in his extensive note of argument an *esto* case was set out. This argument, based upon the application of article 37 of the 2004 Directive, was as follows: *esto* national law granted greater family joining rights to others (whether British nationals or other EU citizens or non-United Kingdom nationals who had been granted, as a matter of purely of United Kingdom domestic law, indefinite leave to remain in the United Kingdom) than the level of family joining rights which are required to be afforded by United Kingdom authorities as a matter of EU law to persons such as the petitioner who have a right to permanent residence in the United Kingdom by virtue of article 16(2) of the 2004 Directive, then the rights ascribed to the petitioner should, in terms, be read up, as it were, to the highest level of family reunification rights afforded by the United Kingdom authorities to the members of all or any of these other classes of comparators. Where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment had not been adopted, observance of the principle of equality could be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. In this case, in failing so to recognise, the respondent had erred in law.

Submissions for the respondent

[13] On behalf of the respondent, senior counsel moved the court to sustain the respondent's third plea-in-law and to refuse the orders sought. Putting the respondent's

position shortly, senior counsel contended that the petitioner's application did not meet the criteria for a family permit in terms of the 2016 Regulations or the 2004 Directive and that the respondent had accordingly acted lawfully in refusing the petitioner's application.

[14] In terms of the application for the family permit itself, senior counsel observed that the application in this case had proceeded on the basis that CAK was seeking to join his mother, the petitioner, in the United Kingdom. The petitioner's application and note of argument did not address any issue pertaining to CAK's relationship with his former stepfather. It was important to remember that the petitioner was not an EU citizen and that CAK was therefore not seeking to join one. Applications for family reunification based upon the 2016 Regulations depend upon the establishment of a link between the family member seeking to come to the United Kingdom and an EU citizen who is lawfully resident in the United Kingdom. The petitioner being a third country national, no such relationship was present in the case of the petitioner's application.

[15] In the whole circumstances the criteria stipulated in the 2016 Regulations had not been met. Regulation 12 focused upon the relationship between (a) the subject of the application who was seeking to come to the United Kingdom and (b) an EEA national (defined in regulation 2 as "a national of an EEA State who is not also a British citizen"), and requires that "the family member will be accompanying the EEA National to the United Kingdom or joining the EEA National there". Various articles in the 2004 Directive, including article 16(2), conferred rights upon third country nationals based upon their relationship with an EU citizen. In this case the petitioner was not such an EU citizen. The only relevant EEA National or EU citizen in the present proceedings was the former husband of the petitioner. Had the application been made whilst the petitioner and her former husband were still married, on the basis that CAK would be joining the petitioner

and his stepfather in the United Kingdom, then CAK would have qualified as a "family member" of his stepfather by virtue of the definition of "family member" in the 2016 Regulations. As at the date of the application, however, the petitioner and her husband had divorced and therefore CAK would not be coming to the United Kingdom to join his former stepfather. In response to the question in the application concerning the identity of the EEA national sponsoring the application, the completed application named the petitioner herself. The petitioner was, however, not an EEA national and accordingly on the facts the necessary link with an EEA national was missing from the application.

[16] The scheme under the 2004 Directive related to the rights of EU citizens who are moving to a different EU state, being a state in respect of which they are not a national. The beneficiaries of the rights established under the scheme were such EU citizens and their family members seeking to accompany and join them. Accordingly, non-beneficiaries under the scheme would include people who are neither EU citizens nor the family members of EU citizens, and indeed EU citizens who remain in their own member state, not having exercised their right of free movement. The obverse of the latter proposition, senior counsel submitted, was that non-EU citizens, if they had acquired a right to permanent residence in a member state, were to be treated on an equal footing with nationals of that member state.

[17] In developing this analysis, senior counsel referred to four authorities. Referring to *X* v *Belgian State*, *supra*, at paragraph 74, he advanced the proposition that the rights of third country nationals deriving from EU law are not autonomous rights, but instead are rights derived from the exercise of freedom of movement and residence by an EU citizen. It was of the first importance therefore, when looking at the position of a third country national, to find a necessary link with such a citizen. Senior counsel further referred to *Metock, supra*, at

paragraphs 70 to 73, in terms of which the Court of Justice authoritatively clarified the scope of the 2004 Directive, stating at paragraph 73:

> "On this point, the answer must be, first, that it is not all nationals of non-member countries who derive rights of entry into and residence in a member state from Directive 2004/38, but only those who are family members, within the meaning of article 2(2) of that Directive, of a Union citizen who has exercised his right of freedom of movement by becoming established in a member state other than the member state of which he is a national."

Senior counsel submitted that the purpose and justification of those rights derived by third country nationals from the exercise of freedom of movement and residence by an EU citizen were based on the fact that any refusal to allow such rights would be liable to interfere with the EU citizen's freedom of movement by discouraging that citizen from exercising their rights of entry into and residence in a host member state: *Singh and others* v *Minister for Justice and Equality* [2016] QB 208 at paragraphs 50 and 51. Finally, senior counsel referred to *R (Lounes), supra,* at paragraphs 31 to 35, 37, 38, 41, 42 and 44 and in particular emphasised the importance of the passage at paragraph 37 in which the Court stated:

> "The court has accordingly held that, since, under a principle of international law, a member state cannot refuse its own nationals the right to enter its territory and remain there and since those nationals thus enjoy an unconditional right of residence there, Directive 2004/38 is not intended to govern the residence of a Union citizen in a member state of which he is a national."

[18] On the basis of this body of authority senior counsel contended that it was plain that the Court rigorously applied the beneficiary test or threshold set out in article 3 of the 2004 Directive and could only apply a purposive interpretation once satisfied that the people involved fell within the 2004 Directive. In order to rely on the rights which the 2004 Directive conferred, all of the requirements thereof required to be met. The Court in *R (Lounes), supra,* at paragraph 48 had further stated:

> "Thus, a derived right of residence of a third-country national who is a family member of a Union citizen exists, in principle, only when it is necessary in order to ensure that the Union citizen can exercise his freedom of movement effectively."

Senior counsel submitted that there was no such justification in the petitioner's case in respect of any purported derivative rights; indeed, the rights which CAK sought by way of the present petition to engage were not necessary to ensure that his French former stepfather could exercise his freedom of movement effectively.

[19] Senior counsel at this stage of his submissions referred to the Commission's Explanatory Memorandum (reference COM (2001) 257 final; 2001/0111(COD)) dated 23 May 2001, founding on that commentary material for the proposition that once a person has gained a permanent right of residence, that person is to be treated on an equal footing with nationals. Accordingly, the principle of equal treatment applied between EU citizens and host country nationals. Senior counsel submitted on behalf of the respondent that in the petitioner's case, when properly analysed, there was no EU citizen involved at all in the application exercise under consideration. That being so, the applicant in the present case could not benefit from rights under the 2004 Directive.

[20] Senior counsel turned at this stage to address what he described as the three distinct routes by way of which family reunification rights for third country nationals might be potentially be pursued within the European Union, which three routes were as follows:

(a) The 2004 Directive route, which was only available where the "sponsor" (the person whom the third country national is applying to join) is an EU citizen residing in a different member state from the state of which they are a national, which route would require in the United Kingdom an application to be made under the 2016 Regulations;

(b) The Council Directive 2003/86/EC ("the 2003 Directive") route, which applies where the sponsor is a third country national lawfully residing in a member state, but which route is not available for applications to come to the United Kingdom because the 2003 Directive has not been adopted in the United Kingdom; and

(c) The domestic law route, which applies (i) to EU citizens resident in their own member states who seek to have a third country national join them, and (ii) third country nationals, such as the petitioner, who have acquired permanent rights of residence within a member state such that they are entitled to be treated equally with the citizens of that member state, but who cannot use the 2003 Directive because it has not been adopted in the particular member state.

[21] Senior counsel submitted that it was clear on the facts of this case that the only route to family reunification available to the petitioner was within category (c), namely the route available under UK domestic law. The 2003 Directive was not in force and was not available. The 2004 Directive was not applicable as the requisite necessary connection mandated under article 3 thereof had not been established. The status of the sponsor was therefore all important. In the petitioner's case, the necessary engagement of the 2004 Directive did not arise on the basis that the petitioner and CAK were not EU citizens, and the threshold requirements of article 3 accordingly were not satisfied.

[22] The position of the petitioner was, it appeared, that once a non-EU citizen has duly obtained a right of permanent residency in a host state there is no longer any restriction on that person's derived family joining rights under the 2004 Directive, that third country national now having the same EU law rights to family joining in the host member state as any lawfully resident EU citizen because her or his permanent residency right is not retained "exclusively on a personal basis", all under reference to article 16(2) of the 2004 Directive.

Senior counsel submitted that this key proposition advanced in this case on behalf of the petitioner was a matter of pure assertion. In the light of the petitioner's status within route (c), it was clear that she would require to apply under United Kingdom immigration rules. The 2004 Directive did not govern the family reunification rights of non-EU citizens who had acquired the right of permanent residence in a member state. It was going too far accordingly to contend that one could derive a positive family right of such a nature, which the petitioner sought to read in by a side wind, as it were, simply because it featured elsewhere in the 2004 Directive. Applying the words of the 2004 Directive, the necessary beneficiary under the scheme thereof was simply absent.

[23] The acquisition of permanent residence described an assimilation to a position of equal treatment with nationals of the host state. It would therefore be inappropriate to seek to derive a family reunification right in such a setting by comparing it with rights given elsewhere in the 2004 Directive in respect of a separate setting. The rights of residence referred to in chapters III and IV were conceptually quite distinct. This was accordingly not the right place for the application of the interpretative canon founded upon on behalf of the petitioner. In the manner of apples and oranges, these rights simply did not cross over and in these circumstances it was illegitimate to draw any significance from the absence of the words "exclusively on a personal basis" in chapter IV.

[24] In concluding his submissions, senior counsel sought to address miscellaneous further points which had been advanced on behalf of the petitioner. On the matter of equal treatment, the comparison advanced on behalf of the petitioner between EU citizens and non-EU citizens with EU law rights and permanent residence was not a proper one. The rights of EU citizens were rights under the 2004 Directive whereas the rights of non-EU citizens were a matter of national law. Further, a person in the situation of the petitioner

with an EU law right of permanent residence had the same rights as a United Kingdom national in respect of family reunification. As the petitioner's rights arose under the same national law as those of a United Kingdom citizen there was no unequal treatment. The *esto* case advanced was a matter that could and should be left aside, there being no basis for it in the light of the arguments heard by the court. The present case was simply not one in which such a Court of Justice reference was at all appropriate, on a proper understanding of the different regimes applying to reunification on the facts of the present case. The law was clear and the court should refuse the remedies sought on behalf of the petitioner.

Discussion and decision

[25] The 2004 Directive relates to and sets out the conditions governing the exercise of the right to free movement and residence within the territory of member states by EU citizens and their family members, together with the right of permanent residence in the territory of member states for EU citizens and their family members. It further makes provision in respect of certain limits placed on these rights on grounds of public policy, public security or public health (article 1). An EU citizen means any person having the nationality of a member state, and a family member means a spouse, registered partner or direct descendants of an EU citizen and those of the spouse or partner of an EU citizen, and dependant direct relatives in the ascending line (article 2). Under the heading "Beneficiaries", article 3 provides that the 2004 Directive shall apply to all EU citizens who move to or reside in a member state other than that of which they are a national and to their family members, as defined in article 2, who accompany or join them. Article 16, the provision founded upon by the petitioner in the present case, makes provision in respect of the right of permanent residence of EU citizens who have resided legally for a continuous

period of 5 years in the host member state and of family members who are not nationals of a member state but who have legally resided with the EU citizen in the host member state for a continuous period of 5 years.

[26] The petitioner has made an application for a family permit on behalf of her son, CAK. Neither the petitioner nor CAK are EU citizens. On the face of the particular application under consideration in this case, CAK is not seeking to join an EU citizen. On the basis of the terms of that application, the generous, broad and purposive interpretation commended to the court on behalf of the petitioner to the concept of spouses residing together under reference to *Ogieriakhi, supra,* is one that on the facts does not serve to advance the petitioner's case. The focus of the 2004 Directive is on EU citizens who are moving to a different EU state rather than remaining in the state in respect of which they are a national. Certain rights are on that basis attributed in terms of the 2004 Directive to particular family members who join such moving EU citizens. Together, these persons are the beneficiaries under the scheme established under the 2004 Directive. There requires accordingly to be a nexus between an applicant or sponsor and an EU citizen who has exercised his or her free right of free movement. The rights of third country nationals under the 2004 Directive must be examined therefore exclusively through the lens of that third country national's connection with an EU citizen who has exercised such freedom of movement.

[27] The most helpful authority on its facts as canvassed by senior counsel in this case was in my view that of *R (Lounes), supra*. The analysis was one in which the "beneficiary" threshold was applied in terms of article 3 of the Directive. The Spanish national involved in the case had acquired British citizenship and had thereby ceased to fall within the definition of "beneficiary". Her residence in the United Kingdom being accordingly inherently

unconditional, the 2004 Directive no longer governed or regulated her position in the United Kingdom. Her spouse, a third country national, likewise did not fall within the definition of "beneficiary" and so could not as a matter of logic benefit from a derived right of residence on the basis of the 2004 Directive. In *R (Lounes)*, *supra*, the following telling insight is provided by the Court at paragraph 48 in respect of the philosophical foundations and purpose upon which the 2004 Directive is constructed:

> "Thus, a derived right of residence of a third-country national who is a family member of a Union citizen exists, in principle, only when it is necessary in order to ensure that the Union citizen can exercise his freedom of movement effectively. The purpose and justification of a derived right of residence are therefore based on the fact that a refusal to allow such a right would be such as to interfere, in particular, with that freedom".

[28] Against that background I am driven to conclude as a matter of fact and law that the derivative rights sought by the petitioner in her application to the respondent through the ECO, and indeed insisted upon before this court by her senior counsel, cannot be justified. The rights which the petitioner seeks to engage on behalf of CAK are plainly not necessary to ensure that the petitioner's former husband, a French national, can exercise his freedom of movement effectively and without interference. The uncontested facts in this case are important here. The petitioner's application for a family permit on behalf of CAK was made on 13 March 2020, by which date the petitioner had separated from and divorced her former spouse. It is clear from the terms of the application that the petitioner, as sponsor, was seeking for CAK, her son, to join her and indeed her alone in the United Kingdom. The former spouse of the petitioner had no relevant role to play in any sense in the application exercise which was considered and undertaken by the ECO on behalf of the respondent and refused in due course on 7 July 2020. In such circumstances there is in my opinion a material lacuna between the purported family member seeking to come to the United

Kingdom, namely CAK, and the only potentially relevant EU citizen present in the factual matrix before the court lawfully resident in the United Kingdom, having exercised his right of free movement in order to be there, namely the petitioner's former spouse, who is of course also the former stepfather of CAK.

[29] The petitioner herself is a third country national. She is not a British citizen, nor is she an EU citizen. It is conceded on behalf of the respondent that, had the application been made while the petitioner was still married to her former husband with a view to CAK joining the petitioner and his stepfather in the United Kingdom, CAK in these circumstances would have qualified as a relevant family member. The application having, however, been submitted only after the petitioner and her former husband had separated and divorced, it was quite obvious that CAK would not be travelling to the United Kingdom to join an EU national there. In declaring herself to be the EEA national sponsoring the application, the petitioner materially misstated the position. She was and is not an EU citizen, and, in this case, notwithstanding the cogent and learned arguments advanced her behalf, I have required to conclude that the necessary, and indeed essential, nexus with an EEA national/EU citizen is simply missing here.

[30] In these circumstances I have further reached the view that the assertion made on behalf of the petitioner that a third country national in her position, that is to say with a permanent chapter IV right of residency, has the same family reunification rights in the host member state as any lawfully resident EU citizen, simply because her permanent residency right is not retained "exclusively on a personal basis", is an unsustainable contention when the facts of the present case are examined in the context of the language of the 2004 Directive itself. Standing the careful wording and structure of the regime or scheme established under the 2004 Directive, it appears to be self-evident that the framers of the 2004 Directive, had

they intended to generate broader rights of family reunification, would surely have so stipulated by way of clear, precise and express provision. While the argument for a purposive and generous interpretation was attractively made on behalf of the petitioner, I have in the whole circumstances concluded that such an approach to the interpretation of the provisions of the 2004 Directive simply does not bring home the reunification rights craved on behalf of the petitioner in respect of CAK in this case.

[31] The argument advanced based on equal treatment also fails. The petitioner, having a permanent of right of residence in the United Kingdom and indeed indefinite leave to remain, has the same rights in respect of family reunification under domestic law as a British citizen. The relevant comparator in such circumstances cannot be the EU citizen, who is not a British citizen, lawfully residing in the United Kingdom; instead, the relevant comparator in respect of equal treatment must be a British citizen. The petitioner in this case has, however, periled her position exclusively on the terms of the 2004 Directive and the provisions of the 2016 Regulations, which of course apply only to EU citizens.

[32] The approach to construction which I have adopted is fortified in the generality by certain contextual matters referred to in the course of the discussion before the court, including the commentary set out in the Explanatory Memorandum referred to by senior counsel for the respondent. Looking at matters more broadly, however, in my opinion the focus and purpose of the 2004 Directive relate to the maintenance of the effectiveness of, and removal of interference from, the freedom of movement of EU citizens and their family members, as is indeed referred to at the very outset of the 2004 Directive. Matters related to family reunification rights are secondary in nature and require to be viewed as having an important but essentially supportive function in respect of the primary focus and purpose of freedom of movement. The object of the 2004 Directive and the 2016 Regulations is not,

accordingly, part of a wider policy of family reunification. Indeed, as I read the relevant authorities, the matter of reunification rights in respect of family members is to be viewed in its essence as part of a protective structure for EU citizens who have exercised their right of freedom of movement to another member state.

[33] In the whole circumstances I hold that the respondent acted lawfully in refusing the petitioner's application, being entitled so to do, and that accordingly no error of law attributable to the respondent in respect of the decision of the ECO dated 7 July 2020 has been established in this case. On the basis of the approach which I have taken to the regime or scheme established under the 2004 Directive and 2016 Regulations, I further hold that the written *esto* case and application for a reference must also fail.

Disposal

[34] The petitioner's application for a family permit not accordingly in my view falling within the terms of the 2016 Regulations, I propose to sustain the third plea-in-law for the respondent, repel the pleas-in-law for the petitioner and refuse the petition. All questions of expenses are meantime reserved.