IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002849
First-tier Tribunal No:
EA/12131/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 March 2023

Before

THE HON. MRS JUSTICE HILL
(sitting as a Judge of the Upper Tribunal)
and
UPPER TRIBUNAL JUDGE LINDSLEY

Between

OYEMA ANNA OSAGHAE
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Ms K McCarthy of Counsel, instructed by Chancery CS Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

Heard at Field House on 17 January 2023

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Nigeria born on 14th October 1953. She applied on 27th April 2021 for a family permit, under the EU Settlement Scheme on the basis that her husband is the father of an EEA citizen (French citizen) child (who is 39 years old) and had been granted a family permit and therefore she was entitled to come to the UK as the step-parent of an EEA national. Her application was refused on 29th June 2021.

2. Her appeal against the decision was dismissed by First-tier Tribunal Judge D Brannan following a hearing on 17th January 2022. This was on the basis that (i) she was not a "family member" under Article 10(e)(ii) of the Withdrawal Agreement, because she was not a "dependent direct relative in the ascending line" within Article 2(2)(d) of Directive 2004/38/EC; or (ii) nor did she have rights under the Withdrawal Agreement as an "extended family member".

3. The appellant sought permission to appeal the decision that she was not a family member on the grounds that the First-tier judge had erred in law in finding that a step-parent who is also a de facto parent does not meet the definition of parent. On 16th May 2022 permission was granted by First-tier Tribunal Judge Haria on the basis that this point was arguable.

4. On 18th November 2022 directions were given, including that the appellant had to file and serve on the Secretary of State a skeleton argument and any application to admit evidence under Rule 15(2A) of the Asylum Procedure (Upper Tribunal) Rules 2008 within 28 days.

5. On 11th January 2023 the appellant made an application under Rule 15(2A) for permission to adduce new evidence in the form of the reported Upper Tribunal decision in Celik (EU exit; marriage, human rights) [2022] UKUT 00220 (IAC), a letter from the Minister of Immigration and a letter from '3 Million'.

6. The matter came before us on 17th January 2023 to determine whether the First-tier Tribunal had erred in law, and if so to determine if any such error was material and the decision should be set aside and remade.

Submissions – Error of Law

7. The appellant's grounds of appeal drafted by Ms L Sinak argued, in summary, as follows. The appellant is not just the step-parent of the EEA child as a result of marriage but is also the parent who exercised parental rights over that child, and was a de facto parent. In these circumstances the First-tier Tribunal should have conducted an individualised assessment and concluded that the appellant is a family member. It is also argued that it was implicit in the grant of entry clearance to the appellant's husband that she should be granted entry clearance if she was found to be family member.

8. Support for the appellant's approach was drawn from the cases of Ayaz v Land Baden Wuerttemberg [2004] EUECJ c-275/02, Dulger v Wetteraukreis [2012] EUECJ C-451/11 and Alarape (Article 12, EC Reg 1612/68) Nigeria [2011] UKUT 413. It is submitted that this would also be in keeping with the EU Charter of Fundamental Rights.

9. The respondent's Rule 24 notice drafted by Mr Clarke argued, in summary, as follows. The Secretary of State does not accept that step-parents are dependent direct relatives in the ascending line, and has expressed this in guidance both historically and in the guidance for the EU Settlement Scheme Family Permit & Travel Permit Version 14 at page 63 which explicitly excludes step-parent from the definition. The appellant is therefore the spouse of a direct relative and not a direct relative herself. The case law cited does not relate to the definition of direct relatives in the ascending line, but to the position of step-children. The Withdrawal Agreement covers step-children at Article 9 (2)(c) but does not include step-parents at Article 9(2)(d).

10. At the outset of the hearing before us Ms McCarthy conceded that in order to be considered as a "dependent direct relative in the ascending line", a person has to be either a parent by birth or through legally acquired parental rights. She confirmed on instructions that the appellant had never formally adopted her step-son. On that basis she accepted that the appeal was in neither of these categories.

Conclusions – Error of Law

11. The First-tier Tribunal judge sets out the legal framework at paragraphs 10 to 26 of the decision, and concludes that the key question is whether the appellant is a family member as defined under Directive 2004/38/EC as these are the family members for the purposes of the Withdrawal Agreement.

12. The First-tier Tribunal then turns at paragraphs 27 to 33 of the decision to the cases, including all of those mentioned in the grounds of appeal, and other law with respect to the definition of family member under the Directive 2004/38/EC. It concludes that the cases are either not to do with the Directive (Ayaz & Dulger) or concerned step-children rather than step-parents (Alarape).

13. It is found that the Directive preserved wider family unity by stating in the recitals that extended family members should have their applications considered by member states in accordance with national law. On consideration of all of this the appellant is found not to be a family member, because she is not a direct relative in the ascending line, and instead to be the spouse of such a relative.

14. At paragraph 41 of the decision of the First-tier Tribunal it is found that the EU Charter of Fundamental Rights is of no assistance to the appellant as there is no evidence this forms part of the law following the departure of the UK from the EU.

15. We do not consider that the First-tier Tribunal erred in law in concluding that neither the cases relied on by the appellant nor the EU Charter of Fundamental Rights assisted her. What mattered for the purposes of the family member issue was whether she fell within the definition of "dependent direct relative in the ascending line". Ms McCarthy's concession at the hearing, which we consider was a sensible one, amounted to an acceptance that on the facts she does not do so.

16. On that basis we find no error of law in the judge's decision.

Rule 15(2A) application/ Application to Amend the Grounds of Appeal

17. This was an application to admit Celik and two documents. It was contended that Celik (which post-dated the First-tier tribunal judge's decision in this case) was relevant to the appeal as it shed light on the views of the Upper Tribunal in relation to how rights are acquired and protected under the Withdrawal Agreement; and that the documents provided clarity in relation to the facilitation process.

18. The application stated that paragraph 12 of the grounds generated an issue about "whether the [First-tier tribunal judge] was right to conclude that the decision triggering the appeal was not part of the facilitation process". It was

submitted that the First-tier tribunal judge had erred in law in not complying with Celik at [53]-[56].

19. We do not accept that paragraph 12 of the grounds can be interpreted in that way. It refers solely to the case law said to be relevant to the step-parent issue referred to above. It therefore makes clear that it relates to the "family member" issue before the First-tier tribunal judge. As the Secretary of State's Rule 24 response highlighted at [3], the appellant had not sought in her initial grounds to challenge the First-tier tribunal judge's findings on the "extended family member" issue, to which the question of facilitation is relevant.

20. At the hearing, Ms McCarthy sought to re-cast the appellant's position yet further, with reference to Batool and others v Entry Clearance Officer [2022] UKUT 00219 (IAC), but attempting to distinguish it. The thrust of her argument was that the Secretary of State should have "signposted" the appellant to the correct application.

21. We indicated at the hearing that the Rule 15(2A) application/ application to amend the grounds of appeal was refused. Our reasons were as follows. Although not specified as such, the Rule 15(2A) application was effectively an application to amend the grounds of appeal by adding a new ground. It was made very late. We note that both Celik and Batool were promulgated on 19 July 2022. No explanation was placed before us as to why the application had not been made shortly after this date; nor why it had not been properly advanced as an application to amend. Further, the Rule 15(2A) application was itself late, and lodged after the 28 days deadline given in the directions (albeit that it was said that the relevant case worker had been unwell during December 2022). We also considered that the merits of the proposed new ground were weak, given that although the appellant might have been able to apply to the respondent for facilitation in the application she made before 31 December 2020 this application had been refused and she had not appealed it. The appeal before the First-tier tribunal judge related to the refusal of an application made after 31 December 2020, which was not therefore one to which facilitation could apply.

Decision:

1. The Rule 15(2A) application/ application to amend the grounds of appeal is refused.

2. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

3. The appeal is therefore dismissed.

Mrs Justice Hill

Sitting as a Judge of the Upper Tribunal
Immigration and Asylum Chamber

23rd January 2023