IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000663
HU/51802/2023
UI-2024-000664
HU/51803/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 September 2024

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Melina Aleksui
Pavlina Aleksui
(no anonymity order made)

Appellants

and

Entry Clearance Officer

Respondent

Representation:

For the Appellants: Mr Holt Counsel instructed by Fountain Solicitors
For the Respondent: Mrs Newton, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 21 May 2024

DECISION AND REASONS

1. The Appellants are twin sisters born on the 4th April 2006. They are nationals of Albania. They appeal with permission against the decision of the First-tier Tribunal (Judge CL Taylor) to dismiss their appeals on human rights grounds.

Background and Matters in Issue

2. The background to these appeals is as follows.

3. The Appellants have a brother, Besnik Aleksui. He is a Greek national living in the United Kingdom with settled status under the EUSS. On the 24th May 2021 his parents applied for leave to enter the UK as his family members. These

applications were successful. His mother arrived on the 12th September 2021 with leave to under the EUSS; his father arrived in October. The Appellants, then aged 15, were left living in the family home in Albania along with an elder sister.

4. The Appellants had themselves made applications under the EUSS but these had failed; it is agreed that this was because as siblings they could not meet the requirements under Appendix EU and they were not within scope of the Withdrawal Agreement. On the 13th June 2022 the Appellants made applications for leave to enter under what was then paragraph 297 of the Immigration Rules. This reads:

> "297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:
>
> (i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:
>
> (a) both parents are present and settled in the United Kingdom; or
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> (b) both parents are being admitted on the same occasion for settlement; or
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> (c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or
>
> (d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or
>
> (e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or
>
> (f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and
>
> (ii) is under the age of 18; and
>
> (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
>
> (iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and

> (v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; and
>
> (vi) holds a valid United Kingdom entry clearance for entry in this capacity

5. Entry Clearance was refused on the 21st December 2022. The applications were refused with reference to paragraph 297(i) since neither parent is settled in the UK, and the ECO was not satisfied that there were serious and compelling family or other considerations which make exclusion of the child undesirable.

6. The Appellants appealed to the First-tier Tribunal. When the matter came before Judge Taylor they pointed out that the 'relative' that they were coming to join was their brother, who does have settled status. The Respondent had no objection to Besnik being identified as the Sponsor, since it made no difference at all to the decision: under paragraph 297(i)(f) it still fell to the Appellants to demonstrate that there were "serious and compelling" circumstances why they should be given entry.

7. The First-tier Tribunal heard live evidence from the Appellants parents and brother Besnik. It found them all to be generally credible. It found as fact that the Appellants remain living in the family home in Albania, and accepted that they are now living there alone, their elder sister having migrated to Greece in May 2022. The family here are in close and regular contact with the Appellants and their parents and brother have been taking it in turns in going to Albania to visit them. The Tribunal accepted that the girls have stopped attending school in Albania, but concluded that this was in anticipation of coming to the UK: there is nothing preventing them from resuming attendance. Overall the Tribunal was satisfied that it would be in the Appellants' best interest if they were living with their parents, but focusing on the wording of the rule, it could not be satisfied that the high test was met:

> "18. The respondent rightly submits that it if the circumstances of the appellants which need to be the focus. There is no evidence that they are suffering from neglect nor abuse nor that they have unmet needs, however if there are unmet needs, these can be met by the appellants' parents returning to Albania permanently. Whilst the appellant accepts that the appellants are minors, they are in their mid teens (they are 17 at the time of the hearing), and as such their care needs are lower than if they were younger. The appellants can remain in the family home, they have accessed medical treatment, they can maintain communication with their family as they do currently and the current, frequent visits can continue. Alternatively, either or both of their parents can return to Albania permanently".

8. The Tribunal's conclusions on Article 8 were as follows:

> "25. I find that the factors raised by the appellant do not outweigh the public interest because the refusal does not result in unjustifiably harsh consequences. The appellants have no unmet needs, their relationship with their parents and brother can continue as it currently does. These parties simply want to be

> together in circumstances where the appellants' parents came to the UK in the full knowledge that the appellants did not have entry clearance to join them. The desire to live as a complete family unit is somewhat undermined by the fact that the appellants' older sister lives in Greece. The appellants' circumstances do not outweigh the weighty factor of not meeting the Immigration Rules".

9. The appeals were accordingly dismissed.

10. The Appellants appealed on several grounds, only one of which was successful in attracting permission to appeal. By his decision of the 27th February 2024 First-tier Tribunal Judge T Lawrence found it arguable that the Tribunal may have erred in omitting from its proportionality analysis a point made on the Appellant's behalf. The argument is explained in the Appellants' grounds as follows:

> 16. At Paragraph 20, the Tribunal noted the Appellants' argument that "the parents are being asked to choose between exercising their EUSS right and being with their son, or returning to Albania to be with their daughters", highlighting the importance of ensuring that the EUSS rights are not infringed when conducting the proportionality assessment.
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> 17. In concluding that the parents can return to Albania to be with the Appellants (Paragraph 22), the determination is incompatible with the UK obligations under the Withdrawal Agreement, as well as the EUSS rights enjoyed by the Appellants' family members in the UK.
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> 18. Article 13 (4) of the Withdrawal Agreement provides that "The host State may not impose any limitations or conditions for obtaining, retaining or losing residence rights on the persons referred to in paragraphs 1, 2 and 3, other than those provided for in this Title. There shall be no discretion in applying the limitations and conditions provided for in this Title, other than in favour of the person concerned".
>
> 19. In suggesting that the parents can return to Albania, this is effectively a limitation and condition on retaining residence rights in the UK. Should the Appellants' parents leave for extended periods, they will lose their status under the EUSS. The Tribunal notes this within the Appellants' parents' evidence at Paragraph 17.
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> 20. In accordance with Article 13 (4), the Tribunal had no discretion to suggest that the Appellants' parents may return to Albania, when this would detriment their status under the EUSS and their rights under the Withdrawal Agreement, especially given that any limitations and conditions could only be found "in favour of the person concerned".

11. This is the matter in issue before the Upper Tribunal. At the hearing on the 21st May 2024 I heard arguments for the Appellants and Respondent and I reserved my decision, which I now give.

Discussion and Findings

12. This is an appeal by the Appellants. The Tribunal was asked to determine whether the decision to refuse them entry clearance amounted to a disproportionate interference with *their* Article 8 rights. It is however common ground that family life is indivisible, and that an interference with the family life of one is an interference with the rights of all those within the ambit of that individual's family: see for instance SSHD v Abbas [2017] EWAC Civ 1393. In Beoku-Betts v SSHD [2009] UKHL 29 Lord Brown of Eaton-under-Heywood expressed it like this [at §20]:

> "Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of the removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims."

13. I therefore accept, as a matter of principle, that the First-tier Tribunal was required to consider the impact of this decision on all effected members of the family. That included the Appellants' parents.

14. I further accept that in its somewhat brief reasoning at its paragraph 25, which I have set out above, the Tribunal failed to deal in any detail a submission made on behalf of the family, namely that the Appellants' parents would be forced to choose between enjoying what is termed their 'EUSS right' to be with their son, and their Article 8(1) right to enjoy their family life with their daughters. The question remains whether that omission is material.

15. There is no written evidence before me to explain the basis upon which the Appellants' parents were granted pre-settled status in order to come to the UK and live with their son. I see no reason, however, to doubt Mr Holt's submission that this leave was granted in recognition that they were each a 'dependent parent' as defined in annex A to Appendix EU. The key takeaway from this fact, as far as Mr Holt is concerned, is that the Respondent has recognised that unless Besnik's parents were given permission to enter the UK to live with him, he would be unable to continue to exercise his treaty right to free movement, and feel compelled to leave the UK in order to be with his parents. That this is so, submits Mr Holt, can be seen from the fact that Appendix EU preserves rights previously set out in the Immigration (European Economic Area) Regulations 2016 ('the Regs').

16. The first difficulty with this argument is that the 'rights' with which it is concerned are no longer rights at all. The United Kingdom has left the EU, and the benefits preserved by the Withdrawal Agreement now appear in the form of ordinary immigration rules: statements of policy made by the Secretary of State.

17. The second difficulty is that none of those rules operate to directly benefit the Appellants. There is no route of entry for the siblings of an EEA national with settled status. That the UK government specifically excluded siblings from Appendix EU is unremarkable, since siblings were not included in the definition of 'family member' under Regulation 7 of the Regs. As such they were not a class

who ever enjoyed an EEA right at all: they were, when certain conditions were met, extended family members who could, at best, expect their applications to join other family members to be facilitated and considered.

18. The third difficulty is that none of those rules indirectly operate to benefit the Appellants. There is no route for entry for the family members-of family members-of an EEA national with settled status. Again, this is unremarkable since there was never such a right under the Regs.

19. That said, is there something in Mr Holt's argument that this free movement chain will break if these girls are not given entry clearance? On the facts, no. The witness statements of the Appellants father, mother and brother make quite clear that this was a family who chose to move to the UK because the father, Mr Sokralis Aleksui, decided it would be nice if the whole family were together. Since their son was already in the UK they decided to be together here. Nothing in the evidence comes remotely close to establishing that Besnik, or even his parents, will leave the UK if these appeals are unsuccessful. The 'choice' between exercising their 'EU rights' (ie taking up the benefits offered by Appendix EU) and their family life with their daughters has already been made. I do not accept that the First-tier Tribunal erred in taking that into account. If I, and the Tribunal are wrong about that, the current construction of the rules is a strong indication that any interference caused by the refusal to grant entry clearance is in these circumstances wholly proportionate.

Decisions

20. The appeals are dismissed.

21. There is no order for anonymity.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
30th May 2024