Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02674/2020
HU/02670/2020
HU/02672/2020

THE IMMIGRATION ACTS

Remote Hearing by Microsoft Teams
On 8th September 2021

Decision & Reasons Promulgated
On 18th October 2021

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

FP and Others
(Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Pipe, Counsel instructed by Nova Legal Services
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

The Hearing

An anonymity direction was made by the First-tier Tribunal ("FtT"), and as the best interests of children are at the heart of this appeal, it is appropriate that a direction is made. Unless and until a Tribunal or Court directs otherwise, the appellants are granted anonymity. No

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report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

1. The resumed hearing was listed before me on 8th September 2021 and took the form of a remote hearing using Microsoft Teams. Neither party objected to a remote hearing. The first appellant and her partner joined the hearing remotely and were able to follow the hearing throughout. I sat at the Birmingham Civil Justice Centre. I was addressed by the representatives and the hearing was conducted in exactly the same way as it would be if the parties had attended for a face-to-face hearing. I was satisfied that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the need to take precautions against the spread of Covid-19, and to avoid further delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, and the complexity of the issues that arise. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

The background

2. The appellants are all nationals of Albania. The first appellant is the mother of the second and third appellants. They arrived in the UK in February 2019 and on 18th October 2019, they applied for leave to remain on family and private life grounds. Their appeal against the respondent's decision of 1st February 2020, was dismissed by First-tier Tribunal Judge Andrew for reasons set out in a decision promulgated on 23rd July 2020.

3. In order to put the factual background and family dynamics in context, I repeat what I said in paragraphs [3] to [6] of my error of law decision:

> "3. … Prior to their arrival in the UK in February 2019 the appellants lived in Albania. In her decision, Judge Andrew refers to the partner of the first appellant and father of the second and third appellants. At paragraph [10] she said:
>
> > "The appellant's partner - I shall refer to him as ECP - is an Albanian national. He came to the United Kingdom, illegally, on 11th March 2002. He formed a relationship with a British citizen KSVJ and on 25th September 2005 they were married in Albania. ECP and KSVJ have a child KLJ, who was born on 24th May 2016. The child is a British citizen. ECP and KSVJ remain married to one another, but they have not been in a relationship since 2006. ECP told me that he was unable to obtain a visa to come to the United Kingdom from Albania and he resided there until he came to the United Kingdom, again illegally, in February 2016."
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> 4. Judge Andrew noted that the child, KLJ, has always lived in the United Kingdom with her great aunt and uncle because of her mother's mental health difficulties. There was evidence before the Tribunal in the form of a letter from KLJ's great aunt that KLJ sees her mother on a regular basis. On 31st October 2017, ECP was granted leave to remain in the United Kingdom on the 10-year parent route, because of the active role played by him in the life of KLJ. There was evidence before Judge Andrew that ECP had made an "in-time" application for further leave to remain upon which a decision was outstanding. Nevertheless, Judge Andrew accepted that ECP is on the 10-year route to settlement. Although not relevant to the appeal before me, at the outset of the hearing Mr Pipe confirmed ECP now has further leave to remain until 29th April 2023, presumably reflecting the respondent's acceptance of his ongoing relationship with KLJ.
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> 5. As for the relationship between ECP and the appellants, Judge Andrew said:
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> > "12. ECP met the Appellant in Albania in June 2009. Two months afterwards they were engaged and then had a traditional wedding party. Following this the appellant moved into ECP's family home. They cannot be legally married because ECP is still married to his British wife. ECP told me he had commenced divorce proceedings in Albania, but they have not been able to progress as the court wishes to see KSJV and she is unable to travel there.
> >
> > 13. On 19th July 2010 EC was born and on 29th March 2013, AC was born. They are Albanian citizens.
> >
> > 14. In February 2016 ECP travelled to the United Kingdom and entered illegally. He left the appellants at home in Albania it would seem following a discussion between the main appellant and ECP. However, ECP continued to send money to the family and once he obtained status in the United Kingdom would visit them in Albania."
>
> 6. At paragraph [16] of the decision Judge Andrew noted the appellants had attempted, unsuccessfully, to enter the UK in 2018 with FP using a Portuguese ID Card to which she was not entitled. She noted, at [17], the

> appellants were more successful on 15 February 2019 when they entered the United Kingdom illegally."

4. Because it is relevant to my decision, it is also appropriate for me to record in this decision, the evidence that was before the First-tier Tribunal regarding the family's connections to Albania, and the evidence of ECP. At paragraphs [20] and [21] of her decision, Judge Andrew said:

> "20. The appellants have relatives who live in Albania. FP's mother and brothers and aunts and uncles live there. ECP has a brother who remains in Albania. I am satisfied that given the children were at school and pre-school in Albania on the balance of probabilities they will have some friends in that country as well. I am satisfied that all the appellants will continue to speak Albanian. I have nothing before me to show that FP has any English. It would appear from the application form that the appellants and ECP speak Albanian at home.
>
> 21. ECP made it clear in his evidence that if the appellants had to return to Albania, he would not follow them as he preferred to stay in United Kingdom where there were better opportunities for work. Accordingly, I approach any balancing exercise on the finding that ECP will not return to Albania. However, he confirmed he would continue to support the appellants if they had to return. This does not, however, mean that their relationship would come to an end. The appellants and ECP have been separated before for a long period of time during which the relationship was maintained by indirect contact and direct contact when ECP visited Albania. He has confirmed he would do the same again."

5. The decision of Judge Andrew was set aside by me for reasons set out in my error of law decision promulgated on 25th February 2021. I directed that the findings made at paragraph [19] of the decision of Judge Andrew are preserved, and that the decision will be remade in the Upper Tribunal. For the sake of completeness, it is useful for me to set out the preserved findings:

> "19. I accept that since their arrival in the United Kingdom there has been family life between the appellant and ECP and also, to a lesser extent, between the appellant and KLJ. It was difficult to be clear as to the extent of contact that ECP and KLJ and the appellants enjoy together because of differences in their evidence but I do accept that generally contact takes place on a weekly basis and that on occasions KLJ stays at the home of the appellants and ECP overnight or for one or two nights. I also accept that ECP makes some financial contribution to KLJ. However, as is made clear by KLJ's great aunt at page 85 of the respondent's bundle 'It is KLJ's choice to continue to live with my husband and myself because this is what she is used to as she has lived in the same house with us most of her life and attended local schools'. This is why I say that the family life KLJ enjoys with

> ECP and the appellants is less than if she had been living with them on a full-time basis. To some extent I am satisfied that KLJ has her own family group in the United Kingdom although she also has a family group with the appellants and ECP."

6. By email sent to the respondent on 10th March 2021, and copied to the Tribunal, the appellants' representatives informed the respondent that they do not intend to call witnesses to give further live evidence at the resumed hearing and they consider it would be appropriate to invite the Tribunal to deal with the appeal on submissions and the evidence previously submitted.

7. At the outset of the hearing before me, Mr Pipe confirmed that the appellants rely upon the evidence that was before the First-tier Tribunal previously, and the evidence set out in an 'Addendum Appellant's Bundle' comprising of 54 pages that was sent to the Tribunal under cover of an email dated 2nd March 2021. Neither the first appellant nor any witnesses were called to give oral evidence before me.

<u>The issues</u>

8. The appellants have appealed the respondent's decision to refuse their application for leave to remain under s82 of the Nationality, Immigration and Asylum Act 2002 on the ground that the decision is unlawful under s6 of the Human Rights Act 1998. The appellants must satisfy me on the balance of probabilities that Article 8 ECHR is engaged. If it is, the burden shifts to the respondent to establish that the decision is proportionate.

9. It is common ground between the parties that the appellants cannot satisfy the requirements of Appendix FM of the immigration rules. The focus of the parties submissions was directed to whether the removal of the appellants to Albania would be disproportionate, and therefore in breach of their Article 8 rights.

<u>The evidence before me</u>

10. It is entirely impractical for me to refer in this decision to all the evidence that is before the Tribunal. I have before me, the evidence contained in the appellant's bundles that were before the First-tier Tribunal previously comprising of 147 pages and an 'addendum bundle' comprising of 43 pages. I also have a copy of the appellant's 'Addendum' bundle comprising of 54 pages that was filed with the Tribunal and served upon the respondent in readiness for the resumed hearing of the appeal before me. For the avoidance of any doubt, in reaching my decision I have had regard to all of the evidence before me whether that evidence is expressly referred to or not, in this decision.

11. I have carefully read the witness statements of the first appellant and ECP dated 18th March 2020, both of which were before the First-tier Tribunal. The first appellant sets out the background to her relationship and marriage to ECP. She confirms that in February 2016, ECP travelled to the UK to see is daughter, KLJ. She confirms that after ECP left Albania, she missed him and felt emotionally fragile. They kept in contact regularly, and ECP would regularly send money for their upkeep. She states that the three years apart were not easy and it was very tough for the children and her to be without ECP. She accepts that she entered the UK without a valid visa on or around 15th February 2019. She confirms that on their arrival in the UK the appellants got to meet ECP's daughter and KLJ loved being with her father, and stepsiblings. Being reunited with ECP enabled the first appellant to feel loved, secure and protected again. She confirms that the second and third appellants are now in full-time education and consider the UK to be their home country. She refers to the family and private life they have all established in the UK, and states that their plans for the future are to give the children the best possible life and to work very hard together and perhaps, one day, start their own business. The first appellant is very eager to work and support her family. The first appellant confirms that she has been living with ECP since August 2009, and they desire, for the foreseeable future at least, to settle and live permanently together in the United Kingdom.

The first appellant claims they have sufficient funds to support themselves without recourse to public funds. The first appellant refers to the reasons given by the respondent in the respondent's decision of 1st February 2020. The first appellant regrets the fact that she entered the UK clandestinely breaking the law for which she expresses remorse. At paragraph [36] of her statement, the first appellant refers to the family relationships in the following way:

> "My partner, our two children, I and my partners daughter [KLJ] have a strong and close relationship, and that her upbringing is shared between my partner and her legal guardian. My partner participates in all areas of her lives including participating in parents' evenings at [KLJ's] school. He visits her and she also stays over at our home regularly. Since we came to the UK, my two children have become inseparable with [KLJ]. She is part of us, and I consider and treat her the very same way as my other two children, and whenever people ask me now how many children do I have, I tell them that I have three children. My partner contributes financially for her maintenance."

12. In his statement, ECP also refers to the background to his relationship with the first appellant and how that has developed. He confirmed that he is in a genuine and subsisting relationship with the first appellant, demonstrated by their commitment to each other and their children. At paragraph [23] of his statement he states:

> "The impact on my life and my daughter if [the first appellant] and our two children had to leave the country would be too devastating to even think about. The questions firing around in my mind would be "how am I going to live without my partner and my two children from this relationship who are the apple of my eye?", "How will I even begin to imagine life without them?", "How will I and my daughter from a previous relationship go about our daily life without my partner and my children who are very attached to them, and we will miss them greatly?". My life would be empty and miserable without my partner and our two children. The stress of the court date and having to get so much evidence ready when all we want to do is get on with our lives and enjoy our life as family altogether. This is having such a devastating effect on my life already. I can't begin to imagine what life would be like if my family wasn't given leave to remain, not only do I have to stress about their immigration status but also the stress of my daughter from a previous relationship, who needs to be here to support her."

13. He claims it is not reasonable to expect him to give up his home and life in the United Kingdom and relocate to Albania. He also claims it is not

reasonable to expect the appellants to return to Albania to resubmit their applications.

14. In addition to the evidence set out in the witness statements made by the first appellant and ECP, I have been provided with letters in support of the appeal by KLJ and her guardian, who I refer to in this decision as LCT. LCT expresses the view that it would be in KLJ's best interests for the appellants to remain in the UK as KLJ enjoys spending the time she can with them, albeit that has been limited during the current pandemic. She confirms that KLJ will be spending weekends with ECP and the appellants again and the contact is very important to our. She confirms that the weekend contact provides her and her husband, "a break", given their respective ages. She claims that ECP works very hard to support his family but it is by no means clear he would be able to stay in the UK if the appellant's have to return to Albania. In her most recent letter, KLJ confirms ECP has asked her to write a letter stating why she wants the appellants to stay in the UK and how she would feel if they were sent back to Albania. She states the thought of them leaving this country is really upsetting and she hopes it does not happen. She looks forward to being able to stay at their house very soon, now the current restrictions are being lifted. She confirms she is regularly in touch with them, and she enjoys playing video games with her stepsiblings.

15. I also have before me an independent social work report prepared by Tahera Khan. I do not need to rehearse the entirety of the contents of the report. The background information provided by the appellants representatives is set out at paragraphs [3.1] to [3.4] of the report. The assessment was conducted remotely on 12th February 2021 and lasted for three hours during which the appellant, ECP, LCT and the children were interviewed. ECP assisted with translation when necessary. In section 6 of the report Tahera Khan identifies the documents that were reviewed by her including a number of character references, each of which are attached to the report and which I have read.

16. The information gathered during the assessment is set out in section 7 of the report. The history of the relationship between the first appellant and ECP was provided by them, and is set out in paragraph [7.1]. The first appellant was aware from the outset of the relationship that ECP was estranged from his wife, and that he had a daughter, KLJ. Tahera Khan notes that on 31st October 2017, ECP was granted limited leave to remain in the UK as he was keen to be part of KLJ's life. The report confirms that whilst in Albania, ECP maintained telephone contact with KLJ, although video contact was limited. At paragraph [7.2] of her report, Tahera Khan refers to the family and social links that the appellants and ECP have in the UK. Tahera Khan records, at [7.3], that the first appellant and ECP are both in good physical health with no diagnosed health needs or prescribed medication. She records, at [7.4], that they live in a three-bedroom house which is privately rented and that ECP is in full-time employment and the sole provider for the family. The views and comments of the first appellant and ECP are set out in paragraph [7.6] of the report. Both the first appellant and ECP are clearly worried about the future of their family life and the possible separation of the family unit. Tahera Khan records the first appellant does not have any family members in Albania that would support her, and her siblings live in Greece and Italy, and her elderly mother is currently in a care home. She records the concern expressed by LCT at the prospect of KLJ's siblings returning to Albania and the separation of the family which LCT fears, will impact on KLJ's emotional well-being and sense of belonging. The position of each of the relevant children, including their wishes and feelings, are set out at paragraphs [7.8] to [7.19] of the report. There is a general overview of the family's current situation in section 8 of the report and Tahera Khan notes the appellants have settled well and integrated into British society. She notes there are strong family ties and LCT is supportive of the role that ECP plays in the life of KLJ. Tahera Khan ascertained the wishes and feelings of the three relevant children, noting however that the second and third appellants are not fully aware of their current immigration status and the prospect of being forced to return to

Albania. Tahera Khan used a balance sheet approach, as set out in section 8.13 of her report, to evaluate the benefits and burdens to the children of remaining in their current circumstances and if the appellants were to return to Albania. Tahera Khan sets out her conclusions and her opinion at section 9 of her report. She notes the family enjoy a stable and supportive life at present, it is a close-knit family, and the first appellant and ECP are in a happy and harmonious relationship. She also notes there is a close bond between each of the three children which can be credited to the values placed on family life by the first appellant, ECP and LCT.

17. Tahera Khan records that prior to the Covid-19 pandemic, KLJ visited her father and the appellants every weekend, and she would stay over the whole weekend. Due to the current lockdown, physical visits have been limited and ECP visits KLJ at her home where they meet at a distance on the doorstep so that they can have ‘contact’. KLJ maintains contact with the rest of the family via social media and regular phone calls. Going forward, Tahera Khan considers there to be two options. First the appellants return to Albania without ECP, who remains in the UK providing for them financially and maintaining contact with KLJ. Tahera Khan states:

> “…My assessment is that the impact of this would be negative on the family, such reasons being that [the first appellant] relies heavily on [ECP’s] support and care of the children, she would have limited employment opportunities in Albania, securing accommodation would be difficult, the financial stress on [ECP] would be exacerbated, the children will no longer be able to access the current education they are afforded and [KLJ] would be separated from her siblings.
>
> Further to this [the first appellant] has limited support from extended family members in Albania and the children may struggle to integrate into Albanian culture and may struggle to adjust to the native language.…”

18. The second option considered by Tahera Khan is that ECP returns to Albania with the appellants. She states:

> “… however this would mean that [KLJ] is separated from her father again, the ties with her cultural identity from her paternal side of the family will be

> interrupted, the family would struggle financially as [ECP] would find it difficult to secure the same level of employment as he does in the UK further exacerbating circumstantial stresses which can have an adverse impact on the welfare of the children.
>
> Should the family be forced to return to Albania, contact between [KLJ], her father and half siblings would be limited to phone and video content. The prospect of visits will be limited due to financial difficulties."

19. Having considered those two options, Tahera Khan concludes as follows:

> "The outcome that would be in the best interests of the children in my professional opinion and based on the Balance Sheet exercise would be for the family to remain in the UK so that they can continue to live as a family, the children can continue to attend school and gain an education, this would also be in line with the wishes and feelings of all three children. Further to this [KLJ] would be able to continue developing her cultural identity from her paternal side by keeping close ties with her siblings and father, she is starting to learn Albanian herself and enjoys getting to know this part of her cultural heritage. The Balance Sheet exercise indicates that there is no benefit of [the appellants] returning to Albania. The burdens of leaving the UK would have long lasting impact on the children, the separation from their father and the daily supporting he offers to [the appellants]."

The parties submissions

20. On behalf of the respondent, Mr Bates submits that the existing 'status-quo' is that the family all live together in the UK, whereas the pre-existing 'status-quo' after ECP left Albania and prior to the arrival of the appellants in the UK, was that ECP lived in the UK having regular contact with KLJ, and the appellants lived in Albania, supported by ECP and having regular contact with him. He acknowledges that the 'optimal best interests' are for the family to be able to live together in the UK, but the best interests of the children are a primary, not a paramount consideration. He submits the issue in this appeal is the balance between the best interests of the children and the public interest in the maintenance of immigration control. Mr Bates acknowledges that ECP has been granted further leave to remain in the UK, based upon his relationship with KLJ and the role he continues to play in her life. KLJ is a

British Citizen, and the family dynamics are such that it would be unreasonable for KLJ to leave the UK.

21. Mr Bates acknowledges that the relationship between ECP and the appellants was not formed at a time when ECP was in the UK unlawfully, but submits, as set out in my error of law decision, the immigration status of the appellants is undoubtedly a factor that is relevant to the overall proportionality assessment on whether a fair balance has been struck between the individual and public interest. He refers to the decision of the Upper Tribunal in Rajendran (s117B – family life) [2016] UKUT 00138 (IAC) in which the Upper Tribunal noted in headnote [2]:

> 2. The "little weight" provisions of s.117B(4)(a) and (5) of the Nationality, Immigration and Asylum Act 2002 are confined to "private life" established by a person at a time when their immigration status is unlawful or precarious. However, this does not mean that when answering the "public interest question" posed by s117A(2)-(3) a court or tribunal should disregard "precarious family life" criteria set out in established Article 8 jurisprudence. Given that ss.117A-D considerations are not exhaustive, in certain cases it may be an error of law for a court or tribunal to disregard relevant public interest considerations.

22. Mr Bates submits that on the evidence before the Tribunal, ECP made a choice to leave Albania and to enter the UK unlawfully to establish contact with his daughter KLJ. He did so, leaving the appellants in Albania and knowing they may not be able to join him in the UK. Nevertheless, following his arrival in the UK, ECP was able to continue supporting the appellants in Albania and to maintain regular contact with them both indirectly and directly. The first appellant and ECP then chose for the appellants to enter the UK unlawfully by evading immigration control. He submits there is no suggestion that the appellants qualify for leave to remain in the UK under the provisions set out in Appendix FM and paragraph 276ADE of the immigration rules. ECP has a choice. He can continue to live in the UK with KLJ or he could return to Albania with the appellants and maintain contact with KLJ. Mr Bates submits the report of the independent social worker does not assist the appellants in any material way. He submits Tahera Khan strays into areas beyond her

expertise and her conclusion that the first appellant would have limited employment opportunities in Albania and securing accommodation would be difficult is without any evidential foundation. Similarly although it is correct that if the second and third appellants are removed to Albania, they would no longer be able to access the current education they are afforded, that fails to have regard talk to the education that would be available to them in Albania. The respondent accepts the appellants enjoy a family life with ECP and KLJ, but he submits, the simple fact is that ECP supported the appellants in Albania previously and has supported KLJ. That support can continue in the way it did previously. Mr Bates submits the second and third appellants are likely to be fluent in the Albanian language, and considering the issues from the perspective of the second and third appellants, this is not a case in which the appellants are able to establish that taking into account their best interests as a primary consideration, it would not be reasonable to expect the second and third appellants to leave the UK, given their background and the limited time they have been in the UK. Mr Bates submits that at the heart of the appeal is the separation of the appellant's from KLJ. He submits that on the evidence before the Tribunal, and taking into account the background and circumstances, the public interest in the maintenance of effective immigration controls outweighs the best interests of the children.

23. On behalf of the appellants Mr Pipe relies upon the Skeleton Argument that was before the FtT. He submits that on the evidence before the First-tier Tribunal, Judge Andrew found the case finely balanced. He submits that was a decision reached without the benefit of a report from an independent social worker but now with the report of Tahera Khan before me, the finely balanced assessment, now falls in the appellant's favour.

24. Mr Pipe submits the issue is whether the removal of the appellants to Albania is proportionate in all the circumstances. The use of the phrase

'Optimal best interests' by the respondent can be misleading. There is only one best interests assessment, and here, that is for the appellants and ECP to all be able to live together in the UK. Mr Pipe submits that on any view, the 'previous status quo' could not now be achieved because unlike previously, the appellants have now formed a relationship with KLJ, whereas they did not have that relationship previously, and it would be entirely artificial to now ignore that mutual relationship. Mr Pipe submits the fact the respondent has granted ECP leave to remain under the parent, on a path to settlement, is to acknowledge and recognise the importance of his relationship with KLJ. True it is that ECP and the first appellant entered the UK unlawfully, but the children cannot be blamed for the actions of their parents.

25. Mr Pipe submits that although Tahera Khan referred to two options in her report, the outcome under both options us unsatisfactory and could not be in the best interests of the children. Option one *(the appellants returning to Albania without ECP)*, would involve separation of the appellants from ECP and KLJ. He submits the observations made by Tahera Khan that the first appellant would have limited employment opportunities in Albania and that securing accommodation would be difficult, are simply matters of common sense. The important factor is the separation of the parents and the separation of the children from a parent and their half sibling.

26. Similarly, option two (*ECP returning to Albania with the appellants)* presents with its own difficulties. This would separate the appellants and ECP, from KLJ and that cannot be appropriate, given the established role that ECP plays in the life of KLJ and the relationship that has now been established, particularly between the siblings. Mr Pipe agrees that here, the focus is really upon the impact of the appellants separation from KLJ. He refers to the information provided by LCT to Tahera Khan as set out in the report and the letters written by her, that are in the evidence before me. Mr Pipe submits the relationships that KLJ has now formed with the

appellants are particularly important to her in circumstances where she does not have much contact with her maternal family. Mr Pipe refers to the conclusions and opinion expressed by Tahera Khan and submits that here, the public interest in immigration control is outweighed by the best interests of the children.

Findings and conclusions

27. It is not suggested that the appellants satisfy the requirements for leave to remain in the UK on the basis of their family life as set out in Appendix FM and paragraph 276ADE of the immigration rules. The issue is whether the appellants can succeed in an Article 8 claim outside the immigration rules.

28. I have considered the letters that are provided in support of the appeal. The authors of those letters attest to the nature of the relationship between ECP and the appellants, and the mutual love and respect they have for each other.

29. As Judge Andrew was before, I am satisfied that the appellants have undoubtedly established a family life in the UK with ECP and KLJ and that Article 8 is plainly engaged. I also find that the decision to refuse the appellants leave to remain has consequences of such gravity as to engage the operation of Article 8. I accept that the interference is in accordance with the law, and that the interference is necessary to protect the legitimate aim of immigration control and the economic well-being of the country. The issue in this appeal is whether the decision to refuse leave to remain is proportionate to the legitimate aim, which requires a fact sensitive assessment.

30. Although the appellants' ability to satisfy the immigration rules is not the question to be determined, it is capable of being a weighty factor when deciding whether the refusal is proportionate to the legitimate aim of enforcing immigration control. As set out by the Court of Appeal in TZ

(Pakistan) [2018] EWCA Civ 1109, compliance with the immigration rules would usually mean that there is nothing on the respondent's side of the scales to show that the refusal of the claim could be justified. Conversely, if the rules are not met, although not determinative, that is a factor which strengthens the weight to be attached to the public interest in maintaining immigration control.

31. Section 55 Borders, Citizenship and Immigration Act 2009 requires immigration functions to be discharged having regard to the need to safeguard and promote the welfare of children who are in the UK. The leading authority on section 55 is ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4. In her judgment, Lady Hale confirmed that the best interests of a child are "a primary consideration", which, she emphasised, was not the same as "the primary consideration", still less "the paramount consideration".

32. I find the starting point is that it is in the bests interests of the second and third appellant and [KLJ] to be with both their parents and where that is not possible, to be with at least one of their parents.

33. Here, KLJ is unable to live with both her parents. I accept KLJ's parents are ECP and KSVJ. They married in Albania on 26th September 2006. ECP applied for entry clearance in September 2005, but that application was refused on 23rd December 2005. KLJ was born on 24th May 2006 when ECP was living in Albania. ECP states in his witness statement, and I accept, that his relationship with KSVJ ended in 2006. I accept KSVJ has received long-term medical treatment and that KLJ's primary carer is LCT (*her maternal great aunt)* by whom she has been looked after, since KLJ was six months old. I accept that the summary set out in paragraph [8.5] of the report of Tahera Khan is an accurate reflection of ECP's involvement during the early years of KLJ's life:

> "[ECP] was away from [KLJ] since her birth and for the first nine and a half years of her life due to his unsettled immigration status, when [KLJ] was

born [ECP] was already in Albania. He left the UK on the 14th September 2005 and returned, clandestinely on the 14th February 2016."

34. I accept that following his return to the UK, ECP took steps to establish contact with KLJ and that he enjoys a meaningful relationship with her. That relationship allows KLJ an important opportunity to maintain her cultural identity and provides her with some stability. The recent pandemic has plainly had an impact upon the face-to-face contact they have been able to enjoy, but nevertheless, ECP has maintained contact with KLJ.

35. Insofar as ECP's relationship with the second and their appellants is concerned, I note that they were born on 19th July 2010 and 29th March 2013 respectively. They were 5 and 2 when ECP left Albania in February 2016 and they remained in the sole care of the first appellant until they arrived in the UK aged 8 and 5 in February 2019. They are now 11 and 8 years old. There is limited evidence before me regarding the arrangements between February 2016 and February 2019, but I accept the evidence of the first appellant that she missed ECP and that she felt emotionally fragile. I also accept that being separated from ECP will have been difficult for the appellants. There is however no evidence before me of any significant deterioration in the first appellant's mental health during that three year period, or of any particular difficulties that the appellants faced in Albania whilst they lived apart from ECP. There is nothing in the evidence before me to establish that the first appellant was unable to provide adequate care for the second and third appellants or that the second and third appellants had any unmet needs to the detriment of their physical and emotional health or wellbeing. I accept the evidence of the first appellant that they were able to keep in contact regularly and that ECP sent money to them regularly. The evidence before the First-tier Tribunal previously was that there was also some direct contact when ECP visited Albania.

36. Up until their arrival in the UK, the appellants do not appear to have had any meaningful relationship with KLJ. There is a paucity of evidence before me of any contact that they enjoyed with KLJ, but even if there was contact, I find it would have been limited to indirect contact. There is no evidence before me of KLJ having had any direct contact with the appellants prior to their arrival in the UK. I have considered what is said by KLJ in the letters that she has provided in support of this appeal and what is said in the statements of the first appellant and ECP. I accept that following their arrival in the UK, the appellants have been able to establish a relationship with KLJ. KLJ herself confirms that since her brother and sister have been in England, she has seen them regularly and spent time at their house, where she has a bedroom of her own. The language barrier has been overcome because her sister has learnt a lot of English and KLJ describes playing video games on the internet and spending time together. In a letter written by LCT, she expresses support for the appellants and confirms KLJ spent regular time with them and enjoys being with them and getting to know her brother and sister. She believes it would be disruptive for KLJ to lose that contact. I have no doubt KLJ enjoys spending time with the appellants. That is plainly apparent from what is said by KLJ and LCT and from the many photographs that are in the bundle before me. I accept, as KLJ states, she would miss the appellants if they had to leave the UK. She is clearly anxious of what the future holds for her in the event that the appellants and ECP leave the UK. I note that in her report, Tahera Khan states that due to the current lockdown *(her assessment was carried out on 12th February 2021)* physical visits have been limited, however ECP visits KLJ at her home and they meet at a distance on the doorstep so that they can have contact. She states that other than that, KLJ and the family are keeping in contact via social media and regular phone calls. Although I have no updating statements and the first appellant and ECP were not called to give evidence before me, I am prepared to accept that as restrictions have eased, more direct contact is likely to have been possible.

37. I considering the best interests of the children I have considered the report of Tahera Khan and attach due weight to the opinions that she expresses. I recognise that Tahera Khan is a qualified social worker and is experienced. There are, nonetheless, features of the report that cause me to give less weight to her report than might otherwise be the case. Her assessment is based upon one remote meeting that she had with the family that lasted three hours. Consent forms and children's exercises were posted out prior to the assessment for completion and return. The assessment over a period of three hours, I accept, is a fairly lengthy meeting, nonetheless, it can only provide a snapshot of the family and its dynamics. Tahera Khan takes at face value all that is said by those she interviewed, and where there are gaps, they do not appear to have been probed. I have carefully considered the Balance Sheet set out in her report identifying the various benefits and burdens to the children. Her overall opinion that the outcome that would be in the best interests of the children, based on the Balance Sheet exercise, is that the family should remain in the UK so that they can continue to live as a family, the children can continue to attend school and gain an education, and that this would also be in line with the wishes and feelings of all three children. She identifies the benefits to KLJ in continuing to develop her cultural identity from her paternal side. She expresses the opinion that the Balance Sheet exercise indicates there is no benefit to the appellants returning to Albania. She states the burdens of leaving the UK would have long lasting impact on the children, a separation from their father and the daily support he offers to the appellants.

38. Somewhat problematically, Tahera Khan strays beyond her expertise in conducting the Balance Sheet exercise that forms the underlying basis for her opinion and fails to adequately explain the basis upon which she reaches her conclusions as to the burdens and benefits. That impacts upon the weight that I attach to her overall opinion.

a. In addressing the 'wishes and feelings' and 'educational needs', she identifies the benefits to the children in the current arrangements continuing. She notes that if the appellants are removed to Albania there is a burden in that the second and third appellants would not have the same educational opportunities as they do in the UK. The evidential basis for that claim is neither set out nor explained. Tahera Khan has no expertise as to the education opportunities that would be available to the second and third appellants in Albania, and she fails to identify why the second and third appellants could not flourish from the education opportunities available to them in Albania.

b. In addressing the 'educational needs', Tahera Khan cannot identify any benefit to the children if the family move to Albania. She notes there is a burden in that the second and third appellants may experience a language barrier as they have forgotten some of the Albanian language. Tahera Khan noted the first appellant's command of the English language is limited and during her assessment ECP was available to translate. In her letter, KLJ confirms that she can now talk to her sister as she has learnt quite a lot of English. The second and third appellants have a good grasp of the Albanian language, and it is difficult to see why return to Albania, where they will be able to communicate in Albanian and they will receive an education, is not of at least some benefit to them.

c. In addressing the children's identity, Tahera Khan identifies the benefits to the children in the current arrangements continuing, including the ability to maintain their cultural identities and to have access to both their maternal and paternal family history, culture and heritage. She states that there is no benefit to the children if the family move to Albania in this respect. That fails to appreciate that the children will be returning to Albania, the country of their

own nationality and the country of which both their parents are nationals, and where they would have every opportunity to access Albanian culture and heritage. She identifies that on removal to Albania the second and third appellants would lose daily access to their paternal family, history culture and heritage. That is a to disregard the information provided to her by the first appellant and ECP regarding their family connections to Albania, as set out in paragraph 7.6 of her report and the evidence recorded in paragraph [20] of the decision of First-tier Tribunal Judge Andrew.

d. In addressing the ‘Five Outcomes’, Tahera Khan identifies the benefits to the children in the current arrangements continuing. She is unable to identify any benefit to the family returning to Albania. She notes that if the appellants are removed to Albania there is a burden in that there would be less income and job opportunities for the parents which may cause circumstantial stress, and therefore impact on their sense of safety and being healthy, as the emotional stress may transfer to the children. The evidential basis for that claim is neither set out nor explained. Tahera Khan has no expertise as to the employment opportunities that would be available to the first appellant in Albania. The burden identified fails to have any regard to the way in which the family supported themselves between February 2016 and February 2019, and the fact that there is no evidence of any adverse impact to their health, safety or economic well-being during that period.

39. I accept that as a starting point it would be in the best interests of each of the children for the family to remain together in the UK. However the best interests of the children is a primary consideration and can be outweighed by other factors in the overall proportionality assessment.

40. ECP returned to the UK in 2016 unlawfully. He has now been granted further leave to remain in the UK until 29th April 2023. At paragraph [21]

of her decision, Judge Andrew referred to the evidence of ECP that he would not follow the appellants to Albania as he would prefer to stay in the UK where there are better opportunities for work. There is no question of KLJ living in Albania. Like Judge Andrew did, I approach my assessment of this appeal on a finding that ECP will not return to Albania, and will remain in the UK to maintain the relationship he has established with KLJ. Although KLJ is clearly anxious of what the future holds for her in the event that the appellants and ECP leave the UK, she can be reassured that ECP has made it clear that he will remain in the UK whatever the outcome of this appeal. He will therefore be available to continue to support KLJ and LCT in meeting KLJ's physical and emotional needs.

41. Although I have no doubt that a refusal of leave to remain would have an impact upon the appellants relationship with ECP and KLJ in particular, this is a family unit that has been fragmented and lived apart previously. The children cannot carry any blame at all for the choices made by, and the actions of their parents. It is entirely understandable that KLJ would wish to maintain the relationship that she has now established with her step-siblings in particular, and that they would wish to continue their contact with her. They have demonstrated their ability to do so during the recent pandemic when face-to-face contact and engagement has been difficult, but the children have managed to stay in contact and maintain that relationship, remotely. I accept that regular indirect contact is very often a poor substitute for direct contact, but here, I have taken into account the chronology, the nature of the relationships and how they have developed. Although removal of the appellants to Albania would result in their separation from ECP and KLJ, this is not a case where the family unit has previously lived together for the duration of the children's lives, and separation of step siblings and a parent would have a considerable detrimental impact upon the children. Taking all the evidence before me into account, it is clear that KJL will remain with her primary carers, LCT and her husband. She will continue to benefit from

contact with her father, who will support her emotionally, and I find, promote her cultural heritage. I find that ECP and LCT are conscious of the relationship that KLJ has with the appellants, and they will support and promote that relationship going forward. I find that the best interests of the second and third appellants can equally be met by their remaining in the care of their mother, the first appellant who has been a constant feature in their lives and has provided them with stability. I accept that removal to Albania would result in their separation from ECP and KLJ, but I am satisfied that they are resilient to change as has been demonstrated by their ability to adapt to life previously in Albania without ECP, and then in the UK. They will be returning to their country of nationality where they will continue to be cared for by their mother and have the opportunity of embracing their cultural identity and heritage. They will also have the benefit of developing their relationships with members of their extended family in Albania. They will be able to maintain contact with KLJ and in the fullness of time, there is no reason why KLJ should not be able to travel to Albania with her father, to visit the appellants.

42. When carrying out my assessment of whether removal of the second and third appellants to Albania is disproportionate, I also take into account the length of their residence in the UK. They have lived in the United Kingdom since February 2019, and although I accept they are reasonably well settled into the English education system, they have not been at school for a lengthy period. There is likely to be some disruption caused by a move to a different education system, but neither is at a critical point in their education. They may well have formed some friendships with their classmates, but there is nothing in the evidence before me that suggests they would be unable to integrate into the Albanian education system, after a short period of readjustment.

43. In reaching my decision, I have also had regard to the public interest considerations set out in s117B of the Nationality, Immigration and

Asylum Act 2002. The maintenance of immigration control is in the public interest. As I set out in my 'error of law' decision, s117B(4) is not relevant here, and I am not mandated to attach little weight to the family life established between the appellants, ECP and KLJ. Nevertheless, the immigration status of the appellants is undoubtedly a factor that is relevant in the overall proportionality assessment and whether a fair balance has been struck between the individual and public interest.

44. Understandably, the appellants would prefer to continue their life in the UK and consider the UK to be their home and where their future lies. That is an entirely understandable and natural desire, but I must consider whether the decision to refuse leave to remain is disproportionate. I reaching my decision I have had particular regard to the appellants relationship with ECP and the relationship they have established with KLJ since February 2019, albeit with some constraints caused by the pandemic, and matters entirely beyond their control. I also note the decision to leave Albania by ECP and the first appellant and to enter the UK unlawfully, was entirely beyond the control of the second and third appellants and are decisions for which no blame whatsoever can be attributed to the second and third appellants. I have considered the letters provided in support of the appeal. The authors of each of the testimonials that are relied upon by the appellants speak of the appellants in very warm terms.

45. Against that I cannot disregard the fact that ECP entered the UK unlawfully to establish a relationship with LKJ and the appellant's presence in the UK has throughout, been unlawful. Although not ideal, as Judge Andrew recorded in paragraph [21] of her decision, the appellants and ECP have been separated before for a long period of time during which the relationship was maintained by indirect contact and direct contact when ECP visited Albania. He has confirmed he would do the same again.

46. Looked at and around, the appellants wish to remain in the UK with ECP and LKJ and do not want to be apart. That is an entirely understandable and natural desire. I do not doubt that the appellants would miss ECP and LKJ, and them, the appellants, but that is something which many families have to deal with when they relocate because their relationships or for a multitude of other reasons. Article 8 does not confer upon individuals the right to insist that they should be allowed to enjoy their family life in one country rather than another. The children have demonstrated their resilience and I am satisfied that the relationships that they have established since February 2019, are relationships that will endure through visits, telephone calls, modern means of communication and interactive video games. I have also noted the practical issue of the support that ECP provides to the first appellant in caring for the second and third appellants. I recognise that such help is valuable to the first appellant and the children. I accept that physical presence is preferable, but the first appellant and ECP have in the past managed, despite physical separation.

47. In my final analysis, I find the appellants protected rights, whether considered collectively with rights of others that they have formed a family life with and associations with, or individually, are not in my judgement such as to outweigh the public interest in the appellants removal having regard to the policy of the respondent as expressed in the immigration rules. For the reasons that I have set out, I am satisfied that on the facts here, the decision to refuse leave to remain is not disproportionate to the legitimate aim of immigration control. In the circumstances I dismiss the appeal on Article 8 grounds.

Notice of Decision

48. I dismiss the appeal on Article 8 grounds.

49. I make an anonymity order.

Signed **V. Mandalia** Date 20th September 2021

Upper Tribunal Judge Mandalia