IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-004851
UI-2023-004853
Formerly
EU/52777/2023 EU/52778/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 20 August 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

SIMRA ASLAM (1)
AFREEN FEMY NAUFAL (2)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Heard at 52 Melville Street Edinburgh on 30 April 2024
(further representations on paper)

Representation:
For the Appellant: Mr S Winter, instructed by Silk Route Legal
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal with permission against the decision of First-tier Tribunal Judge Prudham, promulgated on 16 October 2023, dismissing their appeals against decisions made by the respondent on 12 April 2023 to refuse to grant them pre-settled status under Appendix EU to the Immigration Rules ("EUSS"). The judge also dismissed the linked appeal of Naufal Mohammed Ashraff (stepfather of the first appellant and father

of the second appellant) but he did not seek permission to appeal against that decision.

Background

2. The factual matrix giving rise to these appeals is complex. Naufal Mohammed Ashraff (and Indian citizen) was previously married and lived in Ireland. He has a daughter, Hannah, from that marriage. She was born in 2003 and is an Irish citizen. Mr Ashraff later married Ms Femy Ibrahim (also an Indian citizen). The second appellant is Ms Ibrahim's daughter from a previous marriage; the second appellant is the daughter of both Mr Ashraff and Ms Ibrahim. Both appellants are Indian citizens. All of them now live together as a family in the United Kingdom.

3. On 21 July 2015, Ms Ibrahim was granted leave to enter the United Kingdom under the Inter Company Transfer route. Mr Ashfraff, Hannah and the appellants joined her as her dependants. Their status was later changed. Mr Ashraff was granted leave under the Tier 2 (general) route in 2018; Ms Ibrahim and the appellants were granted leave as his dependents until (initially) March 2023.

4. On 19 November 2019 Mr Ashraff, Ms Ibrahim and the appellants submitted applications under EUSS. In the case of the appellants, this was on the basis that they are dependents of a "Chen" primary carer, that is Ms Ibrahim and Mr Ashraff.

5. On 18 December 2020 Mr Ashraff and Ms Ibrahim were granted pre-settled status, bu the appellants' applications were refused, on the basis that they had extant leave in the United Kingdom. Ms Ibrahim challenged that decision by an administrative review which was ultimately successful.

6. On 22 July 2022, however, Ms Ibrahim and the appellants made fresh applications under the EUSS. These were refused on 12 April 2023 but Mr Ashraff was granted pre-settled status.

7. I note in passing that the residence card issued to Mr Ashraff on 12 April 2023 states, under remarks "Derivative residence Chen" as does Ms Ibrahim's card confirming pre-settlement issued on 18 December 2020.

8. The respondent's case is, in summary, that as the appellants had leave to remain as the dependants of Tier 2 migrants, they did not qualify under the EUSS, as they did not meet the definition of a person with a derivative right to reside.

9. On appeal, the judge found [15] that as the appellants had leave to remain until 28 March 2023, and that this had not been curtailed, they were lawfully present in the United Kingdom at the date of their applications and thus are not eligible under the EUSS.

10. The appellants sought permission to appeal on the grounds that the judge erred in that he had misunderstood that basis of the case put to

him, and that the fact they had extant leave was not determinative. In this case, it is argued that the status they had was precarious and could have been curtailed at any point, as they no longer satisfied the requirements to be treated as the dependants of Tier 2 dependants as the principal was no longer such a person. It was submitted also that the judge failed to consider whether the respondent had erred in treating the parents differently.

11. The hearing on 30 April was adjourned, as it was necessary to obtain further written submissions on the issues raised, in particular with reference to "Chen" derivative rights as opposed to "Zambrano" rights. Directions to that effect were issued.

12. The appellant served a skeleton argument on 16 May 2024. The respondent served her skeleton argument on 10 June 2024. The appellant replied on 17 June 2024.

The Law

13. Appendix EU provides so far as is relevant:

> EU14
>
> (a) The applicant is:
>
> (i)…; or
>
> (ii) … or
>
> (iii) …; or
>
> (iv) a person with *a derivative right to reside* [emphasis added]; or
>
> (v) …; and
>
> (b) The applicant is not eligible for indefinite leave to enter or remain under paragraph EU11 of this Appendix solely because they have completed a continuous qualifying period of less than five years; and
>
> (c) Where the applicant is a family member of a relevant EEA citizen, there has been no supervening event in respect of the relevant EEA citizen
>
> Annex 1 – Definition of person with a derivative right to reside:
>
> a person who has satisfied the Secretary of State by evidence provided that they are (and for the relevant period have been) or (as the case may be) for the relevant period they were:
>
> (a): or
>
> (b) ; or
>
> (c); or

(d) resident for a continuous qualifying period in the UK which began before the specified date and throughout which the following criteria are met:

(i) they are not an exempt person; and

(ii) they are under the age of 18 years (unless they were previously granted limited leave to enter or remain under paragraph EU3 of this Appendix as a person with a derivative right to reside and were under 18 at the date of application for that leave); and

(iii) their primary carer meets the requirements of sub-paragraph (a) or (c) above; and

(iv) the primary carer would in practice be prevented from residing in the UK if the person in fact left the UK for an indefinite period; and

(v) they do not have leave to enter or remain in the UK, unless this:

(aa) was granted under this Appendix; or

(bb) is in effect by virtue of section 3C of the Immigration Act 1971; or

(cc) is leave to enter granted by virtue of having arrived in the UK with an entry clearance in the form of an EU Settlement Scheme Family Permit granted under Appendix EU (Family Permit) to these Rules on the basis they met sub-paragraph (a)(ii) of the definition of 'specified EEA family permit case' in Annex 1 to that Appendix; and

(vi) they are not subject to a decision made under regulation 23(6)(b), 24(1), 25(1), 26(3) or 31(1) of the EEA Regulations, unless that decision has been set aside or otherwise no longer has effect

14. In the skeleton argument drafted for the appellants by Ms Bayati of counsel, it is submitted that [22]:

> It is clear that whilst the SSHD did not curtail the Appellants' leave to remain as dependants of a Tier 2 migrant, the SSHD could and should have curtailed their leave the moment that their father no longer had leave to remain as a tier 2 migrant, namely on 18th December 2020. Once their Tier 2 migrant parent's status changed on 18th December 2020 to pre settled status, the basis for their Tier 2 dependant leave no longer stood since the principal, the Tier 2 migrant, was no longer a Tier 2 migrant. Whilst the SSHD did not curtail their leave, and no reasons have been given for taking a different course in the Appellants' case as compared to their parents who were granted pre settled status, it remained the case that he could and should have done so and the Appellants did not in fact have rights of residence nor were they protected from any risk of removal.

15. It follows that there is an acceptance that the leave was not curtailed and that thus the appellants did have leave, albeit leave that could have been curtailed. But it was not curtailed and thus was extant at the relevant date. As the respondent submitted (skeleton argument, [7]) the power to curtail is discretionary. It was not exercised. Whether it should have been,

and whether any failure to do so was contrary to extant guidance, does not alter the fact that it was not curtailed.

16. The permissible grounds of appeal set out in the Immigration (Citizens' rights Appeals) (EU Exit) Regulations 2020 ("the Citizens' Rights Appeals Regulations") do not allow for an argument that the decision not to curtail was unlawful. Nor, for that reason, do they permit the argument that the respondent had erred in granting leave to the parents but not the appellants. That is a rationality challenge, and whatever merit it may have (and there does appear to be some inconsistency), it falls out with the scope of an appeal under the Citizens Rights Appeal Regulations.

17. For these reasons, I am satisfied that the decision to refuse status on the basis the appellants had extant leave, and thus did not come within the EUSS was correct, and thus the judge did not err in so finding.

18. I turn next to the submissions from the appellants with regard to the Withdrawal Agreement, and R (Akinsanya) v SSHD [2024] EWHC 469.

19. I note that it was not averred in the grounds to the Upper Tribunal that the judge erred in not allowing the appeal on the grounds that the decision was contrary to the Withdrawal Agreement, the other possible ground of appeal under the Citizens Rights Appeals Regulations. As can be observed from the grounds, the first heading is "decision not in accordance with the Immigration Rules and caseworker guidance". The second heading relates to Article 8 of the Human Rights Convention. At no point is it averred that the decisions were contrary to the Withdrawal Agreement. Nor was such a submission made in the appeal skeleton argument.

20. In these circumstances, it is perhaps telling that the appellants' skeleton argument states [30]that:

> "the Rules are not in accordance with the Withdrawal Agreement and the appeal falls to be allowed.

21. If that is so, then that is a vires challenge to Appendix EU and it falls out with the scope of the permissible grounds set out in the Citizens' Rights Appeals Regulations, and it is notable that the skeleton argument does not set out (i) how this does fall within the grounds, or (ii) why this ground was not previously put forward, and (iii) how it could therefore be an error on the part of the judge not to have addressed it. Further, and in any event, the basis on which it is said the appellants fall within the scope of the Withdrawal Agreement is not properly addressed.

22. Accordingly, I am not satisfied that that these arguments fall properly within the scope of the appeal. I have, nonetheless, considered them in order to determine whether there is any obvious error in the decision of the First-tier Tribunal, given the complexity of this area of law. I conclude that there was not.

23. As was noted in Akinsanya, the Withdrawal Agreement did provide for "Chen" carers [20]. Their position, as derivative rights holders, differs from "Zambrano" carers in that the child in question is a child of another EU state lawfully resident for the purposes of EU law in a host state, and requires her parents to be with her in order to exercise her right to reside under EU law effectively.

24. It is, however, difficult to see how the appellants as opposed to their parents, fall within the scope of the Withdrawal Agreement. While their sister, Hannah, is clearly within the scope of article 10.1 as an EU national, and the parents are the family members of such a person (article 10.1 (e)(i), and article 9 (a)(i)), the grounds do not explain how the appellants fall within the definition of family member of Hannah. They did not fall within article 2.2 of Directive 2004/38, and no proper argument is put as to why they would otherwise fall within scope, either within article 9 (a)(ii) or otherwise.

25. Accordingly, for these reasons, and while I have a considerable degree of sympathy for the appellants, given the parameters of the right of appeal, I conclude that the decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Notice of decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed Date: 12 August 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal