Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/06122/2013
OA/06118/2013
OA/06125/2013
OA/06121/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 20 March 2014	**On 19 May 2014**
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Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB

Between

THE ENTRY CLEARANCE OFFICER - HAVANA

Appellant

and

AGDP
C De Las MMT
ALMG
OMG
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondents: Ms C Grubb instructed by Hoole & Co Solicitors

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules

2005 (SI 2005/230). Neither party invited us to rescind the order and we continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Introduction

2. This appeal raises the issue of whether under the 'refugee family reunion' rule in para 352D of the Immigration Rules (HC 395 as amended) the second appellant can properly be described as having been "part of the family unit" of the sponsor, her father at the time that he left Cuba to claim asylum in the UK.

3. Although this is an appeal by the Entry Clearance Officer, for convenience we will refer to the parties in this determination as they appeared before the First-tier Tribunal.

4. The background to this appeal is as follows. The first appellant is the partner of the sponsor. The third and fourth appellants are their children. They are all citizens of Cuba. The second appellant is the child of the sponsor but not of the first appellant. She was born on 21 September 1999 as a result of a casual relationship between the sponsor and her mother. She is also a citizen of Cuba.

5. The sponsor, who is also a citizen of Cuba, arrived in the UK on 21 February 2007 in transit to Russia. He remained in the UK and in 2010 he was arrested by immigration officers whilst working in a restaurant. He successfully made an asylum claim and was granted refugee status on 20 May 2012.

6. All four appellants made applications for entry clearance to join the sponsor as a refugee in the UK under para 352AA (in the case of the first appellant) and para 352D (in the case of the second, third and fourth appellants). On 23 January 2013, the ECO refused each appellant's application. They appealed to the First-tier Tribunal.

The First-tier Tribunal's Decision

7. In a determination promulgated on 26 November 2013, Judge Harries allowed all four appellants' appeals. In relation to the first appellant, she was satisfied that the relationship between her and the sponsor was a genuine one and that their relationship existed before the sponsor left Cuba to claim asylum. In relation to the third and fourth appellants, Judge Harries accepted that they had lived together with the sponsor and first appellant as part of the sponsor's "family unit" at the time that he left Cuba to claim asylum.

8. In relation to the second appellant, Judge Harries also found that she was part of the sponsor's "family unit" before he left Cuba to claim asylum despite her not living full-time with the sponsor. She lived with her mother although she spent weekends and holidays with the sponsor, first appellant and their two children. The Judge's reasons for allowing the second appellant's appeal are at paras 26-28 as follows:

> "26. …I have taken full account of the submissions for the respondent in relation to the second appellant. I am asked to dismiss her appeal because she has been part of a separate family unit and not within that of the sponsor. I reject this submission. I find the sponsor's evidence credible and accept that he has taken responsibility for the second appellant from the outset supporting her both emotionally and financially as her father. The sponsor gives evidence of how close this appellant is to his other daughters, who are very close in age to her, and of her inclusion in his family unit in Cuba.
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> 27. I am satisfied that the sponsor gives a reasonable explanation for the second appellant wishing to unite with him in the United Kingdom, leaving her mother and siblings in Cuba. I find that the ECO has not properly approached this appellant's application by refusing it because she had not been residing with the sponsor at any point before he left the country. That is not the requirement of the Rule; the issue is whether she was part of the sponsor's family unit at the relevant time and I am satisfied that she was.
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> 28. There is case law which establishes that the issue of whether a child was the member of the refugee's family unit is a question of fact and does not necessarily depend upon them having ever lived together. I take account of BM (Columbia) [2007] UKIAT in adopting a purposive construction of the Rules having regard to the principle of refugee family unity. The appeal of the second appellant succeeds..."

9. The Entry Clearance Officer accepted the Judge's decision in respect of the first, third and fourth appellants. However, the ECO sought permission to challenge the Judge's decision in respect of the second appellant on the basis that she erred in law in finding that the second appellant was "part of the family unit" of the sponsor prior to him coming to the UK.

10. On 18 December 2013, the First-tier Tribunal (DJ J M Lewis) granted the Entry Clearance Officer permission to appeal. Thus, the appeal came before us.

Paragraph 352D

11. The applicable Immigration Rule is para 352D which provides as follows:

> "352D. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who is currently a refugee granted status as such under the immigration rules in the United Kingdom are that the applicant:
>
> (i) is the child of a parent who is currently a refugee granted status as such under the immigration rules in the United Kingdom; and
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> (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) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of his habitual residence in order to seek asylum; and

(v) would not be excluded from protection by virtue of article 1F of the United Nations Convention and Protocol relating to the Status of Refugees if he were to seek asylum in his own right; and

(vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity."

The Issue

12. The primary facts as found by Judge Harries are not in dispute.

(i) the second appellant has never lived full-time with the sponsor in Cuba. She principally lived with her mother;

(ii) the sponsor and the appellant's mother have never lived together;

(iii) the sponsor has supported the second appellant both financially and emotionally since she was born;

(iv) the second appellant has a close relationship with the sponsor and also the other appellants. The third and fourth appellants – the daughters of the first appellant and sponsor – are very close in age to the second appellant;

(v) the second appellant always spent weekends and holidays with the sponsor and other appellants in Cuba;

(vi) since the sponsor left Cuba, the second appellant has continued to spend weekends and holidays with the other appellants.

13. The crucial issue concerns para 352D(iv) and whether Judge Harries was entitled to conclude on these accepted facts that the second appellant was "part of the family unit" of her father before he left Cuba to claim asylum in the UK.

The Submissions

14. On behalf of the ECO, Mr Richards submitted that a distinction had to be drawn between "family" and a "family unit". He relied upon the decision of the AIT in BM and AL (352D(iv); Meaning of "Family Unit") Colombia [2007] UKAIT 0055, especially at [28]. He submitted that a purposive interpretation of the Rules would militate against a grant of entry clearance because it could not be a purpose of the Rules to take a young child away from a mother who had had her care when there was no evidence of her inability to look after the child. He submitted that it cannot be a purpose of the family unity rule to apply it so as to divide a family.

15. On behalf of the second appellant, Ms Grubb submitted that the rule should be given its ordinary and natural meaning and that a "family unit" meant precisely what it said, namely it was a family which formed a unit. She submitted that that issue was a factual question which the Judge had determined in the second appellant's favour. It was relevant, she submitted, to take into account financial and emotional support,

contact time, the extent of integration into another family unit and the extent of integration into the family that is claimed to form a unit. She submitted that there was evidence from the second appellant's mother (at page 99 of the original bundle) supporting the second appellant travelling to the UK to join her father. She submitted that the parents were in the best position to determine who should bring up the second appellant and where she should reside and there was nothing in the material before the Tribunal to suggest that it was not in the second appellant's best interests to join the sponsor. She submitted that there was nothing in para 352D requiring the Tribunal to look beyond the wording of the Rule when it said nothing about the need for parental consent or the issue of the best interests of the child.

Discussion

16. The only authority to which we were referred on the meaning of the phrase "part of the family unit" was the AIT's decision in BM and AL. In that case, the children of the sponsor, who was a refugee in the UK, sought entry clearance under para 352D on the basis that they formed part of his "family unit" before he left Colombia to seek asylum in the UK. The facts of that case have some similar features to the present one. There, the sponsor lived with, and eventually married, a woman and together they had a son and daughter who lived with them. The appellants were the sponsor's children born as a result of extra-marital affairs. They had never lived with the sponsor either together with their respective mothers or with the sponsor's wife. There was, however, evidence that there was a close relationship between the sponsor and the appellants. The AIT upheld the Immigration Judge's finding that the appellant had not lived with the sponsor, their father as part of his "family unit". In reaching that decision, the AIT offered some guidance as to the meaning of the phrase "part of the family unit".

17. First, the AIT, having referred to the UNHCR Handbook stated that (at [23]):

> "The policy of these provisions is indeed to promote family reunion."

18. At [25], the AIT rejected the argument that in order to form part of an individual's "family unit" it was necessary that they should live in the same household. Hodge J (President) concluded that whether individuals formed a "family unit" was a factual question. At [25], Hodge J said this:

> "We accept that if the phrase "family unit" were to be limited to children who were living in the same household as an asylum seeker prior to his leaving his country of habitual residence then the Rules could have said so. We acknowledge that the concept of a family is very wide and depends crucially on the context in which the word is used. Ascendant or descendant relatives, uncles, aunts and cousins are always likely to be regarded as members of the same family. Whether they form part of a family unit will depend very much on the facts…. "

19. Hodge J then went on to consider the situation where, perhaps arising out of divorce, a child's time was split between his parents. He said this (again at [25]):

> "… a so-called nuclear family is highly likely to be a family unit. The child of divorced parents who spends the bulk of his time with his mother and otherwise has

> regular contact with his father is certain to be part of the mother's family unit. Whether at the same time he can be regarded a part of the father's family unit will depend very much on the particular facts of the case".

20. Hodge J returned to the situation where the parents of a child lived apart at [27]-[28] as follows:

> "27. We regard the issue as to what is a "family unit" for the purposes of para 352D(iv) as a question of fact. In many cases it will be clear that a child was part of a family unit with an asylum seeker in his country of habitual residence. The child will have lived with the asylum seeker and perhaps another partner. Alternatively if there has been separation the reason for that separation may well be associated with the claim of persecution and a child might still remain part of the family unit from which the potential refugee had been temporarily separated. Here no such claim is made.
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> 28. If on the other hand the separation is the result of social choice by the parties and a separate family unit based upon the mother is created, it will be correspondingly harder to establish that a child is in reality a part of two different family units. This will be especially so if the child is young and the consequence will be separation from the mother rather than family unity as envisaged by the UNHCR handbook."

21. Mr Richards, on behalf of the ECO relies, in particular, on [28] of BM and AL.

22. Finally, the AIT again expressed concern about the situation where the effect of para 352D would be to separate a child from a mother in the country of origin in order to join the father in the UK. At [26], Hodge J said this:

> "In this case the purpose of preserving family unity was promoted and implemented by the decision at the request of the sponsor father to allow [his wife and their two sons] with whom the appellant had co-habited in Colombia to come to the United Kingdom as part of his family unit. There was no such application at that time in respect of the two appellants who were held by the Immigration Judge to have lived with their mothers. The Immigration Rules are understandably silent on whether it is right to promote a position where a child leaves one undeniable family unit with his mother to join his father in the United Kingdom simply on the basis that the child is a minor. Wide ranging child care and child protection issues are likely to arise where a decision to grant entry clearance potentially lead to the break up of a different pre-existing family unit in the country of origin."

23. We have not found this issue to be an easy one. In principle, the correct approach to the construction of para 352D is clear. In Odelola v SSHD [2009] UKHL 25, Lord Hoffmann at [4] stated that the correct interpretation of a rule:

> "…depends upon the language of the rule, construed against the relevant background. That involves a consideration of the Immigration Rules as a whole and the function which they serve in the administration of policy."

24. In Mahad v ECO [2009] UKSC 16, Lord Brown said at [10]:

> "The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy….The court's task is to

> discover from the words used in the Rules what the Secretary of State must be taken to have intended."

25. In ZN (Afghanistan) v Entry Clearance Officer [2010] UKSC 21, Lord Clarke dealing with the interpretation of paras 352A and 352D of the Rules said (at [36]):

> "The question is what policy is encapsulated in the Rules, which is essentially a matter of construction of the language of the Rules."

26. As the AIT recognised in BM and AL, the underlying purpose of para 352D is that of family reunion with the refugee in the UK. The difficulty is how to apply that purpose when reunion may also result in a separation of a child from one part of its family in the country of origin. Again, as the AIT made clear at [25] of its determination, what forms a family unit may be clear where there is a "nuclear family" but where circumstances have resulted in a child, for example through divorce, living with one parent but spending periods of time (including period of residence with) the other parent, the concept of a "family unit" may be difficult to apply to any particular facts or situation.

27. We agree with the AIT in BM and AL (at [25]) that to form part of an individual's "family unit" it is not necessary for a person to live in the same household as that individual although periods of residence may be a powerful indicator of integration within an individual's family unit such that it can be said that the person forms part of that family unit.

28. We also agree with the AIT in BM and AL that where there is separation as a result of "social choice" by the parties – as in a situation of divorce – it will be more difficult for a child to be said to form part of two different family units. That said, such a situation may well arise in a particular case. We see no reason why a child, for example of divorced or separated parents, cannot be part of two family units. It is a matter of common experience that in such situations a child may live with one parent (who may have remarried) and clearly form part of that parent's "family unit" but, nevertheless, spend periods of time and maintain a close connection with the other parent who may also have remarried and have other children whether of that second marriage or as step-children living them. In that situation, the relationship with the second parent's "family unit" may well make it possible to conclude that the child has sufficiently integrated into that family unit so as to form part of it. In our judgment, whether that is so is quintessentially a factual question taking into account all the circumstances relevant to the integration of that child into the second "family unit". Relevant factors will include the closeness of relationship between the child and the second parent, but also between the child and the other members, if any, of the parent's 'new' family unit such as partners and other children; the frequency and duration of contact and periods of residence as part of the second parent's family unit.

29. Whilst it may be that para 352D and the policy of 'family reunion' which it embodies was premised on a single, nuclear family unit in the country of origin, para 352D has to take account of situations where that paradigm has broken down in situations of separation, divorce or, as in this case, potentially two family units have formed from

the social circumstances surrounding the child's birth and upbringing. Although we do not regard the matter as entirely free from doubt, the AIT's decision in BM and AL is authority for the proposition that a child may be a member of more than one family unit. Mr Richards' submissions do not enable us to conclude that BM and AL was to that extent wrongly decided. In this case, the Judge found that there was a closeness not only between the sponsor and the second appellant but also between the second appellant and the sponsor's partner and their two children. The second appellant spent weekends and holidays living with what was undoubtedly the sponsor's family unit. That closeness continued even after the sponsor came to the UK and the second appellant continued to spend weekends and holidays with the sponsor's partner and their children even when he was absent. That integration with the sponsor's family unit is a distinguishing feature between this case and the facts of BM and AL. On these facts, in our judgment, it was open to Judge Harries to find that the second appellant formed part of the "family unit" of the sponsor prior to his departure from Cuba to claim asylum in the UK.

30. For these reasons, the Judge did not err in law in allowing the second appellant's appeal under para 352D of the Immigration Rules and this appeal by the Entry Clearance Officer must accordingly be dismissed. The First-tier Tribunal Judge made no direction and we make none.

31. It is important to note that para 352D does not have embedded within it any requirement to have regard to the best interests of the child. That is the concern which was expressed by the AIT in [26] of its determination which we set out above. Of course, some Immigration Rules are drafted in such a way that a child's best interests form part of the requirements of the rule itself either explicitly or implicitly, for example, para 297(i)(f) requires there to be "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" (see Mundeba (s.55 and para 297(i)(f)) DRC [2013] UKUT 88 (IAC)). Paragraph 352D has no such requirement within it and we do not see how the "natural and ordinary" meaning of the phrase "family unit" can embed a consideration of a child's "best interests". Equally, we do not see how the absence of words embedding a consideration of a child's best interests in para 352D could lead necessarily to a conclusion that para 352D should be interpreted so that every child could only have one "family unit" in the country of origin rather than contemplating the possibility of there being two such family units. A particular child's best interests may point in a contrary direction.

32. Like the AIT before us, we have struggled to see how a child's best interests can easily be factored into an application of para 352D. Section 55 of the Borders, Citizenship and Immigration Act 2009 which imposes upon a decision maker carrying out a function under the Immigration Acts an obligation to have "regard to the need to safeguard and promote the welfare of children" is, of course, restricted to situations where a child is "in the UK" (see s.55(1)(a)). No doubt, as a matter of policy derived from the UK Government's obligations under the UN Convention on the Rights of the Child, even out of country decision makers would, and should, have regard to a child's best interests before granting entry clearance (see Mundeba).

That duty would, of course, be directly imposed upon an immigration officer allowing a child entry into the UK on the basis of any entry clearance granted abroad. In our judgment, it must be through those mechanisms rather than through any interpretation of the ordinary and natural meaning of the words of para 352D that the welfare and best interests of children are taken into account and protected.

33. As we pointed out at the hearing, whether entry clearance should be granted in this case raises a number of issues not directly governed by the Immigration Rules. The decision that the second appellant should leave her mother (probably realistically thereby being deprived of any further contact with her mother) and be looked after by her father in the United Kingdom is not one that can be taken simply on the basis of compliance with those Rules. Where there is, as in this case, another family unit to which the child certainly belongs, there should in our view be investigation at both ends of the child's journey to ensure that the move from one family unit to another is both in the child's best interests and has the consent of the members of the other unit. In the present case the Cuban social service authorities have been closely involved with the second appellant and we think it would be desirable for them to confirm that the second appellant would be best served by leaving Cuba and settling in the UK; further, the authorities in the UK ought to be asked whether all the children (including the two children who are undeniably entitled to admission) are best served by the admission of another child of the father to live with them on a full-time basis in the UK given the limited financial resources which may be available to the family. The UK authorities may also have a view on whether it is in the best interests of the second appellant to remove her from her mother.

34. At the moment, because the emphasis has understandably been on whether the requirements of the Immigration Rules are met, there has been no investigation of these issues. In the circumstances of the present case, however, the question whether the second appellant should be removed from Cuba and brought to the UK for settlement raises issues not wholly answered by those Rules and in our view entry clearance should not issue until decisions have been made along the lines set out above.

Decision

35. The Entry Clearance Officer's appeal to this Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

Date: