Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08023/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25 July 2014	**On 7 August 2014**
Prepared on 26 July 2014	

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

B. M.
(ANONYMITY DIRECTION)

Appellant

And

ENTRY CLEARANCE OFFICER NAIROBI

Respondent

Representation:
For the Appellant: Mr Eluwa, Solicitor, Phil Solicitors
For the Respondent: Mr Deller, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Uganda (born 2.2.95) who applied on 3 September 2012 at the age of seventeen and a half, for entry clearance for settlement as the son of the sponsor, his mother, who had been granted LLR in the UK as a refugee on 3 August 2011. Her claim to

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asylum had been based upon her homosexuality, and the risk of persecutory harm she faced in Uganda as a result.

2. By decision made on 17 January 2013 the Respondent refused that application by reference to paragraph and 352D (iv) of the Immigration Rules. He was not satisfied that the sponsor and the Appellant were members of the same family unit at the date the sponsor had left Uganda in order to seek asylum.

3. The Appellants lodged an appeal with the First Tier Tribunal against that decision, and as a result the decision was the subject of review by the ECM on 8 August 2013. The ECM upheld the decision, noting that it was not in dispute that the Appellant had lived with his aunt since birth and had continued to do so until the date the sponsor left Uganda.

4. The appeal was heard and dismissed by Judge Black in a Determination promulgated on 17 April 2014. He had the benefit of hearing evidence from the sponsor. He noted that it was not in dispute before him that "*the Appellant was taken forcibly from the sponsor by her husband shortly after the child was born. Her husband took the baby to her father who placed him in the charge of the sponsor's sister. The Appellant says he lived with his aunt until her death in April 2012 when he moved to live with a friend of his aunt. The sponsor tells me that throughout the period the Appellant with her sister, his aunt, the Appellant and sponsor kept in contact and the sponsor was able to visit her son in secret. She says that they formed a family unit albeit they did not live permanently together."* [13]

5. The Judge went on to find that there were a number of inconsistencies in the sponsor's evidence, and concluded that; (i) her account of contact with the Appellant until she left Uganda in 2011 was not credible, (ii) that a letter said to have been written by the sponsor on 2/12/12 was a fabrication created to bolster the Appellant's application for entry clearance, (iii) that the sponsor did not have sole parental responsibility for the Appellant as claimed. The Judge did however accept that she "*had a degree of contact with the Appellant over the years before her flight, but I do not accept the Appellant was part of the sponsor's family unit at the time she left Uganda in order to seek asylum in the UK*." [22]

6. The Appellant applied to the First Tier Tribunal for permission to appeal, and permission was granted by Designated Judge Zucker on 7 May 2014. Although four grounds were advanced, the reality of the complaint was that the relevant provision needed to be read purposively, and that a child taken forcibly from a

parent as part of persecutory conduct of the parent would not thereby automatically cease to be a member of the "family unit" of the parent.

7. The Respondent filed a Rule 24 Notice dated 12 June 2014 complaining that the necessary documents had not been provided to her by the Tribunal, and that she was therefore unable to comment substantively upon the criticisms of the Determination made by the Appellant.
8. Neither party made a Rule 15(2A) application to introduce further evidence. I note that there has been no application for any witness to give evidence either to the First Tier Tribunal, or to this Tribunal, from abroad by electronic means; Nare (evidence by electronic means) Zimbabwe [2011] UKUT 443, ML (use of skype technology) [2013] EWHC 2091 (Fam).
9. Thus the matter comes before me.
10. I accept as Ouseley J did in CJ (on the application of R) v Cardiff County Council [2011] EWHC 23, the importance of the approach in Tanveer Ahmed v SSHD [2002] Imm AR 318. Documentary evidence along with its provenance needs to be weighed in the light of all the evidence in the case. Documentary evidence does not carry with it a presumption of authenticity, which specific evidence must disprove, failing which its content must be accepted. What is required is its appraisal in the light of the evidence about its nature, provenance, timing and background evidence and in the light of all the other evidence in the case, especially that given by the claimant. The same can properly be said for a witness' oral evidence.

Error of Law?

11. The grounds do not challenge the Judge's finding that the letter dated 2/12/12 was a fabrication, nor the rejection of the sponsor's claim that she had sole parental responsibility for the Appellant, nor indeed the general rejection of the sponsor's evidence as unreliable. Those findings must therefore stand.
12. The grounds argue that nonetheless the Judge did accept that the sponsor and the Appellant were separated in the course of persecutory conduct by family members consequent upon the discovery of the sponsor's sexuality. Moreover the Judge did accept that the sponsor maintained a degree of contact with the Appellant thereafter – even if she had not told the truth about its true extent, or the circumstances in which that was maintained. Accordingly it is argued that the Appellant was on any view a member of the sponsor's family unit upon his birth, that he did not automatically cease to be a member of it as a result of their forced

separation in the course of persecutory conduct by others, and that the sponsor by maintaining a degree of contact with him thereafter had demonstrated an intention that he should remain a member of her family unit even though their circumstances forced them to live apart.

13. It would not appear that either party referred the Judge to any policy guidance, or jurisprudence, issued by the Respondent in relation to the proper scope, or application, of paragraph 352D of the Immigration Rules. Whether they did, or not, it is plain that the Determination does not make any reference to such guidance or jurisprudence; which the parties accept before me must constitute an error of law. Although the issue at the heart of the appeal is one of fact, it is an issue of secondary fact, which can only be properly determined once the primary facts have been established and the correct principles applied to them. Although the challenge before me does not extend to the primary facts as found by the Judge, I am satisfied, and Mr Deller agrees, that the Judge did fall into a material error of law in his approach to the issue of secondary fact. I therefore set aside his decision, and remake it, there is no need to hear further evidence in order to do so.

The decision remade

14. Although the former API on Family Reunion has been withdrawn, there is no evidence before me to suggest that the Ministerial statement of 17.3.95 has been withdrawn; *Other dependent relatives may be admitted if there are compelling compassionate circumstances*. On the face of the evidence this would appear however to add nothing to the Appellant's case, because the sponsor did not claim (and the Judge did not find) that the Appellant was dependent upon her after their enforced separation in his infancy.

15. I note that the Court of Appeal in MS (Somalia) [2010] EWCA Civ 1236, summarised the policy behind the provisions made in the Immigration Rules for the reunion of the families of refugees as;
The policy is to allow the refugee to bring in family members, for sound humanitarian reasons. There may be further ancillary reasons to do with the State's own convenience; but essentially this is a humanitarian policy arising from the circumstances in which a Convention refugee finds himself.

16. I note the definition of "family members" to be found within Article 2 of the Council Directive 2004/83;
Article 2(h);"family members" means, insofar as the family already existed in the country of origin, the

following members of the family of the beneficiary of the refugee;

.....

the minor children .....or of the beneficiary of refugee. .....status, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law

and Article 9(2) of the Family Reunification Directive 2003/86 which (although it does not apply to the United Kingdom) seeks to limit the right to family reunification to,

"*refugees whose family relationships predate their entry*".

17. In BM and AL (352D(iv); meaning of "family unit") Colombia [2007] UKAIT 55, reference was made to the current UNHCR handbook [23-28]. The Court of Appeal also referred to the terms of the UNHCR handbook in MS (Somalia). They considered the scope and application of paragraphs 352A and 352D of the Immigration Rules when the issue before them was whether a member of the "family unit" of a refugee, could in turn bring into the United Kingdom members of his own "family unit".

18. I note the guidance to be found in BM (Colombia) as to the true nature of the test inherent in the phrase "a family unit" where it is used in paragraph 352D(iv), and the commentary to be found in McDonald 8th Ed #12.196-7. In BM the test was said to be a question of fact;

1. *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. 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 as part of the father's family unit will depend very much on the particular facts of the case.*

1. *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 Maria Naomi and her son Jans 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.*

1. *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.*
1. *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.*

19. The editors of MacDonald consider (#12.196 footnote 11) that in BM the Tribunal accepted that a purposive approach was required to the terms of paragraph 352D(iv). Certainly the Tribunal rejected the suggestion that a child could only succeed under paragraph 352D(iv) if he had actually lived with the sponsor as a member of his household, at the date he left his country of habitual residence.
20. Whether the child of divorced parents who spends the bulk of his time with his mother, and otherwise has regular contact with his father, could be said to be a member of his father's "family unit" was said in BM to depend very much upon the particular facts of the case. Why there should be room for much dispute as to whether or not the factual test was met in the event of this commonplace factual scenario was not however explained. On the face of it there is no obvious reason why the "family unit" test should not be capable of easy, and consistent application, one way or the other, particularly to such a commonplace scenario.
21. The Tribunal in BM were plainly concerned about the child protection and child welfare issues that could arise in the event of an application for entry clearance by a child who would leave the home in which he had lived with one parent, in order to make a new life with the other. They did not however identify how they were to be addressed, or why (if at all) such concerns would be any stronger in relation to a paragraph 352D application, than a paragraph 297 application.
22. The Tribunal considered however that in the commonplace factual scenario of the separation of parents, this would have resulted from a "social choice" that had been made by those parents. Thus it was considered that it would be "*correspondingly harder to establish that a child is in reality a part of two different family units*." This was said to 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*".
23. It is unlikely the Tribunal intended this to be read too literally. Not all couples separate as a result of a mutual decision. Nor is there any obvious reason why a child post

separation of their parents should be regarded as a member of the "family unit" of one parent to the exclusion of the ability to simultaneously be a member of the "family unit" of the other. Joint custody arrangements, whether formal, or informal, are not uncommon.

24. In my judgement, unless the "family unit" test is to be regarded as more restrictive than the ordinary meaning of the phrase would usually carry, then there is no obvious reason why a child should not be able to say, quite accurately, that he was after the separation of his parents, a member of the "family units" of each of his parents. Nor is there any obvious reason why such a child should not also be able to say, quite accurately, that he was also a member of the "family units" of his grandparents, if the strength of his relationships with them permitted him to do so. As the Tribunal said in BM the issue in any given set of circumstances is simply a question of fact.

25. On the other hand the term "family unit of the person granted asylum" must have been intended by Parliament to require more of an applicant than that he demonstrate that the sponsor is his biological parent. It must in my judgement import a requirement that he demonstrate that the sponsor had accepted responsibility as a parent for him as their child. Different parents can no doubt be expected to see that responsibility differently, and their circumstances may mean that they are obliged in practice to discharge that responsibility in many different ways. Like the proverbial elephant, that responsibility may be easier for a third party to recognise than to describe, but one would expect them to include the provision of the basic needs of shelter, and security. To go too far however in terms of prescription would run the risk of shutting out a child from reliance upon a feckless, or previously immature parent.

26. In my judgement some positive assistance can usually be derived from whether the "sole responsibility" test is met at the date the sponsor parent leaves the country of origin. If it is, then that is a strong indicator that the child forms part of his "family unit". However in this case, the Judge rejected the claim that the sponsor had sole parental responsibility for the Appellant at any stage, or at the date of decision. That is not in my judgement determinative of the appeal. The very nature of that test does not mean that if it is not met, the "family unit" test is not made out.

27. How then should the relevant question of fact be approached? The editors of MacDonald suggest the Tribunal's approach in BM was to adopt a purposive approach. That must be right. The multitude and variety of different factual scenarios with which the Tribunal must grapple on paragraph 352D applications, can only sensibly be approached in such a way. The Tribunal must also have

regard to the fact that it is not uncommon for a parent to be required by circumstances to work away from their home, visiting their partner and children when they can, and using their earnings to support them. The decision to do so does not mean of itself that the parent living away from those children has abandoned the children, or is severing their past relationship with them, or that in any sense those children should be regarded as ceasing to be part of that parent's family unit. Those principles must in my judgement inform the approach to be taken in a situation such as this, where it is accepted the physical separation of parent and child has been part of persecutory conduct of the sponsor. In making that finding the Judge accepted that the separation when the Appellant was aged eighteen months, has always been against the wishes of the sponsor, and in accepting that she sought to maintain, and did maintain a "degree of contact" with the Appellant he must be taken to have accepted that despite that enforced separation she had at all material times sought to maintain a parental relationship with the Appellant.

28. In the circumstances I am satisfied that the Appellant has established that on the balance of probabilities he was a member of the sponsor's "family unit" at the date in 2011 that she left Uganda to seek asylum. In those circumstances, the appeal is allowed under the Immigration Rules because that was the sole ground for the refusal by the Respondent of the application for entry clearance.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 17 April 2014 did contain an error of law in the decision to dismiss the Appellant's appeal, which requires that decision to be set aside and remade. I remake that decision so as to allow the appeal under the Immigration Rules.

Signed
Deputy Upper Tribunal Judge JM Holmes
Dated 26 July 2014

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Signed

Deputy Upper Tribunal Judge JM Holmes

Dated 26 July 2014