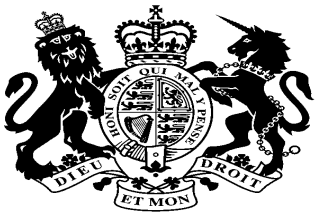

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number:** HU/09261/2017

THE IMMIGRATION ACTS

Heard at Glasgow	Decisions & Reasons Promulgated
on 17 January 2019	On 31 January 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

N A [M]

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

For the Appellant: Mr A Boyd, of Temple & Co, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Russia born on 22 June 2000 (and so became an adult shortly before the FtT hearing on 28 June 2018).

2. The appellant's father, her sponsor, is a citizen of Russia, born on 21 June 1965. He came to the UK from Georgia in April 2009. On 7 June 2013 he was granted leave to remain as a refugee. According to his statement, he last lived in family with the appellant in 2001, in Georgia. The appellant and her mother went to Chechnya in that year, without the appellant.

3. The appellant applied on 4 May 2017 for leave to enter the UK. The ECO refused her application by a decision dated 3 August 2017. Under paragraph 352D (iv) of the immigration rules, the ECO was "not satisfied that you lived together with your sponsor as part of the same family unit prior to his arrival in the UK". Under article 8 of the ECHR, the ECO was not satisfied that she had family life with the sponsor, but in the alternative found that the decision was proportionate and that, having regard to the duty in respect of children, there were no exceptional circumstances to justify a grant of entry clearance.

4. The appellant appealed to the FtT. Her grounds were stated only in terms of paragraph 352D of the rules, with no reference to human rights.

5. FtT Judge Clapham dismissed the appeal "under the immigration rules" by a decision promulgated on 6 August 2018.

6. The appellant's grounds of appeal to the UT are stated in her application dated 18 August 2018. Ground (1) is that the rule requires the person to have been part of the family unit when the sponsor left the country of his habitual residence, not at any later date. Ground (2) is that the appellant, as a matter of fact and law, remained part of a family unit with the sponsor.

7. FtT Judge Swaney granted permission on 13 September 2018, on the view that the judge might have taken the wrong approach to the rule, under reference to *BM and AL* (352D(iv); meaning of family unit) [2007] UKAIT 00055.

8. I observed to Mr Boyd at the outset that, as stated in the ECO's decision, the appellant had a right of appeal to the FtT under section 82(1) of the 2002 Act, i.e., on human rights grounds only. He acknowledged that to be the position.

9. The rule remains relevant. It provides thus:

> **Requirements for leave to enter or remain as the child of a refugee**
>
> 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 currently has refugee status are that the applicant:
>
> (i) is the child of a parent who currently has refugee status granted under the Immigration Rules in the United Kingdom; and
>
> (ii) is under the age of 18; and
>
> (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
>
> (iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of their habitual residence in order to seek asylum; and
>
> (v) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or Article 1F of the Refugee Convention if they were to seek asylum in their own right; and

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

10. The points which I noted from Mr Boyd's submissions were these:

(i) There was family life between the appellant and sponsor, and the case raised an issue of the proportionality of the interference with that family life.

(ii) It would be difficult for father and daughter to meet, other than by through success in this appeal. She would be unlikely to be granted a visit visa, if she failed in her appeal. The appellant could not visit Chechnya, where he would be at risk.

(iii) The UK might not be the only possible place to meet. However, there would be visa and expense constraints on meeting elsewhere, and that would provide short-term contact, not the quality of family life she would have by living here with her father.

(iv) The appellant is not part of the new family unit formed by her mother. She now lives with her paternal grandparents, i.e. with the sponsor's side of her family.

(v) It was in the appellant's interests as a child to join her father. Although now legally an adult, the case was to be decided as at a date when she was a child.

(vi) It was in the appellant's favour that her case met the terms of the rules. The judge went wrong by thinking it was relevant that the family unit (as originally constituted) came to an end at a later date. The family unit between father and daughter continued to exist.

(vii) The religious and social background, and Islamic law, was that the appellant even after reaching the age of 18 remained part of her father's family unit until he consented to her marrying, when she would become part of her husband's family unit.

(viii) As well as her father, the appellant has extended family, an uncle who has become an Irish citizen, and cousins, living lawfully in the UK. Her entry would promote her family life with those relatives.

(ix) The decision should be set aside, and the appeal should be allowed on human rights grounds.

11. The above circumstances were not all in evidence before the FtT. However, Mr Boyd said that they could readily be established, and were all relevant to remaking the decision.

12. Mr Boyd accepted that in remaking the decision section 117B of the 2002 Act, "Article 8: public interest considerations applicable in all case", which was overlooked by the FtT, would apply. He submitted that although there is no evidence that the appellant speaks English, s.117B (2) should not weigh significantly against her, because she is young and can learn; and that although she is not financially independent, s.117B (3)

should not weigh significantly against her either, because of the brutal circumstances under which she has lived, and because she could adapt and learn to support herself.

13. Having considered also the submissions for the respondent, I find that the decision should be set aside, but that the appeal falls again to be dismissed.

14. The appellant, on a strict construction, did not state relevant grounds of appeal to the FtT or to the UT. Her case was pitched in terms of compliance with the rule, not of human rights.

15. *BM and AL* dates from a time when there was a right of appeal in terms of the rules, which does not apply to this case; but the rule is of course an appropriate starting point.

16. Neither party in their submissions referred to *BM and AL*. It does not assist the appellant. The headnote says:

> "What is a 'family unit' for the purposes of para 352D(iv) Immigration Rules is a question of fact. It is not limited to children who lived in the same household as the refugee. But if the child belonged to another family unit in the country of the refugee's habitual residence it will be hard to establish that the child was then part of two different 'family units' and should properly be separated from the 'family unit' that remains in the country of origin."

17. The appellant has not lived with the appellant since she was an infant in Georgia in 2001. She can have little if any memory of direct contact with him. The FtT decision at [45] shows that the sponsor and his wife had separated by 2005. Although it was said in the UT that she now lives with her paternal side, I was referred to no evidence of when she might have moved. The FtT decision reads as if the evidence was that she grew up always with her mother.

18. Taking Georgia to be the sponsor's "country of habitual residence", as Mr Boyd submitted, it was within reason for the FtT to find that the appellant was not part of his family unit when he left there in order to seek asylum in 2009. The appellant and sponsor may disagree, but that conclusion is not shown to have involved the making of an error on a point of law.

19. Even if there were to be a finding of family life between father and daughter for purposes of article 8, that family life is exiguous, and the ECO's decision does not interfere with it to any significant extent, if at all. The appellant and sponsor may communicate as they do now, and may meet, irrespective of the outcome of these proceedings. Any application she may make in the future for a visit visa must be judged on its merits.

20. The considerations which the UT is bound to take into account in terms of section 117B (2) and (3) of the 2002 Act are not decisive on their own, but it is plainly against the appellant that she does not speak English, and is not financially independent.

21. Mr Boyd has made the most of every point which can properly be gleaned for the appellant, but the evidence does not disclose any disproportionate interference with such family life as exists.

22. The decision of the First-tier Tribunal, stating that the appeal is dismissed "under the immigration rules", is set aside. The following decision is substituted: the appeal, which was on human rights grounds only, is dismissed.

23. No anonymity direction has been requested or made.

17 January 2019
UT Judge Macleman