Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11424/2015

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 17th April 2018	**On 10th May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

MEAREG [T]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Worthington, Solicitor
For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Eritrea born on [ ] 1998. He was 17 years of age at the date of his application on 27th July 2015 for entry clearance to settle in the UK as the child of a recognised refugee, his mother [GT] "the Sponsor".

2. The Sponsor had arrived in the UK in July 2011 when she was brought here as a domestic worker by a family from Dubai in the UAE. She ran away from the family and claimed asylum. She was granted refugee status on 18th October 2012.

3. The Appellant appeals with permission against the decision of FtTJ Caswell dismissing his appeal against the Respondent's decision refusing him entry clearance on 26th October 2015, under paragraph 352D(iv) of the Immigration Rules and under Article 8, ECHR.

4. The Entry Clearance Officer (ECO), in coming to his refusal, was not satisfied on two points under paragraph 352D. First he was not satisfied that the Appellant had shown that he was not leading an independent life (352D(iii)). That part of the refusal has now fallen away and is no longer part of the decision before me. The second part of the refusal is that he was not satisfied that the Appellant had shown that he was part of his mother's family unit when she reached the UK in 2011 (352D(iv)).

5. In coming to his decision the ECO noted that the Appellant had been refused entry clearance on 5th March 2014 (the first application). This decision had been subject to appeal to the First-tier Tribunal (Judge Saffer) and had been upheld in a decision promulgated on 13th January 2015. It was said by the ECO that the same grounds which were raised in the first application were now being put forward in the current application. In other words, nothing new in terms of evidence had been put forward sufficient to displace the findings which had been made dismissing the first application.

6. When the present matter came before Judge Caswell she noted the oral evidence of the Sponsor. The evidence was summarised at [4] to [7]. She also noted the issue before her and expressed it in the following terms:

> "The Appellant's case is that the previous Determination of Judge Saffer, which dismissed his appeal against a previous refusal decision on the 13th January 2015, was based on different evidence, and the conclusions in that Determination should not be followed." [8]

7. The relevant facts of the Appellant's claim are of course well-known to both parties and for the purposes of this decision they can be summarised as follows. The Appellant is the only son of the Sponsor and her husband, whom she married in 1996. All three are nationals of Eritrea. The Sponsor's husband was made to enter military service and has remained in national service. She last heard from him in 2009. Because her husband was in the army and because it was said there was no one else to support the family, the Sponsor went to work in Dubai in the UAE as a domestic worker. She left her son in the care of his grandmother and travelled to Dubai in 2001. She remained with the Dubai family working for them for long hours with little time off and low pay from 2001 to 2011. It was at that point that they came to the UK and the Sponsor ran away from them and claimed asylum. During the period she was in the UAE, she sent small sums of money back to Eritrea for her son and her mother and also visited when she was granted leave from her employer. This resulted in four visits of four weeks each.

8. The Sponsor last visited the Appellant in Eritrea in 2009. She said in her evidence to Judge Caswell that she was unable to return to Eritrea after

that time because the authorities had found out that she had financially helped her brother to flee Eritrea. The Appellant remained living with his grandmother until he himself left Eritrea, probably illegally, in September 2013 and went to Ethiopia. He spent four months in a refugee camp, before being taken in by a family friend of the Sponsor, Mr Negasi. The Appellant presently remains with the Negasi family. His claim is that he is no longer welcome there and the Negasi family keep pressing the Sponsor to take him. The Sponsor has visited the Appellant in Ethiopia and there is evidence that money transfers have been sent there for the Appellant's support.

9. The FtTJ noted and considered the evidence before her. First she made a finding that there was no real issue as to whether the Appellant is leading an independent life and found that the evidential picture does not show that he is. That finding disposed of paragraph 352D(iii) and it is correct to say that no further challenge has been raised to that finding.

10. She then said the following at [17]:

> "The issue before me is whether the Appellant meets the test in paragraph 352D(iv) of the Rules, namely, that he "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." The Determination of Judge Saffer is my starting point, and it shows that he decided that the sponsor's country of habitual residence for this purpose was the UAE. I agree with that finding. The Appellant lived in the UAE from 2001 to 2011, when she came with the UAE family to the UK. Although she spent some short periods visiting Eritrea up to 2009 (sixteen weeks in total), I find that Eritrea was not her country of habitual residence from the time she left it in 2001."

11. The FtTJ noted that Mr Worthington referred her to the reported decision of **BM and AL (352D(iv); meaning of "family unit") Colombia [2007] UKAIT 55**. However even taking the principles in **BM and AL** into account, she decided that she could not find, on a true construction of the meaning of the Rules, that a person can voluntarily live in one country for a number of years, have their child living with and looked after by other people in another country, and still say that the child is part of their family unit.

12. She then reminded herself that what was before her was an appeal under the Human Rights Act, namely an Article 8 issue. Having done so, she considered Article 8 but nevertheless found that the Appellant's appeal stood to be dismissed.

Onward Appeal

13. The Appellant sought permission to appeal. The grounds seeking permission contended that the Appellant met the requirements of the Immigration Rules, in that he was part of his mother's family unit at the time that she fled Eritrea. The grounds then refer to **BM and AL** and contended that the FtTJ had erred by failing to have proper regard to the

reason for the separation between the Appellant and Sponsor, in that it was one of economic necessity rather than social choice. It was said that the Sponsor's working conditions in Dubai were not good. Nevertheless she sent the Appellant what money she was able to, spoke to him regularly, and made all the key decisions concerning him.

14. Further it was contended that this is not a case where a grant of entry clearance to the Appellant would result in his being taken away from the other parent, thus disrupting an alternative family unit. Finally it was said that whilst the living arrangements were unconventional, the FtTJ was wrong to conclude that the Appellant and Sponsor were not part of the same family unit.

15. Permission to appeal was granted in the following terms:

    1. By a Decision promulgated on 8 May 2107 (sic) Judge of the First-Tier Tribunal Caswell dismissed the Appellant's appeal against the Respondent's decision to refuse his application for entry clearance for family reunion with his mother.

    2. The grounds on which permission to appeal is sought submit that the Judge erred in law in finding that the Appellant was not part of his mother's family unit when she left her country of habitual residence to claim asylum. It is submitted that on a proper understanding of the principles enunciated in *BM & AL [2007] UKAIT 55*, the Appellant was part of his mother's family unit notwithstanding that she was living and working in the UAE and she had left him in the care of his grandmother. This is arguable.

    3. If the Appellant were to succeed on the above issue, then arguably he would meet all the requirements of paragraph 352D of the Immigration Rules and arguably the refusal of entry clearance would be unlawful under S.6 Human Rights Act 1998.

16. The Respondent served a Rule 24 response defending the decision. Thus the matter comes before me to determine whether the decision of the FtT discloses such error of law that the decision must be set aside to be remade.

Error of Law Hearing

17. Before me Mr Worthington appeared for the Appellant, Mrs Pettersen for the Respondent. Mr Worthington's submission relied on the grounds seeking permission. He said that what constitutes a family unit is a matter of construction and **BM and AL** emphasised that the concept of a family is wide and depends crucially on the context in which the word is used. He used the phrase, "no one size fits all." The term "family unit" is not limited to children living in the same household as the refugee. He said that in the present case the Sponsor had not abandoned her child but had gone to work in Dubai through force of circumstances in order to support her family back in Eritrea. She had left the Appellant in the care of his grandparents and kept in touch, visiting when she was able to. When he

left Eritrea, she was the one who arranged for him to live with the Negasi family in Addis Ababa. The FtTJ had applied the wrong test. The decision should therefore be set aside and remade allowing the appeal.

18. Mrs Pettersen in response defended the decision. She submitted that the FtTJ had properly set out and turned her mind to **BM and AL**. She gave proper consideration to drawing upon the guidance given in the jurisprudence. The FtTJ came to the conclusion that the Appellant was not part of the Sponsor's family unit whilst she was habitually resident in Dubai, and this was after a full consideration of the facts pertaining to this appeal. A proper construction of the Rule had been carried out. The meaning of "family unit" in this part of the Rule had to be looked at in the context of "habitual residence". The FtTJ made a finding at [19] that she could not find that a true construction of the meaning of the Rules meant that a person can voluntarily reside in one country for a number of years, have their child living with and being looked after by other people in another country and still say that the child is part of their family unit. These were findings open to the judge. The decision was sustainable and the appeal should be dismissed.

Error of Law Consideration

19. The issues before me are:

    i. did Judge Caswell err in her finding that the Appellant was not part of his mother's family unit when she left UAE and subsequently claimed asylum: and
    ii. is it the case that circumstances of this case in any event constitute a breach of Article 8 ECHR Family Life?

20. In coming to my decision, I note first of all the guidance given in **BM and AL** as to the true nature of the test inherent in the phrase "a family unit" where it is used in paragraph 352D(iv) of the Immigration Rules. In **BM and AL** the test was said to be a question of fact. I find that the FtTJ clearly kept **BM and AL** in mind when coming to her decision because she says at [18] the following:

> "Mr Worthington seeks to persuade me that the Appellant was part of the sponsor's family unit in Eritrea at the time she was habitually resident in the UAE, and that this meets the test in the Rules. He has directed my attention to various authorities, including *BM and AL* above. However, the facts in that case were different to those here. Although I accept the general principles, that what is a family unit for these purposes is a question of fact, and not limited to children who lived in the same household as the refugee, and that it is hard to find that a child is part of two family units (all of which derive from the reasoning in that case), I do not find that any of this assists the Appellant in the case before me...."

21. The FtTJ's reasons for finding as she did are then set out in [19] where she says:

> "I do not find that a true construction of the meaning of the Rules is that a person can voluntarily live in one country for a number of years, have their child living with and being looked after by other people in another country, and still say that the child is part of their family unit. If it is possible, I do not find that this is the case on the facts of this appeal...."

22. She then set out her findings that the Sponsor had not spent a great deal of time with the Appellant over the last sixteen years and had given him limited amounts of financial support not sufficient to meet his needs. On those findings she concluded that the Rule was not met.

23. Before me, Mr Worthington took exception to the concept that the Sponsor has in some way abandoned the Appellant by putting physical distance between them. His case is that the Sponsor kept in touch with the Appellant, visited when she could and took decisions in his life, underlining her responsibility for him. He added that the Sponsor could not be said to have exercised a lifestyle choice in going to the UAE; it had been a matter of necessity.

24. I find however that the Appellant did make a choice to work in the UAE and thereby to leave the care of her son to his grandmother. No doubt the choice made was difficult and one borne of economic necessity. However she did not leave Eritrea in 2001 as a refugee. Therefore looking at matters in the round and drawing on some assistance which can be derived from the "sole responsibility" Rule, the fact is that the Appellant has clearly been brought up since then by his grandmother. His day-to-day care was with her, no doubt she oversaw his welfare and general upbringing. I find therefore that the FtTJ's finding that the Appellant was part of his grandmother's family unit, and therefore not part of his mother's, is a sustainable finding.

25. I am reinforced in this by consideration of the Immigration Rule itself. Prior to paragraph 325D coming into force, family reunion cases were dealt with by way of policy considerations. Paragraph 352D came into force, as I understand it, to reflect those policy considerations. The Rule exists to enable family reunion for families fractured because circumstances have occurred which caused a person to flee persecution, leaving close family members behind. The Rule requires the fracture in the family to have occurred as a direct result of the persecution, not because of some future event.

26. The case here is as the FtTJ found, that the Appellant's mother was not forced to leave Eritrea on account of persecutory conduct. Instead she left Eritrea to go to the UAE on account of economic considerations. The FtTJ describes it as voluntarily leaving Eritrea and Mr Worthington's case is that the Appellant left to go to the UAE on account of necessity. Perhaps the wording used by the FtTJ could have been better expressed. No doubt the Sponsor had to make a hard choice, but nevertheless the fact remains that the family was fractured not because the Sponsor was fleeing persecution and was therefore forced to leave her habitual residence, but as a result of

difficult economic considerations. It was not until a decade later that the Sponsor claimed asylum after being brought to the UK from Dubai. I find the FtTJ gave proper consideration and findings on the evidence which was before her.

27. For the foregoing reasons I find that the FtTJ's finding that the Appellant was not part of the Sponsor's family unit is neither perverse nor unreasoned, and therefore it stands.

28. That of course is not the end of the matter. The Appellant's appeal before the FtT was an Article 8, ECHR appeal. Drawing on the wider considerations in Article 8, the FtTJ was asked consider whether the factors in this appeal were such as to merit consideration outside the Rules.

29. I find that the difficulty for Mr Worthington is that the judge did look at the wider Article 8 considerations and found that there was nothing which would assist the Appellant. She considered the fact that he is in Ethiopia and therefore outside his country of origin, but found on the evidence before her that even though he was a minor at the date of application, he was approaching his maturity. She was satisfied that he had help and support from the Negasi family. She discounted the letter from them saying that they could no longer accommodate him, not least because they had done so for the last three years. She took into account that the Appellant's mother sent financial support to him and had been able to travel to Ethiopia to see him. The Sponsor's report of seeing him was only that he was "unhappy". The Appellant is apparently in good health and altogether there is no up-to-date evidence in documentary form of any current problems or difficulties for the Appellant. The FtTJ found therefore that there was nothing to allow her to find that there are serious and compelling circumstances such as to bring the Appellant outwith the Rules.

30. The FtTJ went further to say that if she were to consider the appeal on Article 8 grounds outside the Rules and find that there is family life, nevertheless she could not be satisfied that any family life which exists between the Appellant and Sponsor would be such as to satisfy or meet the first two stages in the **Razgar** test. This is on the basis that for the last sixteen years or almost all of the Appellant's life his contact with his mother consists of occasional visits, money being sent and telephone and Viber communications. As she found, there was no reason put forward why this could not continue.

31. Accordingly for all the foregoing reasons, I find that the decision of Judge Caswell, promulgated on 8th May 2017, contains no error of law requiring it to be set aside. The decision therefore stands and this appeal is dismissed.

Notice of Decision

The decision of the First-tier Tribunal, promulgated on 8th May 2017, dismissing the Appellant's appeal under Section 6 of the Human Rights Act 1998 contains no error of law. The decision therefore stands.

No anonymity direction is made.

Signed C E Roberts Date 06 May 2018

Deputy Upper Tribunal Judge Roberts