Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU054282015
HU054902015

THE IMMIGRATION ACTS

Heard at Field House
On 27 July 2017

Decision & Reasons Promulgated
On 11 August 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

FK
JN
(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER – PRETORIA

Respondent

Representation:

For the Appellants: Mr. T. D. H. Hodson of Elder Rahimi Solicitors
For the Respondent: Mr. T. Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellants against a decision of First-tier Tribunal Judge B. A. Morris, promulgated on 27 March 2017, in which she dismissed the Appellants' appeals against the Respondent's decisions to refuse entry clearance for settlement under the family reunion provisions.

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2. I make an anonymity direction continuing that made in the First-tier Tribunal.

3. Permission to appeal was granted as follows:

> "It is arguable that the Judge's decision discloses a failure to appreciate that there was before the Tribunal evidence from the Appellants' maternal grandmother explaining their circumstances at the date of the decision. Arguably that rendered the hearing of the appeal unfair.
>
> In any event it is arguable that the Judge's approach to the concept of "family unit" was flawed. Arguably there was a failure to have due regard to the Ministerial statement of 17 March 1995, and the guidance to be found in the Court of Appeal decision in MS (Somalia) [2010] EWCA Civ 1236 and BM so that there was a failure to take a purposive approach to the question of whether children remain members of the "family unit" of both parents following their separation, in the particular circumstances of this mother."

4. The Sponsor attended the hearing. I heard submissions from both representatives following which I stated that I found that the decision involved the making of a material error of law. I set the decision aside and retained the appeal to be remade in the United Kingdom. My full reasons are set out below.

Error of law

5. The judge sets out in paragraphs 14 and 15 her findings as to what is a "family unit" following the decision in BM and AL (352D(iv); meaning of "family unit") Colombia [2007] UKAIT 00055. In paragraph 14 she sets out the chronology. She states that the Sponsor left the Appellants in 2007, and sets out where the Appellants lived after that time. In paragraph 15 she states as follows:

> "By reason of all the matters set out above, I find that the Appellants have not shown, on the balance of probabilities, that they were part of the Sponsor's family unit at the time she left Uganda on 10 March 2010. By that date they had not seen or had contact with the Sponsor for some three years and during that time they had lived with their paternal grandparents, either with or without their father. They had never lived with the Appellant and her friend in Lungujja or in Busega, nor had they ever spent any time with the Sponsor and her friend at those addresses. In oral evidence the Sponsor told me that in 2009, when she knew that her husband was not caring for the children, she made no efforts to get the children to live with her because the Appellants were safe and in school and life was going well. I find the facts show that each Appellant was part of the family unit of the parental grandparents when the Sponsor left Uganda in March 2010. Consequently, I find that each Appellant has not shown, on the balance of probabilities, that they meet the requirements of paragraph 352D of the Immigration Rules."

6. Paragraph 27 of BM and AL states as follows:

   "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."

7. It is not in dispute that there was separation between the Sponsor and the Appellants from 2007 until the Sponsor left Uganda. It is clear from paragraph 27 of BM and AL that the reason for that separation is relevant to consideration of whether they remained part of the family unit. The judge has not referred to the reasons why the Appellants and Sponsor were separated.

8. Paragraph 27 of BM and AL refers to the fact that the reason for the separation "may well be associated with the claim of persecution". This is the case for the Appellants. The Sponsor left her husband following the abuse she received from the hands of her husband. She left the Appellants at the same time. The basis for her fear of her husband has been recognised. She has been granted asylum.

9. Further, when considering why the Appellants had not lived with the Sponsor and "her friend" or ever spent any time with them, there is no reference to the fact that "her friend" was the Sponsor's lesbian partner, M. This is clearly relevant to the separation given the situation for homosexuals in Uganda, and the subsequent claim for asylum on this basis.

10. The judge refers to the fact that in oral evidence the Sponsor told her that she made no efforts to get the children to live with her because the Appellants "were safe and in school and life was going well". However the Sponsor had already set out in detail in her witness statement that she was afraid of returning to the home. The judge makes no reference to this. I was referred by Mr Hodson in particular to paragraphs 13 to 15 of the Sponsor's witness statement:

    "I remained in hiding in Lungujja with M for 6 months but then my husband discovered us in August 2007. While I was in hiding, I was in touch with my mother – she knew where I was. I also did my best to find out what had happened to my children. I called neighbours whom I knew and they told me that the children had been taken away – they were not at our house in Bunamwaya with my husband. I eventually found out that they had been taken to his parents' house in Kayunga, Masaka district which is over 50 miles from Bunamwaya. I was too scared to go to see them there." [13]

    "I was arrested in August 2007 at M's flat by the LDU (Local Defence Unit). I was taken to Nateete Police Station. My husband was there. I was held for two nights. A guard helped me escape from detention and to call M. She had moved to Busega. I was taken in a car from the police station to join her." [14]

"After that I remained in hiding with M in Busega for over two and a half years. In the end I could not endure living like a fugitive in Uganda always afraid that my husband would find us again and afraid of being discovered as being a lesbian living with her lesbian partner. During those two and a half years my children remained in Kayunga, Masaka with my husband's parents. In the end, I asked my mother to go to visit the child. She did this first sometime in 2009. She told me that the children were fine and doing well at school at that time. But they were being brought up by their paternal grandparents only – their father was not involved. I was relieved to hear this but also felt guilty that I could not do more. However, I felt that I had to ensure my own safety and I could not return to be with them. My mother did visit the children more than once again before I left Uganda on 10 March 2010 but essentially the situation remained the same."

11. There was clear evidence before the judge that the Sponsor was living in hiding from the time that she left the family home in 2007 until she left Uganda. After being in hiding for six months, she was discovered by her husband and arrested. She could not return to the home of her paternal grandparents in order to see the Appellants through fear of her husband and fear of being reported to the authorities. The judge has not considered any of this evidence. While stating that the Appellants had never lived with the Sponsor and her friend, she has given no consideration to the fact that the Sponsor and her friend were lesbians living in hiding in Uganda. They were in fear of the Sponsor's husband and the authorities. While the Sponsor may not have stated in oral evidence that she was scared, she had set this out in her statement, which she had adopted at the hearing. There was no need for her to repeat what she had said in her statement in oral evidence.

12. It is clear from BM and AL that the reason for the separation is relevant and must be considered, especially when the reason for the separation is connected to the persecution. In the Appellants' case it is directly linked to the persecution of the Sponsor. The Sponsor only left the Appellants because of the treatment she was receiving at the hands of the Appellants' father.

13. I find that the judge has erred in failing to apply the case law of BM and AL to the facts as they were in the Appellants' case. The analysis of the family situation in paragraph 15 is not in line with the case of BM and AL as there is a failure to consider relevant information.

14. It was accepted by Mr. Wilding that the judge had erred in failing to consider the grandmother' statement. He argued that this was not material but, in any event, as I have found that there is a material error of law in the judge's consideration of whether or not the Appellants formed a family unit with the Sponsor, I do not need to consider the materiality of this error.

Remaking

15. I have carefully considered the Appellants' circumstances in line with the case of BM and AL. Mr. Hodson submitted that the Appellants' case was in parallel to a mother who was, for example, separated due to being imprisoned. If, for that reason, a mother could not return to her children, following the case of BM and AL, it would not be considered that she did not form part of the family unit given that she was unable to return to them by reasons of imprisonment. He submitted that, in the Appellants' case, the reason for the separation was fear of the Appellants' father and fear of the authorities on account of the Sponsor's sexuality. This fear was well-founded. The Appellant has been granted asylum on the basis of this fear.

16. I find that the Appellant was separated from her children because she was afraid of her husband, and afraid of her husband reporting her to the authorities on account of her sexuality. This fear was well founded given that, after six months in hiding, her husband tracked her down and she was arrested by the authorities. The reason for her separation from the Appellants is the same reason as her fear of persecution. It is inseparable from her claim of persecution. For the same reason that the Appellants and Sponsor were separated, the Sponsor later fled Uganda and sought asylum in the United Kingdom. Following paragraph [27] of BM and AM, this must form part of the consideration of whether the Appellants and Sponsor were part of a family unit.

17. At paragraph 25 of BM and AL it is clear that the concept of a family unit is not limited to children who live in the same household as the refugee. I find that the fact that the Appellants were not living with the Sponsor at the time she left Uganda in March 2010 is not determinative of whether or not they were part of the same family unit, especially given the reasons why they were not living together.

18. The Appellants were living with their paternal grandparents when the Sponsor left Uganda. The Sponsor feared the Appellants' father. She very clearly stated in her witness statement that she was too scared to go and see the Appellants. However, although she was too scared to go and visit them, she did not forget the Appellants during this time. She asked her mother to go and visit them. Her mother visited them in 2009, and visited them more than once again before the Appellant left Uganda.

19. The Sponsor was in hiding both in Lungujja and in Busega. She states very clearly that she could not endure living like a fugitive, always afraid that her husband would find them [15], which is why she left Uganda and sought asylum.

20. I find that, were it not for the same reason that the Appellant claimed and was granted asylum in the United Kingdom, she would not have been separated from her children. They would have remained living together as part of the same family unit. The separation is as a direct result of her fleeing from her husband due to the abuse

she received and her homosexuality. It is clear that the separation was due to a well-founded fear of persecution.

21. Taking into account the case law of BM and AL I therefore find that, although they were not living in the same household, given the reasons for this, the Appellants formed part of the family unit of the Sponsor at the time that she left Uganda in 2010.

22. This being accepted by Mr. Wilding as the only issue under paragraph 352D, I therefore find that the Appellants meet the requirements for entry to the United Kingdom under the family reunion provisions, paragraph 352D.

23. I have considered the Appellants' appeals under Article 8. In doing so I have taken into account my findings above. The Appellants meet the Respondent's requirements for entry clearance under the family reunion provisions of the immigration rules. I attach particular weight to this.

24. I have also taken account section 117B of the 2002 Act insofar as it is relevant to the Appellants' appeals. Section 117B(1) provides that the maintenance of effective immigration control is in the public interest. Given that the Appellants meet the requirements of the immigration rules, the maintenance of effective immigration control will not be compromised by a grant of entry clearance. The rules for family reunion do not contain any requirements for English language or financial independence. This indicates that the Respondent considers the reunion of families in the Appellants' and Sponsor's situation to be more important than the need to speak English and be financially independent (sections 117B(2) and (3)). Sections 117B(4) to 117B(6) are not relevant.

25. I have also taken into account the best interests of the Appellants. Their best interests must be a primary concern in accordance with the case of ZH Tanzania [2011] UKSC 4. The decisions separate the Appellants from their mother which is not in their best interests, especially given the situation in which they were separated, which I do not intend to repeat here given that it is accepted.

26. Taking all of the above into account, and giving particular weight to the fact that the Appellants meet the requirements of the immigration rules expressly designed to facilitate family reunion, I find that the Appellants have shown on balance of probabilities that the decisions are a disproportionate interference with their rights, and those of the Sponsor, to a family life under Article 8 ECHR.

27. I note that the Appellants' circumstances have changed since the date of the hearing in the First-tier Tribunal as sadly the Appellants' grandmother died on the day after the hearing. However, having found that the Appellants meet the requirements of paragraph 352D, and are entitled to entry clearance on the grounds of family reunion, and therefore that the decisions are a breach of Article 8, there is no need for further consideration of Article 8 outside the immigration rules taking into account the changed circumstances.

Decision

28. The decision of the First-tier Tribunal involves the making of a material error of law and I set the decision aside.

29. I remake the decision allowing the Appellants' appeals on human rights grounds. The Appellants meet the requirements of paragraph 352D of the immigration rules.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 10 August 2017

Deputy Upper Tribunal Judge Chamberlain

TO THE RESPONDENT
FEE AWARD

I have allowed the appeals. In the event that a fee has been paid or is payable, I have considered making a fee award. I have decided to make a fee award as the Respondent, having granted asylum to the Sponsor, was aware that the reason that the Appellants had been separated from her was directly connected with her basis of claim for asylum. In the circumstances I make a fee award for the entire fee paid.

Signed Date 10 August 2017

Deputy Upper Tribunal Judge Chamberlain