Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/10328/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 27th March 2018	**On 4th April 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
UPPER TRIBUNAL JUDGE LINDSLEY

Between

D T
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Barri, Solicitor from Chapeltown Citizens Advice Bureau
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Eritrea born on 18th October 2004. He applied, for the first time, to join his father in the UK who has limited leave to remain as a refugee in January 2015. This application was refused as it was not accepted that the appellant and his father were related as claimed. The appellant reapplied supplying DNA evidence to show that he was related as claimed to his father but on 16th September 2015 the application was refused on the basis he had not shown he was

part of his father's family unit and so could not show compliance with paragraph 352D(iv) of the Immigration Rules. His appeal against the decision of 16th September 2015 was dismissed by First-tier Tribunal Judge GRJ Robson in a decision promulgated on the 15th May 2017.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Chamberlain in a decision dated 21st November 2017 on the basis that it was arguable that the First-tier judge had erred in law in failing to consider and properly apply BM & AL (352D(iv);meaning of "family unit") Colombia [2007] UKAIT 55 due to only considering the number of days the appellant and his father spent together and not the surrounding circumstances.

3. The matter came before us to determine whether the First-tier Tribunal had erred in law. At the start of the hearing we drew the attention of the parties to the Home Office guidance: "Family reunion: for refugees and those with humanitarian protection", version 2 published on 29th July 2016 which at page 18 deals with the issue of children conceived to male refugees prior to flight but born post-flight in the country of origin which states that they should be seen as part of any pre-flight family.

4. After hearing submissions on error of law we informed the parties that we found the First-tier Tribunal had erred in law. It was agreed by both parties that the appeal could be remade immediately on the evidence before the First-tier Tribunal. After hearing submissions on re-making from Mr Melvin we informed the parties that we would remake the decision by allowing it. We set out our reasons for our decisions below.

Submissions – Error of Law

5. Mr Barri argued for the appellant that the First-tier Tribunal erred in law as the appellant was living with his father from December 2006 to July 2007 when they were separated. Paragraph 352D(iv) of the Immigration Rules requires the appellant to have lived with his father at the time when the family split. The appellant lived on a day to day basis in his father's home with his father's wife and father's mother at the time his father fled to claim asylum. The method of assessing whether they were part of the unit by looking at the number of days the appellant and his father spent together would be prejudicial against those who worked away from the family home and was not legally correct when the guidance in BM & AL is considered.

6. Further, it is submitted, there clearly is family life between the appellant and his father, and the refusal of entry clearance interferes with that family life as this cannot take place in Eritrea due to the grant of refugee status to his father. It is submitted that this interference was not proportionate, as the relevant Immigration Rule could be met, and so refusal of entry clearance is a breach of Article 8 ECHR and the First-tier Tribunal erred in law by finding otherwise.

7. Mr Melvin accepted that the reasoning of the First-tier Tribunal was short. He argued however that the factual basis for the decision based

on the number of days the appellant spent with his father was correct on the sponsor's own evidence. He submitted that the First-tier Tribunal had not found that the evidence of the appellant living in the sponsor's home was true; and even if the appellant had been living with the sponsor's family for the claimed period of time he would not have met the Immigration Rules. The entry clearance officer had raised in the refusal that he was not satisfied with the appellant's lack of supporting documentary evidence, but these concerns had not really been dealt with by the First-tier Tribunal. Mr Melvin also raised the issue as to why the sponsor's wife had travelled earlier than the appellant's first application to join his father but accepted that this issue had not been raised in the refusal notice.

Conclusions – Error of Law

Requirements for leave to enter or remain as the child of a refugee

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 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.

8. The only issue in this appeal before the First-tier Tribunal was whether the appellant was part of his father's family unit when his father left his country of formal habitual residence in order to seek asylum, and thus whether he could comply with paragraph 352D(iv) of the Immigration Rules set out above. DNA evidence has shown he is his sponsor's biological son, and this is accepted by the respondent.

9. The reported case of BM & AL holds that the question of the definition of a 'family unit' for the purposes of para 352D(iv) Immigration Rules is a question of fact. Further, it is said, a family unit is not limited to children

who lived in the same household as the refugee. We find it was therefore an error of law by the First-tier Tribunal to consider that the issue could be determined simply by calculating the number of days that the appellant and his father spent under the same roof particularly given that the appellant's father had a profession, in this case being a soldier, which required him by necessity to live away from his home much of the time. This was a failure to follow the guidance in BM & AL to consider all of the facts of the case and not to limit the definition to those who had lived in the same household.

10. We are strengthened in our opinion that a focus only on actual physical cohabitation in the decision of the First-tier Tribunal was wrong by the fact that the respondent's own guidance ("Family reunion: for refugees and those with humanitarian protection", version 2 published on 29th July 2016) advises that children conceived before the (male) refugee fled their country to seek asylum and born after they left should be seen as part of the family unit. Clearly such children would not have any physical cohabitation in the same dwelling house.

Submissions - Remaking

11. Mr Melvin submitted that there was insufficient evidence that the appellant lived with the sponsor's family between 2006 and 2007 and so was part of the family unit. He argued that the First-tier Tribunal had not found that the sponsor's evidence should be accepted as credible in the conclusions section of the decision, and the entry clearance officer had found the evidence to be insufficient. The appeal should therefore be dismissed.

Conclusions – Remaking

12. The appellant's history, as presented by his sponsor and father, is that the appellant lived with his mother, to whom he, the sponsor, was not married, from his birth in October 2004 until December 2006. During this time the appellant's father was a soldier in the Eritrean military. He provided financial support to the appellant's mother and visited them when he was on leave. The appellant's father married another woman in January 2006 and subsequently had another child in Eritrea with his wife. In December 2006 the appellant moved to live in his father's home as he was not safe with his mother. The appellant's father continued to work as a soldier and so lived mostly in barracks. The appellant's father visited the appellant for two days in December 2006 and approximately three days in July 2007 whilst on home leave from his work as a soldier.

13. The appellant's father and sponsor left Eritrea on 6th July 2007 to claim asylum, and has lived in the UK since April 2009. The appellant's father's wife and oldest daughter were able to escape Eritrea and join him in the UK in 2013 but the appellant could not go with them. There is no evidence of communication between the appellant and his father, who is illiterate. However, in June 2014 the appellant was able to

escape from Eritrea and went to live in the IR Diena China Camp, Zone One, Addis Ababa, a UN refugee camp in Ethiopia where he remains until now. The appellant's father visited him in Ethiopia in 2014 and provided photographs of them together to the First-tier Tribunal. The whereabouts of the appellant's mother is unknown.

14. We find that the history as outlined above was found to be truthful and credible by the First-tier Tribunal Judge who was asked to accept the credibility of the sponsor, see paragraph 28 of the decision, and who based the decision on that evidence being accurate in the findings at paragraph 35 to 41 with no comment that it was not credible.

15. We find that the history, taking all of the circumstances as set out above into account, means that the appellant was a part of his father and sponsor's family unit at the time when his father left Eritrea, his country of habitual residence to seek asylum. He was based in his father's home with father's wife and other child for a settled period of more than six months prior to his father's flight as a refugee. This was not a time-limited or temporary arrangement. There is no evidence that the appellant has been part of any different family unit since he joined his father's one in December 2006.

16. The other aspects of paragraph 352D are accepted as being met, and as a result we find that the Immigration Rule is met and thus there is no public interest in refusing entry clearance to the appellant. We therefore find that to refuse him entry clearance is a disproportionate interference with his right to respect for his family life with his father, and as a result a breach of Article 8 ECHR.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. We set aside the decision of the First-tier Tribunal.

3. We re-make the decision in the appeal by allowing it on human rights grounds.

Signed: Fiona Lindsley Date: 28th March 2018

Upper Tribunal Judge Lindsley

Fee Award Note: this is **not** part of the determination.

In the light of our decision to re-make the decision in the appeal by allowing it, we have considered whether to make a fee award. We have had regard to the Joint Presidential Guidance Note: Fee Awards in

Immigration Appeals. We have decided to make no fee award because we were not asked to make one by the appellant.

Signed: Fiona Lindsley Date: 28th March 2018

Upper Tribunal Judge Lindsley