



**Upper Tribunal
(Immigration and Asylum Chamber)
OA/07595/2013**

THE IMMIGRATION ACTS

**Heard at Manchester
On October 14, 2014**

**Determination
Promulgated
On October 15, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

ENTRY CLEARANCE OFFICER

Appellant

and

**HHO
MGM**

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr McVeety (Home Office Presenting
Officer)

For the Respondent: Mr Brown, Counsel, instructed by Bolton
CAB

DETERMINATION AND REASONS

1. Whereas the respondent is the appealing party, I shall, in the interests of convenience and consistency,

replicate the nomenclature of the decision at first instance.

2. The appellants, born May 20, 1990 and April 27, 2011, are citizens of Kenya. The appellants applied for entry clearance under paragraph 352AA and 352D HC 395 respectively to join GG, the unmarried partner of the first-named appellant and the father of the second appellant. The respondent refused their applications on February 25, 2013 on the basis neither satisfied the Immigration Rules.
3. On March 19, 2013 the appellants appealed under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 arguing the applications should have been allowed under the Immigration Rules or alternatively under article 8 ECHR.
4. The matter was listed before Judge of the First-tier Tribunal Birrell (hereinafter referred to as “the FtTJ”) on December 20, 2013. In a determination promulgated on December 30, 2013 she allowed the second-named appellant’s appeal under the Immigration Rules and the first-named appellant’s appeal under article 8 ECHR.
5. The respondent appealed that decision on January 13, 2014 arguing there had been two material errors of law. She submitted:
 - a. In respect of the second-named appellant she submitted the FtTJ erred by finding the sponsor’s son was part of a family unit.
 - b. In respect of the first-named appellant she argued the FtTJ’s assessment under article 8 was flawed as she failed to attach sufficient weight to the fact neither appellant satisfied the Rules on the basis of the respondent’s grounds of appeal.
6. Permission to appeal was granted by Designated Judge of the First-tier Tribunal Zucker on January 24, 2014. He found the FtTJ may have erred by extending the definition of family unit to include the second-named appellant and this then led to an error by allowing the second-named appellant’s appeal under article 8 ECHR.
7. A Rule 24 response was filed by appellants’ representatives on February 6, 2014 in which it was argued:

- a. Counsel for the respondent (Mr Cliffe) did not challenge Mr Brown's submissions before the FtTJ on the interpretation of paragraph 352D HC 395.
 - b. The challenges amount to nothing more than a disagreement.
 - c. The FtTJ properly directed herself as to the law as to the meaning of what constitutes a "family unit" at paragraph [8] of her determination and explained why she allowed the second-named appellant's appeal at paragraphs [34] to [35] of her determination and thereafter gave full and sustainable reasons as to why she allowed the first-named appellant's appeal under article 8 ECHR.
8. The sponsor was in attendance at the hearing and represented by Mr Brown.

SUBMISSIONS ON ERROR IN LAW

9. Mr McVeety accepted the FtTJ did consider the decision of BM and AL (352D9iv); meaning of "family unit" Columbia [2007] UKAIT 00055 and that on reflection paragraphs [27] to [28] of BM and AL did fit these facts because the sponsor had fled fearing persecution and consequently it was arguable that the enforced separation was due to the persecution faced by the sponsor. Mr McVeety accepted that if the second-named appellant met the Rules then his argument on the first-named appellant was weakened because they were a family.
10. Mr Brown submitted the FtTJ did not make any error and relied on the FtTJ's findings in paragraphs in paragraph [35], which demonstrated the FtTJ did consider the "family unit" and was satisfied that paragraph [27] of BM and AL covered this case and her findings were open to her. The appeal in respect of the second-named appellant was a mere disagreement.
11. He further submitted there was no error to allow the first-named appellant's appeal under article 8 ECHR. The FtTJ had considered the law and whilst the approach in Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC) had not been set out or followed the reality was that the second-named

appellant's appeal would have been allowed if their child was being admitted under the Rules.

ASSESSMENT OF ERROR IN LAW

12. Mr McVeety accepted that the key to this appeal was the FtTJ's approach to the second-named appellant's appeal. The respondent had been given permission on the basis Designated Judge of the First-tier Zucker was persuaded that the definition "family unit" did not cover the second-named appellant because he accepted the submission that the second-named appellant was only a part of the first-named appellant's family.
13. As conceded today that approach is flawed because the sponsor had left his partner because of perceived persecution. This situation is covered by the decision of BM and AL (352D9iv); meaning of "family unit") Columbia [2007] UKAIT 00055 because the Tribunal accepted that where there has been a separation and the reason for the separation may well be associated with the claim of persecution a child might still remain part of the family unit from which the potential refugee had been temporarily separated.
14. The FtTJ was aware that the sponsor had not mentioned the appellants in his gateway interview but accepted his explanation and found the sponsor to be a credible witness.
15. In the circumstances I am satisfied the findings were open to the FtTJ and I do not find any error in law in respect of the second-named appellant and I uphold the FtTJ's original decision.
16. Mr McVeety accepted that if the second-named appellant met the Rules then leaving the first-named appellant behind would engage article 8 ECHR as she was the second-named appellant's mother. The FtTJ found article 8 was engaged and considered the appeal outside of the Rules. She was satisfied that it would be disproportionate to keep the parties apart and she allowed the appeal.
17. I see nothing wrong with her approach and in the circumstances I uphold the FtTJ's decision to refuse her appeal under the Immigration Rules but to allow it under article 8 ECHR.

DECISION

18. There is no material error of law and I uphold the original decision.
19. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. An order was made and I extend the order to these proceedings.



Signed:

Dated:

Deputy Upper Tribunal Judge Alis

TO

THE RESPONDENT



I do not alter the decision to refuse a fee award.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis