BM and AL (352D(iv); meaning of "family unit") Colombia [2007] UKAIT 00055

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 22 May 2007

Before:

Mr Justice Hodge, President
Senior Immigration Judge Batiste

Between

BM (FIRST APPELLANT)
AL (SECOND APPELLANT)

Appellants

and

ENTRY CLEARANCE OFFICER, BOGATA

Respondent

Representation
For the Appellants: Mrs M Hodgson (Counsel instructed by Beemans Solicitors)
For the Respondent: Mr S Ouseley, Home Office Presenting Officer

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.

DETERMINATION AND REASONS

1. The issue raised in this reconsideration hearing is whether the appellants can properly be described as having been "*part of the family unit of*" their sponsor father at the time he left Colombia to claim refugee status in the UK. Immigration Judge Vaudin d'Imecourt in a determination promulgated on 29 December 2006 (here called the 2006 appeal) found that the two appellants did not live with their sponsor father as part of his family unit and dismissed the appeals. He decided the

appellants could not satisfy the requirements of paragraph 352D(iv) of the Immigration Rules (HC395 as amended).

2. There was an earlier appeal in this case against a refusal of entry clearance for these two appellants. This appeal (here called the 2005 appeal) was heard by Immigration Judge Griffin at Hatton Cross on 20 October 2005. He dismissed both appellants' appeals against the refusal of entry clearance. No appeal was lodged. But in relation to the 2006 appeal a Senior Immigration Judge ordered reconsideration on the basis that there may have been an error of law in that Tribunal's determination on the basis that the appeals raise "*an interesting argument as to the true meaning of 'part of the family unit'*".

The Two Appellants

3. Both appellants are Colombian citizens. Bleiton the first appellant was born on 13 December 1992. He was therefore six years old when the sponsor father came to England and claimed asylum on 31 July 1999. Adder the second appellant was born on 8 August 1997. He was therefore just under two years of age when the sponsor father came to the UK. It is accepted that both appellants are indeed the children of the sponsor father. The two appellants are now respectively fourteen and nine years of age.

4. The only direct evidence of their views before the Immigration Judge was an undated letter from each of them in a bundle supplied by the sponsor father. The letters say that they wish to join their father in the UK.

5. The 2006 Tribunal accepted the evidence of the first appellant's mother given in an interview in Colombia on 9 November 2004. She said she had never been married to the sponsor father and had never lived with him. The first appellant had never lived with the father and had never lived anywhere other than with his mother and his grandmother in Colombia. The first appellant's mother did say that the sponsor father maintained the first appellant whilst in Colombia "*in the sense that he was very often with him*".

6. The second appellant's mother was also interviewed in Colombia on the same date. The 2006 Tribunal found that the second appellant has always lived with his mother and with another brother together with the second appellant's grandmother and grandfather. These grandparents were in fact the sponsor father's parents. The Immigration Judge accepted the evidence that the sponsor father and the second appellant did not live together. As to the mother in relation to the sponsor father, she said: "*We didn't have a stable relationship, we lived in La Paila but not in the same house*". The Immigration Judge said "*When asked how come she lived and still lives with his parents but their son, the father of the boy, lived apart she replied that he had a wife and kids*."

The Sponsor Father

7. The sponsor father came to the UK on 31 July 1997 and claimed asylum. He was granted refugee status on 8 November 2002. The Immigration Judge accepted the sponsor father's evidence that he had commenced a relationship with his now wife Maria Naomi in 1989 or 1990 whilst he was still at secondary school. They lived together from then on until the sponsor father left Colombia. They had had a son within that relationship, Jans, who is now nine years of age and was born in Colombia. Maria Naomi and Jans had joined the appellant in 2000 some ten months after the sponsor father arrived in the UK. They are now married and have had another child, a daughter. The accepted evidence shows that Maria Naomi was the person the sponsor father had always been living with as a permanent partner in Colombia and in the UK. The father told the 2006 Tribunal that the mothers of the two appellants were persons with whom he had affairs but had never lived with.

Immigration Rules

8. The applications by both appellants in the 2006 appeal are based on the provisions of paragraph 352D Immigration Rules. That paragraph is contained in part 11 of the Rules under the general title "*Asylum*". Paragraph 349 in relation to "*Dependants*" provides,

> *"If the principal applicant is granted asylum and leave to enter or remain any spouse, civil partner, unmarried or same sex partner, or minor child will be granted leave to enter or remain for the same duration".*

This is no doubt the basis on which Maria Naomi and the sponsor father's child Jans and their daughter have been granted status here.

9. Paragraph 352D appears under the heading "*Unaccompanied children*" and provides as follows,

> *"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 has been granted asylum in the United Kingdom are that the applicant*
> *(i) is the child of a parent who has been granted asylum 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 his habitual residence in order to seek asylum ……"*

10. Part 8 of the Immigration Rules under the heading "*Family Members*" in relation to the sub-heading "*Children*" sets out the requirements for a child to join a parent

present or settled in the UK. An Entry Clearance Officer in 2004 suggested that an application might be made under paragraph 297 for the two appellants to join their father in the UK. It appears that such an application was made in 2004 as a claim under paragraph 297 of the Immigration Rules was considered by the 2005 Tribunal.

The 2005 Appeal

11. There had been an application for entry clearance for the two appellants in 2004 and an appeal against the refusal of entry clearance which as indicated above was heard on 20 October 2005. The date of promulgation of the determination is not clear on the papers but the decision was promulgated in 2005.

12. In that 2005 appeal there was no appearance on behalf of the appellants by the sponsor father or otherwise. The judge had before him the interviews with the mothers from November 2004. It is unclear if he had before him notarised statements of each of the mothers dated 7 July 2004. In those statements they give permission for their respective sons to join their father in the UK. It is also unclear if those notarised statements were before the Entry Clearance Officer who conducted the interviews in November 2004. The Entry Clearance Officer did say that "*Bleiton's mother is even prepared to sacrifice her role as the child's mother for her son's future saying her son would have more possibilities living in the UK. However were he to go to the UK he would be losing the stability of the emotional support and love care he gets from his mother and grandmother*". Immigration Judge Griffin concluded at paragraph 14 of his determination:

> "*In so far as rule 352D, is concerned there is absolutely no evidence before me that the appellants formed part of the sponsor's family prior to his going to the United Kingdom. Indeed the contrary seems to be the case. At all times they have lived with their mothers and all paternal grandparents. The sponsor was married to another woman, and by whom he had children, and it appears it was that person and those children whom he initially brought to the United Kingdom by way of family reunion. I find therefore that the appellants do not meet the requirements of paragraph 352D (iv).*"

13. In relation to paragraph 297 the Immigration Judge concluded the requirements of this Rule were also not satisfied. The sponsor father had given no evidence that he had sole responsibility for the children and the judge said "*I believe the mothers have made all the decisions which have been necessary in the upbringing of both these appellants*". The judge had no evidence before him as to the father's financial circumstances and rejected any claim that he could afford to maintain and keep the two appellants. He also concluded that the accommodation the sponsor father had would not be big enough to accommodate the two appellants. He therefore concluded that the requirements of paragraph 297 were not met. The claim under paragraph 297 has not been repeated in the appeal to the 2006 Tribunal.

The 2006 Tribunal's Decision

14. Immigration Judge Vaudin heard evidence from the sponsor father in the 2006 appeal. He had before him notarised statements from both mothers from 7 July 2004 as indicated above. There was a certificate from a police officer in Colombia from 26 September 2005 saying the appellant sends money for food for the appellants. There is a statement from 28 November 2005 from the mother of the first appellant saying the father provides for him. There is a declaration by a police officer in Colombia dated 27 December 2005 reporting the sponsor's claim that he provided fully for the two appellants.

15. The Immigration Judge in the 2006 appeal set out his detailed findings of fact and reasons as follows:

> "*13. I find that each of these appellants is a national of Colombia and that they were born in Colombia to different mothers. I also find that the sponsor is a Columbian national who came to the United Kingdom in later 1999 and applied for asylum which he was granted. Furthermore, I find that the sponsor formed a close association with a woman by the name of Maria Naomi, with whom he has lived on a permanent basis in the same household since 1989 or 1990. They have had one son of their relationship who was born nine years ago called Jans. The sponsor, Maria Naomi and Jans lived together in the same family unit in Colombia. When the sponsor fled Colombia and came to the United Kingdom, Maria Naomi and Jans eventually joined him in the United Kingdom some ten months after his arrival here. Maria Naomi and the sponsor married some five years ago and have had a daughter of their relationship called Nadine who also lives with them. On the evidence before me, which includes the interview of the appellants' respective mothers, I find that the appellants and their sponsor father have never lived together as one family unit. The appellants are the children of two women with whom the sponsor has had what can best be described as extra marital affairs. I find that the appellants and the sponsor have never lived together as one family unit either with their mothers or with the sponsor's present wife. On the clear evidence before me, at the time of his departure from Colombia the sponsor had created a family unit with Maria Naomi and their son Jans. There is evidence that there has been a close relationship between the sponsor and the two appellants. To his credit the sponsor has clearly always cared for his two sons, who still live in separate family units with their mothers and other relatives in Colombia, and he has no doubt a strong affective relationship with them. Looking at paragraph 352D of Rule HC 395, I note that subparagraph (iv) of that paragraph requires each of these appellants to show that they were 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 in the United Kingdom. I cannot give to the words "family unit" any other interpretation except its very natural interpretation of one unit as a family. The appellants have each lived with their mothers and other relatives in*

> *completely separate family units to their sponsor father's family unit with his wife and 'legitimate' children. At the time of his departure from Colombia, I find, on the evidence before me, on a balance of probabilities that the appellants did not live with their sponsor father as part of his "family unit".*"

Given those findings the Immigration Judge dismissed the appeal.

The Parties' Submissions

16. Mrs Hodgson on behalf of the appellants submits that the Immigration Judge erred in his interpretation of the meaning of "*family unit*" within paragraph 352D(iv). She regarded it as clear that the judge was limiting his definition of a family unit to those members of a family who lived together. This interpretation or definition is she said far too narrow. In her grounds for review she said,

> "*In particular it is submitted that a family unit should be defined by the nature of the relationship. It is submitted that to exclude automatically any family members (minors) who are not living with both parents altogether as a unit would exclude any children of a refugee who is divorced, separated or unmarried to the mother of the child and did not, for very valid reasons, live with the children, and that this approach ignores the now common situation of the "fragmented" family.*"

17. It was argued that the purpose behind the provisions in paragraph 352D was to re-establish the basic family bonds of parents and children and to re-unite members of an existing family who have by dint of circumstances become fragmented. It was noted that the judge had accepted there has been a close relationship between the sponsor father and the two appellants. The sponsor father had contributed financially and had lived close to the two appellants when in Colombia and there had been a strong relationship. The judge it was said should have looked at the wider relationship between the appellants and the sponsor and the sponsor's wife and children when making the decision about whether the two appellants were part of the sponsor father's family unit in Colombia.

18. We were taken to various legal dictionary definitions of the word "*family*". There was however no definition anywhere that counsel had been able to find of the words "*family unit*".

19. Reliance was placed on the UNHCR Handbook and in particular the guidance given in chapter VI entitled The Principle of Family Unity. Paragraph 185 reads,

> "*185 As to which family members may benefit from the principle of family unity, the minimum requirement is the inclusion of the spouse and minor children. In practice, other dependants, such as aged parents or refugees are normally considered if they are living in the same household…. The principle of family unity operates in favour of dependants not against them.*"

The two appellants are the minor children of the sponsor father. A strict application of the guidance given by the UNHCR ought to mean that they should be admitted to the UK as children of a recognised refugee.

20. It was further argued that the bond between parent and child makes for family unity. It was said the evidence in this case indicates that when the sponsor father left Colombia in July 1999 he had a close bond with the two appellants who were then six and nearly two. The purpose behind the promotion of family unity for refugees was the need for such a refugee to have the same enjoyment of family life as before leaving their home country. It was also said that the evidence, the two undated letters, points to the two appellants' wish to join their father and the mothers were willing for that to happen.

21. The respondent argued that the two appellants were not part of the sponsor father's family unit when in Colombia. Each lived with his own mother and each was part of a family unit containing the particular appellant's mother and in each case one or other of his grandparents. The blood relationship exists but there are here three separate family units. A blood tie is not of itself enough to enable the appellants to enter the United Kingdom under paragraph 352D merely because they are the children of a refugee. If the Rule had intended that any minor child of a refugee would be entitled to join him in the United Kingdom it would have said so. The purpose of paragraph 352D(iv) in relation to a family unit was to allow a refugee to establish in the UK such family unit as was in place before. When the father left his country of origin for the UK the two appellants were not in fact part of the sponsor father's family unit and accordingly the Immigration Judge was correct to dismiss the appeal.

Discussion

22. We were not assisted by any of the definitions of "*family*" which were put before us by counsel nor were we referred to any case which suggested a definition of "*family unit*" for the purposes of the Rule. We consider it right to approach the meaning of the phrase having regard to the context in which the Rule is made and to the policy purpose behind it.

23. The UNHCR Handbook quotes from the Final Act of the Conference that adopted the 1951 Refugee Convention as follows:

> *"Recommends governments to take the necessary measures for the protection of the refugee's family especially with a view to …..*
>
> *(i) ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country ……"*

It is clear in our judgement that various paragraphs in Part 11 of the Immigration Rules under the general heading "*Asylum*" are designed to implement that recommendation. Paragraph 349 as quoted above allows the inclusion in a refugee's claim for asylum of minor children accompanying him together with accompanying spouses or civil partners etc. Under the heading "*Unaccompanied Children*" provision is made for children seeking asylum in their own right but paragraph 352D sets out the requirements to be met by a minor child seeking to join a person who has already been granted asylum in the UK. The policy of these provisions is indeed to promote family reunion. But the question remains what is a "*family unit*".

24. It was argued before us that the decision by the Immigration Judge in the 2006 appeal appears to provide that a minor child can only qualify for entry to the UK as a child of a person granted asylum if that child can show that he or she lived in the same household as the asylum seeker prior to him leaving his country of habitual residence. We do not agree that the determination can be read in that way. It seems to us that the judge was looking at the facts of this case and deciding as a matter of fact whether the two appellants were part of the sponsor father's family unit in Colombia. He decided that as a matter of fact they were not.

25. We accept that if the phrase "*family unit*" were to be limited to children who were living in the same household as an asylum seeker prior to his leaving his country of habitual residence then the Rules could have said so. We acknowledge that the concept of a family is very wide and depends crucially on the context in which the word is used. Ascendant or descendant relatives, uncles, aunts and cousins are always likely to be regarded as members of the same family. Whether they form part of a family unit will depend very much on the facts. A so-called nuclear family is highly likely to be a family unit. The child of divorced parents who spends the bulk of his time with his mother and otherwise has regular contact with his father is certain to be part of the mother's family unit. Whether at the same time he can be regarded as part of the father's family unit will depend very much on the particular facts of the case.

26. In this case the purpose of preserving family unity was promoted and implemented by the decision at the request of the sponsor father to allow Maria Naomi and her son Jans with whom the appellant had co-habited in Colombia to come to the United Kingdom as part of his family unit. There was no such application at that time in respect of the two appellants who were held by the Immigration Judge to have lived with their mothers. The Immigration Rules are understandably silent on whether it is right to promote a position where a child leaves one undeniable family unit with his mother to join his father in the United Kingdom simply on the basis that the child is a minor. Wide ranging child care and child protection issues are likely to arise where a decision to grant entry clearance potentially lead to the break up of a different pre-existing family unit in the country of origin.

27. We regard the issue as to what is a "*family unit*" for the purposes of para 352D(iv) as a question of fact. In many cases it will be clear that a child was part of a family unit with an asylum seeker in his country of habitual residence. The child will have lived with the asylum seeker and perhaps another partner. 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. Here no such claim is made.

28. If on the other hand the separation is the result of social choice by the parties and a separate family unit based upon the mother is created, it will be correspondingly harder to establish that a child is in reality a part of two different family units. This will be especially so if the child is young and the consequence will be separation from the mother rather than family unity as envisaged by the UNHCR handbook.

29. We are satisfied that the Immigration Judge approached what is a factual decision in a proper way. While he did not spell it out precisely we are satisfied that both of these children are now and were, when the sponsor left Colombia in 1999, members of a family unit consisting of their mother and the relevant grandparents. The sponsor father's family unit in Colombia was his now wife and his son Jans. Such close contact as there was with the six year old and two year old appellant children in Colombia did not in the Immigration Judge's view make them part of the sponsor father's family unit. We agree with the judge's assessment of the factual background.

30. We are reinforced in that view by the decision taken in the 2005 appeal. Devaseelan v Secretary of State for the Home Department [2002] UKIAT 702; [2003] Imm AR 1 highlights the need to use factual findings in an earlier appeal within this jurisdiction as a starting point for factual decisions to be made in a later appeal. The first judge had before him the interviews with the two mothers which took place in 2004. It was open at that time to the sponsor father to attend and give evidence before the judge at the 2005 appeal but he did not. Most of the written evidence that he has produced appears to have been available to him prior to that hearing in October 2005. No reasons have been put forward as to why the evidence was not produced at the 2005 appeal hearing. We consider the judge at the 2005 appeal reached the correct conclusion on 352D in this case on the basis of the evidence he had. The evidence was added to somewhat for the 2006 appeal hearing. The Immigration Judge in 2006 summarised all the evidence he received fully and clearly. He reached what we consider to be a wholly proper decision on the factual position of the sponsor and the two appellants. We conclude that the Immigration Judge was correct to regard the two appellants as not being part of the father's family unit in Colombia.

31. In the circumstances and for the reasons given we do not consider that the Tribunal in the 2006 appeal made a material error of law and so the original determination dismissing the appellants' appeals stands.

MR JUSTICE HODGE
PRESIDENT
Date: 5 June 2007