**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/10840/2015

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 9 November 2017** | **On 30 November 2017** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW**

**Between**

**SMT**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER - PRETORIA**

Respondent

**Representation:**

For the Appellant: Mr A Malik, Counsel instructed by Hameed & Co Solicitors
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

## DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure

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to comply with this direction could give rise to contempt of court proceedings.

2. The appellant is a citizen of the Democratic Republic of Congo (DRC) who was born on [ ] 2003. On 4 August 2015 she applied for entry clearance under paragraph 352D of the Immigration Rules as the child of a parent who had been granted refugee status in the United Kingdom.

3. The appellant had made a previous application dependent on the same Rules which was refused on 25 February 2014. The appellant appealed against that decision to the First-tier Tribunal. In a decision promulgated on 2 January 2015 First-tier Tribunal Judge Flower dismissed the appellant’s appeal.

4. The Entry Clearance Officer refused her application for entry by way of a decision made on 1 October 2015. She appealed against that decision to the First-tier Tribunal.

5. In a decision promulgated on 1 February 2017 First-tier Tribunal Judge Fenoughty dismissed the appellant’s appeal. The First-tier Tribunal found that the appellant did not meet the requirements of paragraph 352D of the Immigration Rules although as set out by the judge in paragraph 46 it was not open to the appellant to appeal on the basis that the decision was not made in accordance with the Immigration Rules. The judge set out that the ability to satisfy the Rules may be taken into account in assessing the proportionality of the decision to refuse her application. The Tribunal considered the matter under Article 8 of the European Convention on Human Rights and found that any interference with the family life of the appellant and the sponsor was proportionate to the decision to refuse entry clearance.

6. The appellant applied for permission to appeal against the First-tier Tribunal decision and on 4 September 2017 First-tier Tribunal Judge Black granted permission to appeal.

**The hearing before the Upper Tribunal**

7. In the grounds of appeal, four separate grounds have been set out, however, at the commencement of the hearing before me Mr Malik accepted that the first ground of appeal must fall away because the appellant had no right of appeal against the decision under paragraph 352D of the Immigration Rules. The remaining grounds assert that the judge -

   (a) failed to engaged with the material evidence;

   (b) approached the question of proportionality under Article 8 incorrectly, and

(c) failed to have proper regard to Section 55 of the Borders, Citizenship and Immigration Act 2009.

8. It is asserted that whilst there has been a previous appeal and that that is the starting point this is by no means the ending point for the purposes of the instant appeal. The judge appears to have placed undue reliance on the previous decision. The previous judge failed to consider the relevant guidance. The appellant's circumstances were now different. The approach of the judge to the evidence demonstrated a failure to properly assess all the relevant evidence. The judge found that the authors of at least two of the letters lived in the UK and had not come to the Tribunal to give evidence in person. It is asserted that this finding is based on presumption and that this was not put to the sponsor during his evidence. Therefore this is procedurally unfair and contrary to the common law duty of fairness.

9. The judge's approach to the question of proportionality under Article 8 is flawed because the judge applied too high a threshold requiring significant family life, the test is simply family life. There is no presumption that family life does or does not exist.

10. It is submitted that the judge failed to carry out an adequate assessment of the best interests of the child and therefore has not engaged with the duties under Section 55 of the Borders, Citizenship and Immigration Act 2009. In oral submissions Mr Malik submitted that there was evidence before the judge regarding the appellant's medical condition referring to page 21 in the appellant's bundle. He asserted that this was relevant to the best interests' analysis of the child. He referred to the sponsor's witness statement which set out at paragraphs 15, 18 and 19 that the general situation in the DRC made it unsafe for the appellant to live there. The general security situation was relevant to the best interests of the child. The judge ought to have looked at the situation in the country when considering her best interests. I asked Mr Malik if there was any evidence of a medical condition apart from the one incident relating to being treated and for exposure to tear gas. He indicated that there was no other medical evidence.

11. He referred to paragraph 8 of the decision where the judge set out the sponsor's evidence that he visited the appellant on five occasions whereas at paragraph 59 the judge indicates that the appellant visited on only two occasions. He submitted that that is a factual error and that that is material because it infected the judge's analysis of the level of family life between the appellant and the sponsor. He referred to the sponsor's witness statement at paragraph 18 where he stated that he had visited in 2016. There was no reference to this visit in the First-tier Tribunal's decision.

12. He submitted that there was no reference anywhere in the decision to Section 55 of the Citizenship Act. Initially Mr Malik appeared to submit that a failure to refer to this section was of itself a material error of law.

However, after clarification, he indicated that the issue was that the judge had not undertaken an adequate assessment of the child's best interests. He submitted that the relationship was not disputed and therefore the judge had applied too high a threshold by requiring there to be a significant family life rather than simply a family life. He referred to paragraph 59 of the decision and submitted that the judge had failed to engage with the evidence before her regarding the death certificate and the letter from the church. With regard to the proportionality assessment this was a case that the appellant was part of a family unit prior to the sponsor's flight from the UK. The judge had made insufficient findings with regard to whether or not the appellant formed part of that pre-flight family and failed to give adequate reasons. With regard to this submission however Mr Malik agreed that as he had conceded that the appeal on any finding under the Immigration Rules cannot be mounted he did not press this matter any further.

13. Mr Nath submitted that the judge did in fact give due consideration to all the documents. He referred to page 21 of the bundle. This was a temporary condition that the appellant had suffered from. There was nothing to indicate that there was any medical condition that the judge ought to have taken into account when assessing her best interests. This was a one off occurrence. With regard to the documents referred to by Mr Malik he submitted that the documents do not take matters any further. The medical report at page 23 of the bundle does not concern the appellant, and is not therefore relevant to her best interests. With regard to the document at page 25 of the bundle he submitted that this document indicates the general situation in the DRC. There is no indication that the judge did not take all this evidence into account. The judge does not have to mention every single piece of evidence before her.

14. Regarding best interests at paragraphs 55 and 59 in particular, the judge does go through what the best interests of the child are. A judge does not need to specifically mention Section 55. What the judge does need to do is apply the law and the judge had done that in those paragraphs. The judge did consider the risks in the DRC and took into account the letter from the church and other documents when assessing the best interests of the child. At paragraph 59 the judge summarises the best interests' points. With regard to the judge's use of the word 'significant' with reference to family life he submitted this must be looked at in the round. Paragraphs 44 to 56 set out the factors that the judge has taken into account. At the end of paragraph 54 the judge refers to the very limited contact, the child's attendance at school etc. and at paragraph 56 when looking at family life, and analysing that life, the word 'significant' does not detract from the judge's findings overall. It is necessary to read the findings on Article 8 as a whole, not look in isolation at what is said in one paragraph. There is nothing in the decision that would indicate that the judge was applying or requiring a higher standard than that there be family life between the parties. The judge did not have to accept that the appellant's grandmother had died as, when looking at the evidence submitted as a whole, no originals had been supplied and no explanation

given that was accepted by the judge. This was a very detailed decision. The judge clearly analysed the evidence and the circumstances at the time of the hearing of the application. The conclusions at paragraphs 59 and 60 were ones that were clearly open to the judge.

15. Mr Malik in reply submitted that apart from paragraph 57 the word ‘significant’ appears in paragraph 54 of the First-tier Tribunal’s decision. In paragraph 57 the judge refers to the decision not interfering significantly with existing family life. He submitted a high threshold test was clearly applied. With regard to the relationship between the appellant and the sponsor and the level of contact he submitted that this was based on an incorrect factual finding regarding the number of occasions the appellant had been visited by the sponsor.

16. At the conclusion of the hearing I reserved my decision. I indicated to the parties that the Tribunal file did not have a copy of the decision of the First-tier Tribunal of 5 December 2014. Mr Malik indicated that his instructing solicitors did have a copy of that decision. I directed that he send a copy of that decision to the Tribunal. Both parties indicated that there would be no necessity for any further submissions as a result of me taking into consideration the initial First-tier Tribunal decision. I received a copy of the decision shortly after the hearing.

## Discussion

17. The judge set out in some detail the evidence in this case. The judge indicated that she took into account the findings from the appeal heard on 5 December 2014 and set out in brief the findings of First-tier Tribunal Judge Flower.

18. The judge set out in paragraphs 17 to 31 in considerable detail the evidence presented in written form and the evidence of the sponsor’s oral evidence at the hearing. From paragraph 37 onwards the judge assessed that evidence and made findings on the evidence. At paragraph 43 the judge set out:

> “43. The tribunal found the sponsor’s evidence to be vague. He did not satisfactorily explain why it was only at the hearing that he gave evidence about the unwillingness of people to look after the appellant, and their perception that she was cursed because her mother died when she was a baby, and she had lived with her grandmother and would therefore be perceived as a witch. No supporting evidence had been provided in relation to this claim, and it was not mentioned in any of the letters or documents in support. The sponsor did not explain why there were only two photographs of him and the appellant, and no evidence of their telephone contact.
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> 44. The tribunal did not accept the sponsor’s explanation for failing to produce the original death certificates and more extensive photographs of his visits to the appellant. He said he had them at home, and could have brought them, if he had been asked. However, he had been represented throughout the proceedings, and the tribunal

which refused his previous appeal made it clear that the evidence produced on that occasion was insufficient.

45. In all the circumstances, the tribunal did not feel it could place significant weight on the sponsor's evidence, which it found to be inconsistent, unreliable and lacking credibility."

19. With regard to the submission that the Tribunal Judge had not put to the appellant or sponsor that the authors of the two letters lived in the UK and had not attended the Tribunal, this goes to the point as to whether or not the appellant satisfied the Immigration Rules. As accepted by the appellant's representative this ground of appeal could not be pursued as the appellant had no right of appeal against the decision that she did not meet the Immigration Rules, therefore this is not relevant even if it were a material error of law.

20. Ground 1 asserts that the judge did not consider all the material evidence. The judge did engage fully with the evidence providing adequate reasons for rejecting certain aspects of it. Specific reference by Mr Malik was made to the death certificate, the number of occasions the sponsor had visited and the letter from the church.

21. As set out above the judge did not place significant weight on the death certificate explaining that she did not accept the sponsor's explanation for failing to produce the original. The judge set out at paragraph 42:

> 'The Tribunal had been presented with photocopies of death certificates in respect of the appellant's mother and grandmother. It was unclear why the originals of these documents were not provided, and the tribunal considered the lack of documentation to lessen the weight it could place on these documents…'

22. The judge did clearly consider this evidence fully. It was open to the judge to place little weight on this evidence in the circumstances.

23. With regard to the asserted mistake of fact about the number of visits made the judge set out at paragraph 56:

> '…Insofar as there is any family life between the appellant and the sponsor, it is of a limited nature, as they have lived in different countries for her entire life, during which time the tribunal accepted, from the findings of the last tribunal, that sponsor had visited her twice.'

24. Given the finding of the judge that the sponsor's evidence was '*inconsistent, unreliable and lacking credibility'* the judge was entitled to reject the sponsor's evidence of having visited on more than 2 occasions and to accept only, as per the findings of Judge Flower, that he had visited on 2 occasions. The judge set out at paragraph 42:

> '…No travel documents were provided to evidence the trips which the sponsor claimed to have made to visit the appellant, and no copy of his passport was produced.'

25. The finding of the judge was not a factual error as she had not accepted this evidence.

26. At paragraph 21 the judge set out the detail contained in the letter from the church and at paragraph 55 said, *'Notwithstanding the letter from the church, there was no independent evidence or objective evidence to support the sponsor's claim that the appellant was in danger…'*

27. The judge fully took into consideration the letter from the church. She considered all the material evidence which she found to be lacking either by its absence, by lacking detail, or was inconsistent vague and incomplete. It had previously been brought to the appellant and sponsor's attention by Judge Flower that any evidence put forward to support a further claim would need to be more detailed and specific.

28. The second ground of appeal is that the proportionality assessment was flawed as the judge imposed too high a threshold requiring a 'significant' family life. With regard to the analysis of family life the First-tier Tribunal set out:

> "53. The appellant and the sponsor had never lived together, and although the sponsor said he had visited her, there was very limited evidence of any such visits. The sponsor's evidence of the arrangements for caring for the appellant was vague and inconsistent. He said he was worried about her, but, in contrast, he had said that he did not wish to uproot her whilst she was being cared for by her grandmother. He said he sent money to her, but the evidence of this was the money transfer receipts to three different people, only one of whom had given written evidence, more than 18 months earlier, to confirm this. She was the person who the sponsor said lived with the appellant's grandmother, not someone who had assumed responsibility for the appellant's care. In the circumstances, the tribunal was unable to ascertain the extent to which the sponsor was supporting the appellant, although it accepted that he may have made some financial contribution.
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> 54. In view of the lack of evidence, other than the sponsor's assertions, to support the appellant's claim, the tribunal did not consider that she had demonstrated that there was significant family life. There was insufficient evidence to support the sponsor's assertion that this was so, there was very limited evidence of any contact between them, and the appellant was continuing to attend school, and to be cared for.

29. It is clear that the judge is not imposing any higher standard but is referring to the evidence about the nature and strength of the relationship as asserted by the sponsor and the appellant. This is demonstrated further in the following paragraphs:

> 56. The sponsor said he telephoned the appellant five times a week, but the tribunal had not accepted this, as the very limited evidence did not support his claim, and there was no evidence from the appellant, who is now 13 years old, and could have been expected to provide a statement to support her claim. Insofar as there is any family life between the appellant and the sponsor, it is of a limited nature, as they

have lived in different countries for her entire life, during which time the tribunal accepted, from the findings of the last tribunal, that sponsor had visited her twice.

57. In this case, the decision to refuse the appellant's application did not change the existing nature of any family life which existed, and it did not create separation between the sponsor and the appellant, although it may have the effect of continuing it. The respondent's decision made no change to the appellant's existing situation, which was that she was living in her country of birth, with a friend of her grandmother's, so the decision did not interfere significantly with existing family life.

30. The judge accepted that there is family life and was considering the extent of the interference with that family life. This is further evidenced at paragraph 60 below by the reference to '*an interference with any family life*'.

31. Ground 3 concerns s55 and the best interests of the appellant. In oral submissions reference was made specifically to a failure to consider the medical evidence and the general security situation. The tribunal set out:

55. With regard to the appellant's best interests, the tribunal did not consider that it had been shown that her best interests would be served by her leaving her home. The sponsor said she was studying, and was living with different people in an area where she had lived for her entire life. Notwithstanding the letter from the church, there was no independent evidence or objective evidence to support the sponsor's claim that the appellant was in danger, and the tribunal was not satisfied that the evidence showed her interests were harmed by remaining in Kinshasa.

..

59. The tribunal considered the best interests of the appellant, who is now 13 years old. It is generally in the best interests of children to be with their parents, and a child's interests are a primary consideration. However, the appellant had never lived with the sponsor, he had only visited twice, and there was minimal evidence that they were in contact. The tribunal was not satisfied from the evidence that the current arrangements are not in her best interests. The tribunal was not satisfied that the current arrangements would come to an end in the immediate future.

60. The tribunal balanced the factors pointing to an interference with any family life of the appellant and the sponsor against the public interest importance in maintaining immigration controls. Whilst it accepted that the sponsor's life is now established in the UK, it did not consider the circumstances of this case to be so compelling as to outweigh the public interest considerations. It found that the decision, in all the circumstances, insofar as it amounts to an interference with the family life of the appellant and the sponsor, is proportionate to the consequences of the decision."

32. Although brief the judge has considered the best interests of the appellant. The judge had set out earlier in the decision the evidence and her analysis of that evidence and made findings that were adequately reasoned. Having undertaken that task this was the starting point for considering the best interests of the appellant. The judge dealt with the assertion that the appellant was in danger rejecting the sponsor's assertions. It was not therefore an error to fail to take this into account in assessing best interests as the judge had not accepted this. The medial evidence referred to was a single occurrence of the need for medical treatment following exposure to tear gas in September 2016. There was no evidence that there had been any ongoing issues and Mr Malik confirmed at the hearing that there was no other medical evidence. There was therefore no ongoing medical conditions that the judge ought to have considered in assessing the appellant's best interests. It was open to the judge in the circumstances of this case to reach the findings she did on the best interests of the appellant.

33. There were no material errors of law in the decision of the First-tier Tribunal such that it should be set aside.

**Notice of Decision**

The appeal is dismissed. The decision of the Entry Clearance Officer stands.

Signed P M Ramshaw Date 29 November 2017

Deputy Upper Tribunal Judge Ramshaw