Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/04647/2014

THE IMMIGRATION ACTS

Heard at Centre City Birmingham	**Decision & Reasons Promulgated**
On 5th July 2016	**On 19th July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

MOTTY THATO RAMPANA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Searle of Counsel instructed by MB Law Practice
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appealed against a decision of Judge Stott of the First-tier Tribunal (the FtT) promulgated on 30th September 2014.

2. The Appellant is a female citizen of Botswana born 2nd October 1997 who entered the United Kingdom on 7th February 2011 as a visitor. She was granted leave to enter for six months.

3. Prior to expiry of that leave, on 4th July 2011 the Appellant applied for settlement in the United Kingdom, claiming that she wished to remain in this country with her mother Edith Rampana to whom I shall refer as the Sponsor.

4. The Respondent refused that application on the basis that DNA evidence proved that the Sponsor is not the Appellant's mother but is her aunt. The Respondent's mother Lady Judith Rampana was living in Botswana.

5. However the Appellant was granted further discretionary leave to remain outside the Immigration Rules, on 11th October 2012, valid until 11th April 2013. The purpose of this leave was to enable her to make arrangements to return to Botswana.

6. Rather than making arrangements to return to Botswana, the Appellant on 8th April 2013 applied for further leave to remain in the United Kingdom based upon her family and private life. That application was refused on 6th January 2014, and in addition to refusing to vary leave to remain, the Respondent made a decision to remove the Appellant from the United Kingdom.

7. The Appellant appealed to the FtT pursuant to section 82 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). The appeal was heard on 23rd September 2014. After hearing evidence from the Appellant and the Sponsor, the FtT dismissed the appeal under the Immigration Rules, and on human rights grounds.

8. The Appellant applied for permission to appeal to the Upper Tribunal on the basis that the best interests of a child, the Appellant, were not identified and given primary consideration by the FtT.

9. Permission to appeal was granted by Deputy Upper Tribunal Judge Rimington in the following terms;

> "There is an arguable error of law that the judge failed to make any reference to the best interests of the child. Permission to appeal is granted."

Error of Law

10. At a hearing before me on 7th March 2016 I heard submissions from both parties regarding error of law. Full details of the application for permission, the grant of permission, and the submissions made by both parties are contained in my decision dated 9th March 2016, which was promulgated on 18th March 2016. I set out below paragraphs 14-21 of my decision which contain my conclusions and reasons for finding an error of law and setting aside the decision of the FtT;

"14. The Appellant applied for discretionary leave to remain, and her representatives made it clear in the letter accompanying her application, that they were requesting an exercise of discretion, and not relying upon the Immigration Rules.

15. The FtT found that the appeal could not succeed under the Immigration Rules, and this finding is not challenged and therefore stands.

16. It is clear from paragraph 1 of the decision that the FtT was aware of the Appellant's age, and paragraph 4 makes it clear that the FtT was aware that it was claimed that it would be in the Appellant's best interest to remain in the United Kingdom.

17. The Respondent had considered section 55 of the 2009 Act and best interests of the Appellant at pages 5 and 6 of the reasons for refusal letter dated 6th January 2014.

18. I agree with the submissions made on behalf of the Respondent, that it is not an error of law, without more, simply not to refer to section 55 of the 2009 Act. What however must be made clear is that in a case involving a child, and when proportionality is considered under Article 8 outside the Immigration Rules as in this case, the best interests of the child must be a primary consideration. It is clear that the best interests of a child are not a paramount consideration, or the only primary consideration. The best interests of a child can be outweighed by other considerations.

19. However in this case, the findings made by the FtT which are contained at paragraphs 14-23 do not disclose that the best interests of the Appellant as a child were identified, and thereafter considered together with any other considerations. I set out below the conclusions of the Upper Tribunal in Abdul at paragraph (ii) of the head note;

    (ii) Where it is contended that the decision maker and/or the First-tier Tribunal (FtT) has acted in contravention of section 55 of the Borders, Citizenship and Immigration Act 2009, the Upper Tribunal will scrutinise the degree of engagement with all material evidence and, in particular, will search for clear findings in a decision of the FtT of what the best interests of any effective child are.

20. The conclusion of the FtT is clear, in that it was decided that the Appellant was not entitled to remain in the United Kingdom. What is not clear, is the identification of the best interests of the child, and then consideration of other factors which may outweigh the best interests.

21. I am therefore persuaded that the decision of the FtT is flawed by a material error of law, and cannot stand."

11. It was suggested on behalf of the Appellant that the appeal should be re-made by remittal to the FtT, but having considered the Senior President's Practice Statements and in particular paragraph 7.3, which indicates that re-making in the Upper Tribunal rather than remitting will constitute the

normal approach to determining appeals where an error of law is found, even if some further fact-finding is necessary, I decided that the appeal should be re-made by the Upper Tribunal. The hearing was adjourned so that further evidence could be given. It was made clear the findings of the FtT in relation to the Immigration Rules were maintained, and therefore the issue to be decided related only to Article 8 outside the Immigration Rules.

Re-Making the Decision – Upper Tribunal Hearing 5th July 2016

Preliminary Issues

12. I ascertained that I had received all documentation upon which the parties intended to rely, and that each party had served the other with any documentation upon which reliance was to be placed. I had received the Respondent's bundle with Annexes A-E, the Notice of Appeal, and the Appellant's bundle indexed 1-14. All of these documents had been before the FtT. In addition I received from Mr Searle a skeleton argument dated 4th July 2016.

13. Both representatives indicated that it was understood that the hearing related only to consideration of Article 8 outside the Immigration Rules.

14. Mr Searle advised that the Appellant and Sponsor would be giving oral evidence, and confirmed that neither required an interpreter.

15. Both representatives indicated that they were ready to proceed and there was no application for an adjournment.

Oral Evidence

16. The Appellant and Sponsor gave evidence independently, both adopting the contents of their undated witness statements contained at pages 1 and 2 of the Appellant's bundle.

17. Both were questioned by the representatives and I have recorded all questions and answers in my Record of Proceedings, and it is not necessary to reiterate the evidence in this decision. If relevant I will refer to the oral evidence when I set out my conclusions and findings.

18. I will summarise below the witness statements. The Appellant stated that she had suffered from tuberculosis in Botswana and described living with an uncle who has "a mental problem and is constantly smoking" and she blamed this for contracting TB. She described the environment in which she was living as uncomfortable, which adversely affected her performance at school.

19. The Sponsor brought her to the United Kingdom to see if the Appellant liked living in this country, and the initial intention was that she would then return to Botswana, and decide whether she wished to make a settlement application. However, the Appellant explained that things did

not work according to plan, and she ended up having to stay longer than expected.

20. She then enrolled at school and found that she was performing much better at school in this country than she had in Botswana.

21. The Appellant confirmed that she comes from a Christian background, and that she would not cause any problems if allowed to stay in the United Kingdom. She was studying business and hoped to have a career in business. She stated that if she had to leave this country it would destroy her emotionally, because she has made so many close friends.

22. The Sponsor's statement was brief, referring to the Appellant as her daughter. The Sponsor confirmed that she is the only person who is able to look after the Appellant and she brought the Appellant to this country to ensure that she is well looked after.

23. Without reiterating the oral evidence, it is fair to say that both the Appellant and Sponsor expressed a very strong wish that the Appellant be allowed to stay in this country. It was contended that the Appellant regards the Sponsor as her mother, and the Sponsor adopted her at birth because the Sponsor's sister, who is the Appellant's biological mother, gave birth when she was a teenager and could not look after the Appellant.

24. The Sponsor came to the United Kingdom in 2003 with a work permit, and was granted indefinite leave to remain in 2008. She owns her own property upon which there is a mortgage, and she is employed as a nurse.

25. The Appellant stated in oral evidence that she has just finished college, and that she studied performing arts, and she wishes to set up her own theatre company performing for children.

The Respondent's Submissions

26. Mr Mills submitted that it is no longer necessary to consider the best interests of a child, because the Appellant is not a child. She is now 18 years of age. Mr Mills submitted that the Tribunal must consider circumstances at the date of hearing, and must therefore consider the Appellant's appeal on the basis that she is an adult. With reference to paragraph 10 of Mr Searle's skeleton argument, Mr Mills commented that it was incumbent upon the Secretary of State to decide an application on the basis that an individual is a child, if that individual was a child when the application was made, even if by the time the decision was made, the individual had reached the age of 18. I was asked to find that this did not apply to the Tribunal.

27. Mr Mills accepted that Article 8 was engaged and he accepted that the Sponsor had acted in the capacity of a mother to the Appellant since 2011 when the Appellant arrived in the United Kingdom, and therefore the Appellant had established a family and private life.

28. I was asked to find that the Respondent's decision is proportionate and does not breach Article 8.

29. It was not accepted that the Sponsor had acted as the Appellant's mother since birth. There was no evidence of adoption until documents which were dated in 2012 had been submitted and it was clear, and now accepted, that the purported adoption would not be recognised in the United Kingdom. I was asked to note that the Appellant's biological mother was not a teenager when she gave birth, as had been claimed by the Sponsor, but as she was born 1st April 1977, she was in fact 20 years 6 months of age when she gave birth.

30. I was asked to find that evidence given before the FtT, indicated that the Appellant and her biological mother were living together with the Appellant's grandmother until 2008. The Appellant and Sponsor had been vague as to what happened to the biological mother thereafter, though the Sponsor had said that she was still living in Botswana.

31. Mr Mills pointed out that the Sponsor had left Botswana in 2003. She delayed making an application for the Appellant to come to the United Kingdom until 2011, and at that time had used deception by describing herself as the Appellant's mother in the visit visa application.

32. I was asked to note that the Sponsor had made no effort to undertake a legally recognised adoption. Both the Sponsor and Appellant stated that the grandmother with whom the Appellant had lived is now frail and suffering ill-health but there is no medical evidence to confirm this. The Sponsor had confirmed that one of her sisters had returned from the United Kingdom to Botswana in 2012 to look after the Appellant's grandmother and the Appellant knew this. Mr Mills submitted that the Appellant had lied to the Tribunal when she was questioned on this issue, as she asserted that she was in touch with her grandmother, who lived alone.

33. I was asked to find that there are no compelling circumstances which would justify allowing the appeal under Article 8 outside the Immigration Rules. Mr Mills suggested that if the Sponsor and Appellant wished to live together then it would be reasonable for the Sponsor to return to Botswana together with the Appellant, as they are both citizens of that country. I was reminded of the considerations contained in section 117B of the 2002 Act, and in particular that little weight should be attached to a private life established by a person when that person has been in this country with a precarious immigration status.

The Appellant's Submissions

34. Mr Searle relied upon his skeleton argument which runs to thirteen pages and therefore will not be set out in this decision. I was asked to consider the Appellant's case on the basis that she was a child when her application

for leave to remain was made, and therefore she should be treated as a child by the Tribunal.

35. If that was not accepted, Mr Searle submitted that the appeal should still be allowed pursuant to Article 8 outside the Immigration Rules.

36. I was asked to accept that the Sponsor had acted as the Appellant's mother since her birth, and although documentation had only been issued in 2012, the adoption would be recognised in Botswana.

37. I was asked to find that the Sponsor and Appellant had not attempted to deceive the immigration authorities in this country, and the Appellant entered as a visitor, and subsequently made an application for settlement, on the basis that the Sponsor is her mother.

38. I was asked to accept that the Appellant's grandmother, with whom she lived until she left Botswana in 2011, is now elderly and frail and could no longer look after her.

39. Mr Searle submitted that the Appellant had integrated into British society, and I was asked to note the references contained within the Appellant's bundle, which came from the Appellant's friends and teachers, and I was asked to find that it would not be in the Appellant's best interest to return to Botswana.

40. Mr Searle submitted that the length of time that the Appellant had been in the United Kingdom should be taken into account, together with her relationship with the Sponsor, and I should therefore conclude that refusing to grant her leave to remain would be disproportionate and a breach of Article 8 of the 1950 Convention.

41. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

42. I have taken into account all the evidence, both oral and documentary that has been placed before me, and also taken into account the submissions made by both representatives.

43. In considering Article 8, the burden of proof is on the Appellant to establish that she has a family and/or private life that engages Article 8. If that is established, the Respondent must show that the decision is lawful, necessary for one of the reasons set out in Article 8(2), and proportionate. For ease of reference I set out below Article 8;

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There should be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the

prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

44. I find as a fact that the Appellant entered the United Kingdom as a visitor on 7th February 2011 and has resided here continuously since arrival. I find that the Sponsor travelled to the United Kingdom in 2003 with a work permit. She is a qualified nurse and has had employment in that capacity since arriving in this country. She was granted indefinite leave to remain in 2008.

45. I accept that the Appellant and Sponsor live together and have done since the Appellant's arrival in the United Kingdom.

46. I find that there has been no valid adoption. I do not accept that the Sponsor adopted the Appellant at birth. I do not accept that the Appellant's biological mother was a teenager when she gave birth, and I find she was in fact aged 20 years and 6 months.

47. The evidence given before the FtT confirmed that the Appellant lived with her grandmother and biological mother until 2008. The money transfer receipts within the Appellant's bundle indicates that the Sponsor was sending money back to the Appellant's biological mother in Botswana in 2010 and 2011.

48. I do not find any satisfactory evidence that the Appellant and Sponsor maintained contact with each other on a regular basis between 2003 when the Sponsor left Botswana and 2011 when the Appellant came to the United Kingdom. The evidence in relation to contact conflicted, in that the Appellant in oral evidence claimed that the Sponsor returned to Botswana "every other month". The Sponsor stated that she returned once a year, and on balance I accept the Sponsor's evidence. This is because if the Sponsor had returned to Botswana every other month, there is no reason why she would not have said so in her evidence.

49. I do not accept the Appellant as a credible witness. She was asked by Mr Mills whether she was in touch with her grandmother in Botswana and she confirmed that she was. She was asked who her grandmother lived with, and she confirmed that she lived alone. She said her grandmother was ill and could not go out and socialise. The Appellant said that she did not want to return and live with her grandmother, and I accept her evidence on that point, and I accept her evidence that she wants to remain with the Sponsor. However I do not accept that she was truthful when describing her grandmother's circumstances, as the Sponsor stated in her oral evidence, that one of her sisters left the United Kingdom in 2012 specifically to look after the Appellant's grandmother. She also explained that one of her brothers, who would be the Appellant's uncle, also lived with the Appellant's grandmother. The Sponsor confirmed that she also has other siblings living in Botswana. I find that the Appellant was attempting to provide a false picture of the circumstances in Botswana, and trying to portray her grandmother as being elderly and unwell, and

living alone, and unable to look after the Appellant. I accept that the Appellant's grandmother is elderly, but there is no medical evidence to prove her illnesses, and different answers were given by the Appellant and Sponsor as to what illnesses she had, and she does not live alone.

50. In considering Article 8, based upon the facts that I have found, I remind myself of the principles in SS (Congo) [2015] EWCA Civ 387 (paragraph 33) in which it was confirmed that compelling circumstances would need to be identified to support a claim for a grant of leave to remain outside the new Immigration Rules in Appendix FM.

51. In considering Article 8 I have adopted the five stage approach advocated by the House of Lords in Razgar [2004] UKHL 27 which involves answering the following questions;

    (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

    (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

    (3) If so, is such interference in accordance with the law?

    (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

    (5) If so, is such interference proportionate to the legitimate public end sought to be achieved.

52. The decision in Beoku-Betts [2008] UKHL 39 means that I must consider the family and private life of the Sponsor as well as the Appellant.

53. In my view I must consider the circumstances as they exist at the hearing date, and therefore the Appellant is no longer a child. Therefore I do not consider the best interests of a child. I find that the Appellant has established a private life since her arrival in this country, and it was conceded by Mr Mills that the Appellant had established a family life with the Sponsor. I therefore consider Article 8 on the basis both of family and private life.

54. As Article 8 is engaged, I must consider whether the Respondent's decision would interfere with the Appellant's private and family life, and I find that it would if she was removed from this country.

55. I then must consider whether the interference is in accordance with the law and I find that it is on the basis that the Appellant cannot satisfy the Immigration Rules in order to be granted leave to remain.

56. I find that the proposed interference is necessary in the interests of maintaining effective immigration control, which in turn is necessary to protect the economic well-being of the country.

57. The issue that must be decided is whether the Respondent's decision is proportionate to the legitimate public end sought to be achieved.

58. When considering family life, I bear in mind that this family life has existed since February 2011 and the Appellant is now an adult. I place significant weight upon the fact that the Appellant cannot satisfy the Immigration Rules in relation to family life.

59. I find that when the Appellant arrived in this country as a visitor, it was the intention both of the Appellant and the Sponsor that she should remain here. The family life established, has been established when the Appellant has had a precarious immigration status. The issue of a precarious immigration status is not specifically referred to in section 117B in relation to family life, but I find that it is a relevant consideration. The only leave that the Appellant has ever had, was six months leave to enter as a visitor, and thereafter discretionary leave to enable her to return to Botswana. That leave was subsequently extended by reason of the fact that she submitted an application for leave to remain before it expired and subsequently entered an appeal.

60. Having carefully considered the evidence, I find that if the Appellant and Sponsor wish to carry on their family life and cohabit, it would be reasonable for the Sponsor to leave the United Kingdom and return to Botswana. Although the Sponsor has indefinite leave to remain, she is not a British citizen. She is a citizen of Botswana. She has lived the greater part of her life in Botswana. She would have accommodation in the family home in Botswana, and her mother and siblings live there. There are no relevant medical issues, and the Sponsor as a qualified nurse would be able to find employment.

61. Alternatively, I find that it would be reasonable for the Appellant to return to Botswana even if the Sponsor wished to remain in the United Kingdom. The Sponsor could visit the Appellant, and they could maintain contact by modern means of communication. I appreciate that they stated that they wish to remain living together in this country, but I have to balance against that, the public interest in maintaining effective immigration control, and the fact that the Appellant cannot satisfy the Immigration Rules.

62. In relation to the Appellant's private life I have taken into account all the letters written by her teachers and her friends, which are contained within the Appellant's bundle. It is to the Appellant's credit that her teachers regard her so highly.

63. There is no up-to-date evidence from the Appellant's school or college, and in her oral evidence she stated that she had just finished a course at a performing arts college.

64. In considering the Appellant's private life, I have to take into account that she cannot satisfy the Immigration Rules in relation to private life, as contained in paragraph 276ADE(1). No evidence has been presented by the Appellant to show that she could not continue her education in Botswana, or find employment in Botswana. She has had the advantage of being educated in the United Kingdom which may assist her in finding employment. It is common ground that she was not entitled to receive an education in the United Kingdom. The Appellant would have no language difficulties if she returned to Botswana, and I do not accept she would encounter medical difficulties. I do not find that any satisfactory evidence has been submitted to prove that the Appellant would be at risk of tuberculosis if returned to Botswana.

65. Again, I must consider section 117B of the 2002 Act. I accept that the Appellant can speak English, and although she is not financially independent, the Sponsor is financially independent. However the Upper Tribunal confirmed in AM (Malawi) [2015] UKUT 0260 that an individual can obtain no positive right to a grant of leave to remain from either section 117B(2) or (3), whatever the degree of fluency in English or strength of financial resources.

66. I must take into account section 117B(5) which states that little weight should be given to a private life established by a person at a time when their immigration status is precarious. The Appellant has always had a precarious immigration status since her arrival in the United Kingdom as a visitor.

67. Therefore although I accept that the Appellant has established a private life in this country, I must attach little weight to it.

68. In conclusion, I do not find that it has been established that there are any compelling circumstances which would justify granting leave to remain to the Appellant based upon Article 8 outside the Immigration Rules. The Appellant has close family members in Botswana, and would have accommodation. She is a citizen of Botswana and has spent the greater part of her life in that country. I find that the weight that must be attached to maintaining effective immigration control outweighs the weight to be attached to the wishes of the Appellant and Sponsor, that the Appellant be allowed to remain in the United Kingdom, even though she cannot meet the Immigration Rules necessary to be granted such leave. I find that the Respondent's decision is proportionate and does not breach Article 8 of the 1950 Convention.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision. The appeal is dismissed under the Immigration Rules and on human rights grounds.

There has been no request for anonymity and I see no need to make an anonymity order.

Signed Date: 8th July 2016

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed. There is no fee award.

Signed Date: 8th July 2016

Deputy Upper Tribunal Judge M A Hall