Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/03542/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons promulgated**
On 5 May 2015	**On 8 September 2015**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Alice Abuye Bosumiye
(Anonymity order not made)

Appellant

and

Entry Clearance Officer,
Nairobi

Respondent

Representation
For the Appellant: Ms. C. Simpson of Counsel instructed by Auleys Reeves.
For the Respondent: Mr. T. Melvin, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Fox promulgated on 23 October 2014, dismissing the appeal of the Appellant against a decision of the Respondent dated 4 February 2014 to refuse entry clearance to join her maternal aunt in the UK.

Background

2. The Appellant is a national of the Democratic Republic of the Congo born on 14 January 1999.

3. She is the niece of Ms Leonnie Bosumiye ('the sponsor'). The sponsor entered the UK in December 2003 – shortly before the Appellant's fifth birthday. She claimed asylum; in due course, in 2009, she was granted indefinite leave to remain, she became a naturalised British citizen in 2011.

4. The Appellant's mother suffered from a disability. This affected her ability to look after her daughter. The identity of the Appellant's father is said to have been unknown: in any event it has not been disputed that he has had no role in the Appellant's life. Because of the Appellant's mother's disabilities assistance was received in respect of her care from a neighbour Adeline Mbumba.

5. I pause to note that it is said in the sponsor's witness statement "*Alice was given to my sister's neighbour Adeline who looked after her since birth*" (paragraph 9). However, it appears that there was no formal transfer of parental responsibility or adoption, but rather the neighbour looked after both the Appellant and her mother – necessarily the Appellant's relationship with her mother continuing.

6. Be that as it may, unfortunately on 9 July 2010 the Appellant's mother died. From then on the Appellant was looked after by Adeline in her own home.

7. In December 2013 an application for entry clearance to join the sponsor in the UK was made.

8. The application was refused for reasons set out in the Notice of Immigration Decision dated 4 February 2014 with reference to paragraph 297(i) of the Immigration Rules and Article 8 of the ECHR.

9. I pause to note that, amongst other things, the Respondent did not accept the aunt/niece relationship claimed between the sponsor and the Appellant. However that relationship is now accepted further to the finding of the First-tier Tribunal Judge (paragraph 14).

10. The First-tier Tribunal Judge dismissed the Appellant's appeal for reasons set out in his determination.

11. The Appellant sought permission to appeal which was granted by Designated First-tier Tribunal Judge Taylor on 6 January 2015.

12. The Respondent has filed a Rule 24 response dated 19 January 2015 resisting the challenge – and indeed Mr Melvin has provided an amplified version of that by way of Skeleton Submissions.

Consideration

13. In the premises it is to be noted that the level of contact between the Appellant and the sponsor has been relatively limited. The sponsor left the DRC for the UK when the Appellant was 4 years old and has only visited on 2 occasions since, although there has been some contact through written and telephone communication and some limited financial support. In contrast the Appellant's current carer has known the Appellant all her life and has assisted in her upbringing throughout her life. Further the Appellant has been in the effective day-to-day care of her current carer since her mother's death.

14. Nonetheless it is said that the Appellant was to be handed over to the care of the sponsor: this is expressed in letters in the Appellant's bundle at pages 37 and 40.

15. It is also said that the Appellant has psychological problems which are referred to variously in the letters of support contained in the Appellant's bundle.

16. The First-tier Tribunal Judge dealt with these matters at paragraphs 12–17 of his decision.

17. At paragraph 18 of his decision the First-tier Tribunal Judge observes that Article 8 was not being pursued as a 'freestanding' matter, adding "*I am satisfied that no arguable case could be made for making such an application*". He was overt in stating that he was "*satisfied that the Immigration Rules deal with any Article 8 issues*". In other words the Judge expressed himself to be satisfied that there were no exceptional matters that took this case beyond the ambit of the Rules such as to justify a relaxation of the Rules, a matter he recorded as accepted on the Appellant's behalf by Counsel.

18. Permission to appeal was granted on this basis: "*The grounds argue inter alia that the Judge erred in applying too high a standard of proof and in concluding that there were no serious and compelling circumstances of the case; that the appellant should have been permitted to join her only living relative who is in the UK. The grounds are arguable*".

19. I am not persuaded that there is any such error of law in respect of the application of standard of proof. The First-tier Tribunal Judge properly directed himself to the appropriate standard of proof – the civil standard of a balance of probabilities – at paragraph 8. I cannot detect anything in the fact-finding that suggests a misapplication of that standard of proof. In my judgement the way in which the matter is pleaded in the Grounds in support of the application for permission to appeal does not represent a challenge to the application of the standard of proof in evaluating primary facts. Rather it is a disagreement with the Judge's conclusion that those primary facts did not amount to serious and compelling circumstances. The evaluation of whether such facts amounted to serious and compelling

circumstances is not a matter that is the subject of an application of standard of proof; it is an evaluation – or judgement - of all of the circumstances (as established pursuant to the standard of proof of a balance of probabilities) against the ultimate test propounded in the Rules. In short: did the established facts amount to serious and compelling circumstances? I find it was open to the Judge to conclude that they did not; the challenge is essentially a disagreement with that evaluation, and such disagreement is not properly founded on an allegation of inappropriate primary fact finding.

20. As regards the Judge's findings it is to be noted that having appropriately directed himself at paragraph 8, and having reminded himself as to the burden of proof at paragraph 10, he concludes paragraph 10 with the words "*I find as follows*". The recitation of matters thereafter at paragraphs 11–17 are the findings, which in my judgement do not depart significantly from the matters asserted as essential elements of the Appellant's case.

21. Ms Simpson argues in particular that the Judge had not made any findings in respect of the Appellant's mental health. I am, however, persuaded that the Judge has dealt with this matter adequately.

22. Issues in respect of the Appellant's mental health were asserted in the supporting letters, in particular at pages 37 and 40 of the Appellant's bundle. It is clear that the Judge has taken into account these matters: "*I note what the appellant claims in regard to her emotional state. This carries some support in the letters attached to the Appellant bundle, coupled with the oral evidence of the sponsor today*" (paragraph 15). However, the Judge appropriately noted that the sponsor could not take this evidence much further, before noting in particular that the Appellant did not seem to be in receipt of any kind of medical treatment, counselling, medication or other support in circumstances where there was no suggestion that such facilities would not be available if required (paragraph 17). In my judgement it was open to the Judge to conclude that the Appellant circumstances were not so serious as to require any such support from medical/professional services.

23. In such circumstances it seems clear to me that the Judge had regard to what was being said about the Appellant's emotional state, made a finding, adequately reasoned, to the effect that it was not so grave as to require intervention by healthcare professionals, and necessarily factored such circumstances into his overall evaluation of the case under the Immigration Rules.

24. For the avoidance of any doubt I do not consider that the Judge's use of the word dramatic at paragraph 15 – "*dramatic or exceptional circumstances*" - is indicative of a misunderstanding or misapplication of the wording of paragraph 297(i)(f). In context, in my judgement it is clear enough that the Judge was simply listing a number of matters the absence of which *in toto* meant that there were not "*sufficient grounds to consider*

the Appellant meeting the requirements of the immigration rules" (paragraph 15).

25. In the circumstances I find no error of law or material inadequacy of reasoning. The decision to dismiss the appeal under the Immigration Rules stands.

26. In her oral submissions in respect of Article 8 Ms Simpson denied that any concession had been made before the First-tier Tribunal. She acknowledged, however, that this presented her with a procedural difficulty. There was nothing by way of dispute in the Grounds in support of the application for permission to appeal in respect of the Judge's recording of a concession in the determination; far less was there any affidavit evidence from Counsel in this regard. Indeed as Ms Simpson had been Counsel before the First-tier Tribunal not only would it have been necessary for affidavit evidence to be filed but she would have had to consider passing the case to alternative counsel in the absence of any acceptance of the claimed circumstances before the First-tier Tribunal by the Respondent. The matter had not been raised in the Grounds, and appropriate procedures had not been followed in this regard. In such circumstances I was not prepared to allow the Article 8 issue to be reopened. In this context in any event I note that there is nothing obvious that indicates any material facts that would be relevant to Article 8 that would not be encompassed by the wording of the Rules at paragraph 297(i)(f).

27. Accordingly the Judge's observations and conclusions in respect of Article 8 remain intact.

28. For the avoidance of any doubt I have noted and taken into account Ms Simpson's observations in respect of section 55 of the Borders, Citizenship and Immigration Act 2009 and the case of **T (Jamaica)**. The Judge has not made express reference to section 55: however because it has no extra-territorial effect it is not of direct application in an entry clearance case. Whilst it is of application by analogy – see **T (Jamaica)** – on the facts of this particular case I am satisfied for the reasons already given that the Judge had regard to issues in relation to the Appellant's welfare as identified in the supporting letters, as discussed above. In all such circumstances I do not consider that the absence of any express reference to section 55 or to **T (Jamaica)** constitute a material error.

29. Because I have concluded that there was no error of law I have not taken into account the further evidence that the Appellant sought to submit at the commencement of the hearing – a medical report dated 2 February 2015.

Notice of Decision

30. The decision of the First-tier Tribunal Judge involved no material error of law and stands.

31. The appeal remains dismissed.

Deputy Judge of the Upper Tribunal I. A. Lewis 5 September 2015