

**Upper Tribunal**

**(Immigration and Asylum Chamber)** Appeal Number: HU/05081/2017

**THE IMMIGRATION ACTS**

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| **Heard at Field House** | **Determination Promulgated** |
| **On Wednesday 8 August 2018** | **On Thursday 6 September 2018** |
|  |  |

**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**[F M]**

Appellant

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellant: Mr I Khan, Counsel instructed by Tann Law solicitors

For the Respondent: Mrs N Willocks-Briscoe, Senior Home Office Presenting Officer

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

No anonymity order was made by the First-tier Tribunal. No order was sought by the Appellant. There is no good reason to make an anonymity direction in this case.

**DECISION AND REASONS**

**BACKGROUND**

1. By a decision promulgated on 10 July 2018, I found an error of law in the decision of First-tier Tribunal Judge R G Walters promulgated on 2 August 2017 and I set aside that decision. I directed that the decision should be re-made in this Tribunal following an opportunity for the Appellant to file further and better evidence. My error of law decision is appended to this decision for ease of reference.
2. A brief chronology is set out at [2] of my earlier decision and it is not necessary to expand on that chronology at this stage. I will do so when considering the evidence in more detail below.

**Legal Framework**

1. This is an appeal against the Respondent’s decision dated 27 February 2017 refusing the Appellant’s application for entry clearance dated 5 January 2017. That application is made pursuant to paragraph 297 of the Immigration Rules (“the Rules”).
2. Although the only issue for me is whether the Respondent’s decision breaches the Appellant’s human rights (here under Article 8 ECHR), it is relevant to that decision whether the Appellant is able to succeed under the Rules.
3. Paragraph 297 of the Rules reads as follows:

### “Requirements for indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom

297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:

(i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:

(a) both parents are present and settled in the United Kingdom; or

(b) both parents are being admitted on the same occasion for settlement; or

(c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or

(d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or

(e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child’s upbringing; or

(f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child’s care; 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) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and

(v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; and

(vi) holds a valid United Kingdom entry clearance for entry in this capacity; and

(vii) does not fall for refusal under the general grounds for refusal.”

1. There is no issue relating to the Appellant’s age. She is under the age of eighteen. She will be eighteen in March 2019. Her sponsor, [MM] (“the Sponsor”) is the Appellant’s half-sister. Although there is a guardianship order in the Sponsor’s favour, made by a Court in Zimbabwe, the Sponsor is not the Appellant’s parent. The Appellant lives in Zimbabwe with her biological mother. It is therefore common ground that the only sub-paragraph of 297 of the Rules which can apply is paragraph 297(i)(f). The first issue for me is therefore whether there are “serious and compelling family or other considerations which make exclusion of the child undesirable”.
2. The Respondent also takes issue with whether the maintenance and accommodation elements of paragraph 297 are met. That is the second issue with which I am concerned.
3. Since this is a human rights appeal, the issues concerning the Rules are only relevant to the question whether it is in the public interest to refuse the Appellant entry. Separately, since this is an appeal relying on Article 8 ECHR, I must decide whether there exists a family life between the Appellant and the Sponsor, the extent of the interference with that family life occasioned by refusal of entry and the proportionality of the decision to refuse entry when the interference with any family life is weighed against the public interest.
4. The Appellant is a child, albeit not a young one. Her best interests therefore have to be taken into account. Those best interests are a primary consideration although not the paramount one. I take into account what is said in the Supreme Court’s judgment in that regard in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4.

**EVIDENCE**

1. I have before me the Appellant’s bundle which runs from A1 to B99 (hereafter referred to as [AB/xx]) together with a supplementary bundle which is numbered pages [1] to [8] (hereafter referred to as [ABS/xx]). I have read all the evidence but refer below only to that evidence which is relevant to my consideration of the issues.
2. I also heard oral evidence from the Sponsor. She has also given a written witness statement dated 23 May 2018. I also have a written witness statement from the Appellant signed on 23 May 2018.

**The Appellant’s situation in Zimbabwe**

1. As I note above, the Appellant lives in Zimbabwe with her biological mother. The Appellant’s mother (who is also the mother of the Sponsor) suffered a stroke in 2013. It is the Appellant’s case that her mother is too ill now to care for her.
2. Previously, the Appellant was cared for by an aunt and uncle but, since then, the uncle has committed suicide, that aunt has become depressed and is said to be unable to care for the Appellant. Another aunt of the Appellant then lived with her and her mother. However, that aunt has now relocated to the Middle East leaving the Appellant alone with her mother. There is evidence confirming that the Appellant’s uncle hung himself in June 2014 which is consistent with the Appellant’s case. As Mrs Willocks-Briscoe pointed out, though, there is no evidence relating to the Appellant’s aunt’s mental state and that she is unable presently to look after the Appellant.
3. I now have better evidence in relation to the Appellant’s mother’s illness in the form of a letter from Dr A Muskwe ([AB/A21]). That letter expands upon and explains earlier evidence relating to the Appellant’s mother’s illness. The doctor says that the Appellant’s mother has seizures which are sporadic and cause her to lose consciousness and muscle strength. It is not said how often those occur, but the doctor says that the “attacks are unpredictable and pose a threat to her own safety and those around her”. Separately, the Appellant’s mother is said to suffer from “frequent dizzy spells that are usually associated with moments of lack of vision”. Finally, the Appellant’s mother suffers from twitching and jerking of her left arm, particularly affecting her elbow and wrist joints and suffers from continuing weakness since the stroke. The doctor indicates that the mother’s condition continues to deteriorate due to brain damage from seizures. He says that she is prescribed heavy anti-convulsants which cause drowsiness and that she requires nurse aid throughout the day.
4. In spite of what is said by the doctor about the need for nursing support on a daily basis, the Sponsor said in her evidence that the only support in fact provided is that of a maid who comes to help out during the week. She said that this arrangement is part-time. The Sponsor said that, outside those hours, it is the Appellant who has to care for her mother. She said that such duties should not fall upon a child and that the Appellant did not do well in her exams because of those responsibilities.
5. The Appellant’s statement confirms that her mother is looked after by others and that her sister is responsible for “hiring and firing” of those workers and for paying them ([6] of her statement). However, she says that this help is “a nurse aid and a domestic worker” and she makes no mention of having to look after her mother when those workers are not there.
6. The Sponsor was asked why she could not employ someone permanently to look after her and the Appellant’s mother. She admitted that she could but said that the arrangements were not stable because employees left. She sought to illustrate that by reference to evidence that she had employed one maid who left to be with her husband and she had to find another maid. She also accepted that, if the Appellant left Zimbabwe to come to the UK, she would have to find a maid to live in with the Appellant’s mother unless her uncles (the mother’s brothers) could assist. I will deal below with the Sponsor’s evidence about why she says they cannot do so at the present time.
7. The Sponsor gave evidence that the Appellant’s mother is happy to allow the Appellant to move to the UK because she is unable to look after the Appellant or give her love and attention. I note that there is no evidence from the Appellant’s mother although I accept given her medical condition that the obtaining of a statement might be more difficult. What is though absent is any evidence from the Appellant about how she might feel if she has to leave her mother behind in Zimbabwe. I accept that she says that she is “like a child with no parent or adult to look after me” but that does not deal with the feelings about being physically separated from her mother which she might experience if she comes to the UK.
8. I accept the evidence that the Sponsor has been appointed by the Zimbabwean Courts as the Appellant’s guardian ([AB/A9]). However, as I observed in my earlier decision ([14]), that order says nothing about the evidence which was before the Court, whether it was considered to be in the Appellant’s best interests that the Sponsor act as her guardian and whether, assuming it was, if that decision was made on the assumption that the Appellant would remain in Zimbabwe or whether it was understood by the Courts that the Sponsor intended to bring the Appellant to the UK.
9. The Appellant attends school in Zimbabwe. She previously attended a boarding school. That brings me to the vulnerability on which the Appellant relies.
10. The Appellant has suffered abuse at the hands of a teacher in Zimbabwe. This occurred at “[LIS]”. It is confirmed by a letter from that school dated 11 May 2018 ([AB/A20]). The letter indicates that the teacher concerned was dismissed and the matter reported to the police. The teacher pleaded guilty to the allegations. The incidents complained of occurred in early 2017. There is a letter dated 13 February 2017 ([ABS/4-6]) which the Appellant wrote at the time reporting the incidents. The school referred the Appellant for counselling with a chaplain. The Appellant then moved schools to [ESS] in January 2018.
11. The letter from [LIS] ends by saying that “[w]e hope that [the Appellant] moving to her sister and change of environment may help her recover from the trauma she is going through.” I accept that the Appellant will have suffered as a result of the incidents concerned but there is no evidence from a counsellor or psychiatrist indicating any longer-term effects of the abuse or the Appellant’s current mental health. The Sponsor said that, in her view, the Appellant needs further counselling, but she is not an expert in such matters.
12. I need to mention now the late evidence from the Sponsor about abuse also said to have been suffered by the Appellant when she was a child at the hands of her uncles. Those are the uncles to whom I refer at [17] above. There is no mention of this abuse in either the Appellant’s or the Sponsor’s witness statements although both deal with the abuse by the teacher.
13. The Sponsor raised this for the first time in oral evidence in response to a question during examination in chief about other family members who may be able to care for the Appellant and the Appellant’s mother. She said that the Appellant’s aunt, [M] (the aunt who has since moved to Dubai) did not believe the Appellant when she reported this abuse to her and that, although there was a police report about it, the Appellant was forced by her aunt to withdraw the allegation and told that she was lying.
14. The Sponsor said that she only discovered this abuse when she visited the Appellant in August/September 2017. She sought to use this as reason for not raising the matter earlier. However, as Mrs Willocks-Briscoe pointed out, both the Sponsor and the Appellant have signed witness statements since then and neither has mentioned it. Both knew, based on what I said about the lack of evidence previously, the importance of raising all issues in their evidence. In answer to a question in cross-examination, the Sponsor said that she understood that she needed to provide evidence about why she wanted or needed to support her half-sister but said that this evidence was covered by her statement that the Appellant was vulnerable “although she did not say it in words”. I am completely unable to accept this suggestion. The statement very clearly speaks only of the “sexual abuse” by the teacher at the Appellant’s previous school ([7] of the statement).
15. The Sponsor went further and said that the reason she believed the Appellant was abused because she too had suffered the same abuse from the same sources and that there was a history of abuse on her mother’s side of the family.
16. I have considered carefully whether the failure to provide evidence of this abuse previously (or at all in the case of the Appellant) may be due to reluctance to discuss it. Whilst that might be the case in relation to the Sponsor herself if she did suffer such abuse and has not previously disclosed it, I cannot accept that explanation in relation to the Appellant. She has been willing to disclose and discuss the abuse she suffered from her teacher. She wrote the letter to which I refer at [21] herself and was willing to provide detail of the abuse suffered. That letter was written within a few weeks of the incidents occurring. The Appellant has received counselling in that regard which would no doubt have prompted her to disclose any other ill-treatment. She was also willing (on the Sponsor’s case) to discuss this with the Sponsor in 2017. It is said that the Appellant had reported the abuse to the police but was forced to withdraw the allegation (although there is no evidence of any police report having been made other than in relation to the teacher as referred to by the school’s letter). Those are not the actions of a child unwilling to disclose incidents of abuse.
17. There are a large number of “What’s App” messages in the Appellant’s bundle. There are a number of messages which mention “abuse”, particularly around the time of the last hearing before me. In particular, at [AB/B35], the Sponsor says she wishes that the abuse had been disclosed at the time and that she would have taken the documents with her to the hearing. That exchange must relate to the abuse by the teacher because that is the only abuse disclosed to the Tribunal at the last hearing. There is reference to the Appellant having reported the abuse and having to withdraw at [AB/B31] which, it appears, prompted the Appellant to send the Sponsor something in writing concerning the abuse and when she reported it. Given the dates there referred to (“February”), that must be the letter to which I have already referred.
18. The Appellant has also been willing to disclose what she sees as ill-treatment at the hands of her aunts in her statement. She makes absolutely no mention of her uncles nor of any ill-treatment by them which could be read as a veiled reference to abuse. Particularly given the failure of both the Appellant and the Sponsor to mention this in their witness statements, and the absence of any other evidence, such as any report to the police, I do not find this evidence to be credible. It follows that I do not accept either the Sponsor’s evidence that it is because of this abuse that her uncles cannot be asked to help out with her mother’s care whereas she said that they may be able to do so once the Appellant had left Zimbabwe. If, as was the Sponsor’s evidence, those uncles may be able to assist with the care of her mother, there is no reason why they cannot be asked to do so now.
19. I move on to the Appellant’s current education in Zimbabwe. As I noted at [15] above, the Sponsor attributes the Appellant’s difficulties with her examinations to the caring responsibilities which she has for her mother. I do not accept that this is the cause or at least not the only cause. As I have already noted, the Appellant does not mention that she has to care for her mother who she says is looked after by others. I consider it far more likely that the reason the Appellant has faced difficulties with her education is due to the abuse suffered at her previous school at what appears to have been a crucial point in her education.
20. I assume that the Appellant took her examinations whilst at [LIS] as she received her results before she moved to her new school (according to the What’s App messages). She needed to re-take certain subjects although she had passed three subjects ([AB/B21]). Other discussions suggest that the Appellant may only have failed other subjects by a few marks because the Sponsor asks the Appellant how to go about getting the papers re-marked ([AB/B19]). There is discussion between the Appellant and the Sponsor about which subjects she should re-take and whether she should revise for those at home with the help of a tutor or at the new school. The Sponsor confirmed that she has paid for a tutor.
21. The Sponsor told me in evidence that the Appellant wanted to re-take her GCSEs because she had not done well enough in certain subjects but might decide not to take those exams. The Appellant has been studying for the re-takes whilst also studying for A levels in history, English and one other subject which the Sponsor thought may be geography. The Appellant is in the lower sixth form. I asked the Sponsor what arrangements she envisaged for the Appellant’s education if she came to the UK. The Sponsor said that as the Appellant’s exams in Zimbabwe are marked through Cambridge University, the syllabus ought to be the same. She said that a change in her education mid-term “might push [the Appellant] back a year”. She did not see that as a problem. I note though from the What’s App messages the Appellant’s concern about having to repeat a year ([AB/B20-21]: “I don’t want to repeat”; “Help me. Don’t let me take a grade back”.
22. In terms of her education, the What’s App messages show that the Appellant is engaged with decisions made about her future education and the choices she needs to make for her future career (see for example conversations at [AB/19-21]).
23. As Mrs Willocks-Briscoe pointed out, when asked by the Sponsor in their message conversations whether she liked her new school, the Appellant replied “I love it. I love love it. It’s really nice” ([AB/B18]). When asked if she is enjoying “Vale”, the Appellant replies that “Vale is awesome” ([AB/B25]).
24. I do not accept the Sponsor’s evidence that the Appellant does not have friends. The Sponsor said that other parents will not allow their children to associate with the Appellant because of the abuse. I assume that is the abuse which the Appellant suffered at her previous school, particularly since I have not accepted that the Appellant suffered any other abuse. I can see no reason why other parents would not allow their children to associate with the Appellant for that reason; it appears that the Appellant was an innocent victim. However, I accept that it may be the case that the Appellant has had to make new friends, having had to move schools following the incidents.
25. Again, though, the What’s App messages do not suggest that the Appellant is alone and has no friends. She speaks at [AB/B25] of fundraising with others, at [AB/B26] of going on a picnic at school, at [AB/B27] of running for prefect, at [AB/B28] of wanting to go on a school trip and also at [AB/B28] of a friend named “Fran”. The messages show that the Appellant is heavily involved in extra-curricular activities and is keen on sports. She plays squash ([AB/B40]) and golf ([AB/B41]). The content of the messages gives the impression of a teenager enjoying school, enjoying other activities outside school and enjoying socialising with her friends.
26. The Sponsor confirmed that the Appellant does not have any health issues. There are one or two references in the What’s App messages to the Appellant feeling ill for a day and having to attend physiotherapy for treatment for an injury but nothing which suggests any ongoing medical complaints. I have already explained why I do not accept the Sponsor’s evidence that the Appellant is in need of further counselling.
27. I accept that the Sponsor is responsible for paying the Appellant’s school fees. The evidence of money transfers to Zimbabwe is difficult to follow but I accept the Sponsor’s explanation that this is because it is not possible to simply transfer money by bank transfer and that she therefore has to transfer money to friends who then transfer money to Zimbabwe. She told me that she pays school fees of about $2500 per term. I was taken to one payment shown in the Sponsor’s bank account on 30 December 2016 of £1200 to a friend in Southampton which I was told was payment for school fees for one term.
28. I accept also that the main point of contact for the Appellant’s school in Zimbabwe is the Sponsor. That is confirmed by the letters from the schools and also from the What’s App messages.

**Maintenance and Accommodation in the UK**

1. The Sponsor shares her accommodation with her partner, [MK], and their younger daughter, [K], who is aged ten years. The Sponsor’s elder daughter lives in Nottingham. The Sponsor rents a property which is a two-bedroom flat at [*n*] Millers Close. The monthly rent is £875. The tenancy agreement is in the sole name of the Sponsor. The Sponsor said that the landlord is aware that Mr [K] also lives there. She explained that the landlord said that the agreement could add Mr [K] as a joint tenant when the rent is re-negotiated. That would suggest that the rent has not been increased since 2011 which is surprising but not completely unbelievable (and accords with the payment of rent shown in the Sponsor’s bank statements). Mr [K] has written a letter dated 6 January 2017 which gives his address as [*n*] Millers Rise. I am prepared to accept therefore what the Sponsor says about her current living arrangements.
2. The Sponsor confirmed that, if the Appellant is permitted to come to the UK, she would live with the Sponsor, Mr [K] and [K]. The Sponsor said that the Appellant would have to share a bedroom with [K]. I accept that whether that is the appropriate solution, or the Appellant would use the living room as her own room, the accommodation is suitable (although I note that there is no independent evidence confirming the size of the property or its suitability as accommodation for two adults, one older and one younger child). I accept however, based on the Sponsor’s evidence, that the arrival of the Appellant would not cause overcrowding. There is though no evidence from the landlord that he would be content to allow another person to occupy the property.
3. The position in relation to maintenance is less clear. There are a large number of bank statements in the bundle which are those of the Sponsor. Those do not show that she has a surplus of disposable income; indeed, a number of the statements show that her account is overdrawn. In addition to her salary, the other credits in her account come from child tax credits, transfers between the two accounts and credits from other family members including Mr [K]. As I have already noted, it is difficult to follow the evidence of the transfer of funds to Zimbabwe or where those are shown in the accounts, other than in relation to the one payment to which I refer at [38] above. I am therefore unable to find that the Sponsor would have additional disposable funds available to her if the Appellant comes to the UK. Although the Sponsor’s outgoings in her statements show that she pays rent for the property in which she lives, she gave evidence that her partner puts money in to her account in relation to rent.
4. The Sponsor’s evidence as to earnings is that she works for a NHS trust earning take-home pay of £1180 per month. That is slightly higher than is suggested by the contract of employment in the bundle and the payslips at [AB/A30-43] but those date back to April 2017 at the latest and it is credible that her income may have increased by £100 per month since.
5. The Sponsor also said, when questioned about the income available to her, that she has another bank account with TSB. She did not produce the statements from that account. There is no evidence in the statements which she did produce of transfers to and from a TSB account in her name (as compared with the evidence of regular transfers between the two Barclays Bank accounts). In the absence of such evidence, I do not accept that such an account exists or shows that the Sponsor has more disposable income available to her than is shown by the bank statements in the bundle. I note though that the statements date back to 2016 and the Sponsor may have marginally more income now than then.
6. The Sponsor points out that she also has available to her the income of Mr [K]. I accept her evidence that he earns roughly £1500 per month. That is consistent with the payslips at [AB/A23-29] and the tax statement at [AB/B1] (although that latter document suggests a net income of £37,373.97 that includes £14,002 of benefits rather than income).
7. The Sponsor and Mr [K] have been in a relationship, I am told, since 2002 and have one child together ([K]). The Sponsor informed me that she and Mr [K] moved in together in 2011. Before that, she lived in Liverpool and he lived in Manchester. She then moved to the [*n*] Millers Close address and he followed her to St Albans.
8. The Sponsor and Mr [K] do not have a joint bank account. As Mrs Willocks-Briscoe pointed out, there are no bank statements showing Mr [K]’s financial position. There is a letter from him at [AB/A17] which states that he “will assist my partner, [MM] in supporting [FM] when she comes to live with us in the United Kingdom”. It is said that proof of income is included which I take to be the payslips and tax statement contained elsewhere in the bundle.
9. Given the lack of evidence as to Mr [K]’s means to offer the Sponsor financial support with the Appellant, I am not prepared to accept that he is able to make up any deficit in the Sponsor’s income in that regard. He may have other commitments from his income which would not be apparent unless his bank statements were also included.
10. On the face of the evidence, the Sponsor earns £1180 per month from which she pays £875 per month by way of rent. She also receives child tax credits which, at the time of the statements, amounts to approximately £250 per month (£123.54 every two weeks).
11. Although the Sponsor does receive irregular credits to her account from Mr [K], often for quite large sums, those are all referenced “[K]” which suggests that they are earmarked for the upkeep of their child and not for payment of the rent. In any event, as I have already observed, the evidence of the Sponsor’s own financial dealings suggest that she is only just managing on the income she has including the credits from Mr [K] and has little disposable income. The statements do not show regular payments out of her accounts for the Appellant’s upkeep in Zimbabwe although I have accepted that the evidence in this regard is somewhat difficult to follow.
12. I accept that the Sponsor is currently paying for the Appellant’s school fees which might represent a saving if the Appellant were to come to the UK and is educated at public expense. She would though have to continue to pay for the Appellant’s mother’s help in Zimbabwe and might have to increase that expenditure if a live-in helper were required (unless her uncles could assist).
13. As Mrs Willocks-Briscoe pointed out, there is no evidence in the form of a schedule showing income and outgoings and an availability of disposable income sufficient to support the family including the Appellant to an adequate level.
14. For those reasons, when the financial evidence is considered as a whole, I am not satisfied that this evidence shows that the Sponsor would have sufficient additional disposable income to pay for the upkeep of the Appellant as well as her current outgoings without recourse to public funds.

**Relationship between the Sponsor and the Appellant**

1. The What’s App messages show that the Sponsor and the Appellant speak regularly via that medium. The messages are not daily as the Sponsor says; there are some gaps. However, I accept that those show frequent and regular contact. I accept that the Appellant refers to the Sponsor as “Mum”. The Appellant also has conversations with [K]. [K] refers to the Appellant as her “best aunty” ([AB/B32]).
2. There is though less evidence of face-to-face contact. The Sponsor has only visited the Appellant in Zimbabwe for a few days in 2013 and two weeks in August/September 2017. She gives as reason for those infrequent visits that she has “work and other responsibilities here in the UK. It makes it very difficult for me to make frequent and expensive trips to Zimbabwe” ([13] of the statement).
3. The Sponsor lived in Zimbabwe with the Appellant, their mother and the Sponsor’s elder daughter before coming to the UK. She says that the Appellant and the Sponsor’s elder daughter have a very strong bond as they grew up like sisters. The age difference is only about four years. However, that daughter no longer lives with the Sponsor. She lives independently in Nottingham. I am not entirely clear when the Sponsor came to the UK. However, I assume it was at a date prior to 2002 as that is when she says that she and Mr [K] entered into a relationship. She does not say that she was still in Zimbabwe at that time.
4. The Appellant’s entry clearance application discloses a previous application for a visa to visit her family in the UK in 2012 which was refused for lack of funds. There is no evidence that the Appellant has ever visited her family in the UK. She has left Zimbabwe on a number of occasions between 2010 to 2014 to visit South Africa. It is not clear whether those visits were with the Sponsor or other family members.

**DISCUSSION AND CONCLUSIONS**

1. As I have already noted, the Appellant cannot succeed under paragraph 297 of the Rules unless there are “serious and other compelling family or other considerations” which make exclusion undesirable and that suitable arrangements have been made for the Appellant’s care in the UK”.
2. Mrs Willocks-Briscoe drew my attention to the Tribunal’s decision in Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 88 (IAC) and in particular what is said in the headnote as follows:

*“i) The exercise of the duty by the Entry Clearance Officer to assess an application under the Immigration Rules as to whether there are family or other considerations making the child’s exclusion undesirable inevitably involves an assessment of what the child’s welfare and best interests require.*

*ii) Where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. An entry clearance decision for the admission of a child under 18 is “an action concerning children…undertaken by…administrative authorities” and so by Article 3 “the best interests of the child shall be a primary consideration”.*

*iii) Although the statutory duty under s.55 UK Borders Act 2009 only applies to children within the UK, the broader duty doubtless explains why the Secretary of State’s IDI invites Entry Clearance Officers to consider the statutory guidance issued under s.55.*

*iv) Family considerations require an evaluation of the child’s welfare including emotional needs.*

*‘Other considerations’ come in to play where there are other aspects of a child’s life that are serious and compelling for example where an applicant is living in an unacceptable social and economic environment. The focus needs to be on the circumstances of the child in the light of his or her age, social backgrounds and developmental history and will involve inquiry as to whether:-*

*a. there is evidence of neglect or abuse;*

*b. there are unmet needs that should be catered for;*

*c. there are stable arrangements for the child’s physical care;*

*The assessment involves consideration as to whether the combination of circumstances are sufficiently serious and compelling to require admission.*

*v) As a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor; change in the place of residence where a child has grown up for a number of years when socially aware is important …”*

1. Therefore, although, ultimately, the question under paragraph 297(f)(i) of the Rules is whether there are “serious and compelling family or other considerations which make exclusion of the child undesirable”, the appropriate starting point is what the Appellant’s best interests require. That is the more so now that the only issue for me is whether the decision to refuse her entry clearance is in breach of Article 8 ECHR.
2. I begin by taking into account that the Appellant is not a young child. She is aged seventeen and will be eighteen next year. There is no bright line meaning that the Appellant instantly becomes an adult. However, the evidence suggests that she is already quite independent (see for example what I say at [33] above about her involvement in decision-making about her education and the fact that, when she suffered the incidents of abuse at her previous school, she reported those herself). As such, although family relationships will still hold importance for her, her private life is also something which needs to be given significance when considering what her best interests require.
3. I have accepted that the Appellant has a close relationship with the Sponsor and that she calls her “Mum”. However, she also has her biological mother living in Zimbabwe. The Appellant says that her mother has changed since her stroke, which evidence I accept. She says that her mother no longer acts as a parent to her. I accept that evidence as the What’s App messages show that it is to the Sponsor that the Appellant speaks when she needs to discuss things like her education. That might suggest that her best interests favour her being physically with the person who she now regards as her closest relative in terms of seeking advice. She also has a relationship with the Sponsor’s younger child and I was told that the Appellant has a close relationship with the Sponsor’s elder child with whom she grew up in Zimbabwe and who is close to her in age. I have no statement from that child (now an adult) but even accepting that evidence, that child lives in another part of the UK remote from the Sponsor and her immediate family. The Appellant would not therefore be living with that child if she were to come to the UK.
4. The Appellant would be leaving behind her mother in Zimbabwe. In terms of her best interests, it is therefore necessary to take into account how the Appellant might feel if she has to leave her mother behind in Zimbabwe. The Appellant speaks in her statement of feelings of guilt arising from the Sponsor and her aunt [M] having fallen out about the incidents of abuse. It is likely that she would experience at least some feelings of guilt about leaving her mother in Zimbabwe in the care of a domestic servant. The best interests of a child are usually best served by being with at least one of her biological parents.
5. Neither is this a case where the Appellant was previously cared for by the Sponsor in Zimbabwe. She was cared for by her aunts and it is only since those aunts have been unable to care for the Appellant that the Sponsor has sought to bring the Appellant to the UK. I accept that the Appellant does not speak fondly in her statement about those aunts but nonetheless this is not a case where the Sponsor has brought the Appellant up and wishes to continue the same arrangement in the UK. The Sponsor herself says that bringing the Appellant to the UK was not “our first choice” ([5] of her statement). This is not a case moreover where the Appellant and the Sponsor have lived together in a family unit in Zimbabwe until recently. The Sponsor left some time ago, at least prior to 2002, and has only visited twice (according to her own statement). Even if her statement is only intended to record visits since her mother’s illness in 2013, that is twice for an overall period of less than a month in the course of five years.
6. The Appellant also has other family members in Zimbabwe. For example, she tells the Sponsor in the What’s App messages about attending the family wedding of her cousin.
7. I also need to consider the impact on the Appellant’s private life of leaving Zimbabwe aged seventeen. Based on the evidence before me, the Appellant has never visited the UK. She has lived in Zimbabwe for all her formative years. She will be used to the culture in Zimbabwe. She has no familiarity with the culture in the UK. As I have already observed, although she is said to have a close bond with the Sponsor’s elder child, that child is now an adult and not living at home. [K] is much younger. The Appellant would not therefore have any family member who could help her integrate into UK culture and help her form a new social life. It is likely to be something of a culture shock for her and it may be quite difficult for her to adjust (although the evidence about her recent adjustment following the incidents of abuse suggests she is quite resilient).
8. The Appellant has also been educated entirely in Zimbabwe. She is now at a particularly crucial stage of her education, having to re-sit some of her GCSEs and undertaking studies at A level. The Sponsor’s evidence was that the change of education system might lead to the Appellant having to re-take a year. The Appellant has already had to change schools quite recently. A change not only of a further school but also into a different country’s education system is likely to be very disconcerting for a child of her age. The Appellant has adapted quickly to her new school which she says she “loves”. However, the upheaval involved in a move to the UK is likely to be similarly significant if not more so.
9. The Appellant would be leaving behind her friends and a country and way of life which she knows to come to a country where she has no friends and with which she is completely unfamiliar. I appreciate that the Appellant would have the Sponsor and her family to support her to adapt. However, she may find it difficult to adapt since none of that family are of a similar age, save for the elder daughter who no longer lives with or in the same area as the Sponsor and her immediate family.
10. I accept that it may be in the Appellant’s best interests in terms of her family life to live with her family in the UK. She clearly has a close relationship with the Sponsor to whom she turns for advice.
11. However, when all the factors relating to the Appellant’s best interests are taken into account, I do not accept that the disruption to the Appellant’s private life caused by a move to the UK coupled with her separation from her biological mother is in the Appellant’s best interests.
12. Even if I am wrong about that, I go on to consider whether there are “serious and compelling family or other considerations” justifying the Appellant being permitted to enter the UK.
13. The first factor prayed in aid by the Appellant and the Sponsor is that the Appellant’s mother is unable to look after her. The Sponsor goes further and says that the Appellant has to look after her mother and those caring responsibilities have impacted on her education. I have explained at [30] above why I do not accept that latter evidence. I do though accept that the medical evidence shows that the Appellant’s mother is unable to look after the Appellant, at least not to any great extent, in any physical capacity. It is less evident that the mother’s ill-health impacts on her ability to care for the Appellant emotionally but I do accept that the Appellant has formed a close bond with the Sponsor emotionally to the extent that she refers to her as “Mum” and I also accept the Appellant’s written evidence that she feels as if there is no parent or other adult to care for her.
14. The second factor is the more important and that is the Appellant’s vulnerability arising from the sexual abuse which she suffered at the hands of her former teacher. I have given reasons at [23] to [29] why I do not accept that the Appellant suffered abuse by family members. The Appellant also says that she was not well treated by her aunts. However, her aunts no longer live with her. The Appellant says it was a “relief” when her aunt [M] went to live in Dubai.
15. Returning then to the incident of abuse at her previous school, I accept that this must have been traumatic for the Appellant. However, she handled this herself, reporting it via a detailed letter to the authorities in February 2017. The Sponsor was not involved in that reporting as she had to ask the Appellant about when it was reported and for a copy of the letter for the purposes of these proceedings (see [28] above). Again, that suggests that the Appellant is able to look after herself. I fully accept that the Appellant needed counselling after the incident, but I have explained at [22] above, why I reject the Sponsor’s evidence that the Appellant needs further counselling.
16. The evidence otherwise does not show that there is any evidence of neglect or abuse or that there are “unmet needs”. Insofar as the Appellant needs emotional support from the Sponsor, she has shown by the passage of time that she is able to get this from her frequent contact via social media. The Appellant from what she says disliked her aunt [M]. It cannot be suggested based on what the Appellant says about her relationship with her aunts at [5] of her statement that she had emotional support from that source which now needs to be replaced by such support from her half-sister. It appears from what she says there that she has not really had much emotional support since 2013. That may well explain her independence as is shown in the evidence. However, what the evidence does not show is that her needs are being “unmet” in such a way that the circumstances are “sufficiently serious and compelling” to render her exclusion from the UK undesirable.
17. As the Tribunal points out at [34] of the decision in Mundeba, the question whether considerations are “serious” and “compelling” “sets a high threshold that excludes cases where, without more, it is simply the wish of parties to be together however natural that ambition may be”. That threshold is not met on the evidence in this appeal.
18. It follows from the above conclusions that I do not accept that there are “serious and compelling family or other considerations which make exclusion of [the Appellant] undesirable”. For the reasons I give at [40] to [53] above, I do not accept either that the Appellant (and the Sponsor) have shown that there is adequate maintenance for the Appellant in the UK.
19. It follows that the Appellant cannot meet paragraph 297(i)(f) of the Rules. I turn then to consider Article 8 ECHR.
20. I have found that, even though the best interests of the Appellant may favour her living with her family in the UK, her best interests overall are to remain living in Zimbabwe. She can continue her close relationship with the Sponsor as she does now at a distance and is able to apply to visit her family in the UK. She is now aged seventeen and there is no reason she cannot travel independently. Equally, the Sponsor and her family can visit the Appellant in Zimbabwe. The Appellant’s mother’s care can be dealt with, as now, by the engagement of a carer or maid so that any caring responsibilities which the Appellant has for her mother (which she does not in any event rely on in her statement) can be alleviated. Those best interests are a primary consideration although not the only or the paramount consideration.
21. I am prepared to accept that the Appellant has a family life with the Sponsor. She is financially dependent on the Sponsor at the present time and she has an emotional relationship which goes beyond the normal relationship between siblings (or more accurately half-siblings). As I have noted, the Appellant calls the Sponsor “Mum” and turns to her when she wants advice. I accept that the refusal to allow the Appellant entry to the UK is a sufficiently serious interference with that family life to warrant justification.
22. I turn then to consider the public interest. It is relevant to that public interest that the Appellant is unable to meet the Rules for the reasons I have already given. It is also relevant that I have found that the evidence does not satisfy me that the Sponsor would be able to maintain the Appellant in the UK without some recourse to public funds.
23. Outside the Rules, the Appellant has to show that there are “unjustifiably harsh” consequences if she is not permitted to enter the UK (Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11). As with the threshold for whether there are “serious and compelling” considerations for the purposes of paragraph 297, this is a high threshold. I have already explained why that threshold is not met under paragraph 297 in this case. For the same reasons, I do not accept that the evidence shows that the consequences of refusal of entry are “unjustifiably harsh”.
24. Particularly in circumstances where I have found that the Appellant’s best interests, in terms of her private life, are not served by a move to the UK, when the interference with her family life is balanced against the public interest and in circumstances where her case does not meet the Rules, I conclude that the decision to refuse entry clearance is a proportionate one.

**DECISION**

**The Appellant’s appeal is dismissed.**

Signed  Dated: 3 September 2018

Upper Tribunal Judge Smith

**APPENDIX: ERROR OF LAW DECISION**



**Upper Tribunal**

**(Immigration and Asylum Chamber)** Appeal Number: HU/05081/2017

**THE IMMIGRATION ACTS**

|  |  |
| --- | --- |
| **Heard at Field House** | **Determination Promulgated** |
| **On Friday 20 April 2018** | 10 July 2018 |
|  |  |

**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**[F M]**

Appellant

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellant: Mr N Garrod, Counsel instructed by RMB solicitors

For the Respondent: Mrs Z Kiss, Senior Home Office Presenting Officer

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

No anonymity order was made by the First-tier Tribunal. No order was sought by the Appellant. There is no good reason to make an anonymity direction in this case.

**DECISION AND REASONS**

**Background**

1. The Appellant appeals the decision of First-tier Tribunal Judge R G Walters promulgated on 2 August 2017 (“the Decision”). By the Decision, the Judge dismissed the Appellant’s appeal against the Respondent’s decision dated 27 February 2017 refusing her human rights claim as contained in an application made on 5 January 2017 seeking entry as the child or other dependent of a settled person under paragraph 297 of the Immigration Rules.
2. The Appellant is a national of Zimbabwe. She was born on 22 March 2001. She applies to join her half-sister who is settled in the UK (“the Sponsor”). It is said that the Appellant cannot continue to reside in Zimbabwe as there is no-one to look after her. Her mother is said to be too ill to do so. One of her aunts also has a depressive illness and cannot care for her. The other aunt who was caring for her has relocated to the Middle East.
3. The Judge found that the Appellant could not show that there are serious and compelling family or other considerations which make the exclusion of the Appellant desirable for the purposes of paragraph 297 ([18] of the Decision). The Judge did not accept that Article 8 ECHR was engaged on the evidence before him. He therefore dismissed the appeal.
4. The first of the grounds relies on the Respondent’s failure to provide the Respondent’s bundle. The Sponsor was unrepresented at the hearing and it is asserted that the Respondent’s bundle would have included “crucial evidence” which was put before the Respondent with the application. It is suggested that the Judge should have alerted the Sponsor to the Respondent’s duty to provide a bundle, the implication being that there was a procedural unfairness rendering the Decision unlawful.
5. The second ground challenges the Judge’s findings (or lack of findings) on certain of the evidence. It is there noted that the Judge has failed to give due consideration to the Sponsor’s oral evidence.
6. The third ground concerns the Judge’s finding that there are no serious and compelling family or other considerations. It is pointed out that the Appellant is a minor child. It is asserted that she has “experienced trauma” and does not have anyone to care for her or the ability to care for herself. Reference is made to a failure to consider the Appellant’s best interests. The Appellant notes that the Judge has disregarded the guardianship order made by a Court in Zimbabwe.
7. Permission to appeal was granted by First-tier Tribunal Judge Blundell on 31 January 2018 in the following terms so far as relevant:-

“…[2] Whilst the judge was evidently faced with a paucity of evidence, I consider it arguable that he has failed to consider the question presented by paragraph 297(i)(f) in accordance with the guidance given by the Upper Tribunal in Mundeba [2013] UKUT 88 (IAC). It is arguable that the judge failed to make clear findings of fact regarding the appellant’s family and other circumstances in Zimbabwe, and that he failed to consider (in particular) whether the appellant has unmet needs in her present situation. He arguable failed, in the circumstances, to consider the appellant’s best interests and to reach a lawful decision.

[3] Whilst I would not have been minded to grant permission to appeal on the other points raised in the grounds of appeal, all grounds may be argued.”

1. The appeal comes before me to determine whether there is a material error of law in the Decision and if so either to re-make the decision or to remit to the First-tier Tribunal to do so.

**Discussion and conclusions**

1. I can dispose shortly of the point about procedural fairness. The Respondent was unrepresented before the First-tier Tribunal Judge. The Judge could not therefore simply ask for a copy of the bundle. Furthermore, Mrs Kiss confirmed that she still did not have a Respondent’s bundle on file. Although the Judge noted at [4] of the Decision that he might have found a copy of the Visa Application Form (“VAF”) helpful, I was shown a copy of that and I cannot see how that would have assisted at all. I was also given a copy of the list of documents submitted with the VAF. Having checked through the list with the benefit of Mr Garrod’s submissions, it was clear that the only evidence which the Judge did not have in the bundle submitted by the Appellant consists of two letters, one from the Sponsor and the other from her partner which merely confirm the position. Since the Sponsor gave oral evidence at the hearing, those add nothing. It certainly cannot be said that the Appellant was deprived of the opportunity to rely on “crucial evidence”.
2. However, that does cross over with some of what is said in the remaining grounds, particularly in relation to the Judge’s treatment of the evidence which he did have before him.
3. First, the Sponsor gave oral evidence at the hearing, although since she was unrepresented, there may have been a blurred line between what was evidence and what submissions. Whether evidence or submissions though, the Judge has failed to refer to what was said at all. That is of potential materiality because, for example, Mr Garrod pointed out that the Judge has misunderstood the Appellant’s case at [7] of the Decision where he refers to the Appellant moving to live with the aunt who is relocating to Dubai whereas the position is that the aunt moved in with the Appellant and her mother. That is relevant to one of the reasons given for refusing the application, that the Appellant lived at the same address as her mother in the four years after her mother’s stroke, with the inference that her mother had been able to care for her.
4. In similar vein, the Judge refers in two places to the Appellant’s mother as the Appellant’s grandmother. It appears therefore that he has not understood the factual premise behind the claim that the Appellant has no-one left in Zimbabwe who can care for her because her mother is too ill and the aunt who was caring for her is no longer in the country.
5. Second, at [8] of the Decision, the Judge refers to the supporting letter from the Appellant’s aunt who has moved to Dubai and then says at [9] of the Decision that, although it is endorsed by a Commissioner of Oaths, it does not take the form of an affidavit. He does not though reach any conclusion on the content of that letter or make any finding that, as a result of what he says at [9] of the Decision, he does not give this evidence any weight.
6. In this and other regards, Mrs Kiss is right to point out by reference to the documents that they do not say very much at all. This is so, for example, in relation to the Guardianship Order in the Sponsor’s favour which states merely that “The applicant, [MM] [the Sponsor] be and is hereby appointed as the guardian of [FM]”. As the Judge observes at [15] of the Decision, due to the lack of other paperwork, there was nothing to show on what that order was based or the reasons for it. For example, in the UK, there would generally be some form of interlocutory procedures and the Family Courts would generally have at the very least a report as to whether the proposed guardianship arrangement is in the child’s interests. In this case, that is of particular importance because it is not clear whether the Court was told that the Sponsor lives in the UK and that placing the Appellant in her care involves uprooting the Appellant from the country where she was born and has grown up. It also involves separating the Appellant from her mother.
7. Another area of evidential omission is the absence of any statement from the Appellant herself. Although she is still a child, the Appellant is now aged seventeen years. She is educated. She attends a boarding school. I would in such circumstances expect a statement from her setting out some information about her family and other circumstances in Zimbabwe. There is a lack of evidential underpinning for example for the assertion in the grounds that the Appellant has experienced trauma and is incapable of looking after herself.
8. The Judge has made the point at [11] to [13] of the Decision that the medical evidence supporting the assertion that the Appellant’s mother (there said to be her grandmother) cannot care for the Appellant is not comprehensible. That may be so in relation to the illnesses there described and I agree with Mrs Kiss’s submission that the medical report is highly unsatisfactory due to lack of detail on the crucial points. However, the doctor does say that the Appellant’s mother is unable to look after a minor in her condition. The Judge has not had regard to that aspect of the report.
9. Mr Garrod also pointed out that the Judge has failed to consider at all the evidence that the Appellant attends boarding school. As I observed, I am unclear how that assists the Appellant given that, at least in term-time, she will have the care of the school to meet her day-to-day needs. However, Mr Garrod is right to note that this evidence is not considered at all.
10. I agree with what is said in the grant of permission about the paucity of the evidence before the Judge. There is however a paucity of reasoning on the part of the Judge and a failure to make findings on the central aspects of the appeal. In that regard, whilst the appeal is only on the basis that the decision breaches the Appellant’s human rights, it is central to that issue whether she can meet the relevant rule. As Mrs Kiss also pointed out, there are no findings on the accommodation and maintenance requirements of that rule, although, once again, there is very limited evidence in that regard.
11. Although, as I say, there was limited evidence as to the “serious and compelling family or other considerations which make the Appellant’s exclusion undesirable” justifying a conclusion that paragraph 297(f) is met, the Judge needed to make findings about the evidence which there was and provide reasons for finding that the rule is not met. The Appellant is entitled to know the reasons why she has lost.
12. For those reasons, I am satisfied that there is a material error of law in the Decision and I set it aside. Mr Garrod initially submitted that the appeal should be remitted for findings to be made. However, as I pointed out, this may not be in the Appellant’s interests in this case for two reasons. First, although the issue whether the Appellant meets the relevant rule has to be determined by reference to date of application, the Article 8 issue more generally will need to be determined as at date of hearing. If there is any significant delay in the listing of that further hearing, the Appellant may already have turned eighteen years old. Second, and more importantly, if it is being asserted as I understand is the position, that the Appellant has no-one to take care of her needs in Zimbabwe and there are serious family or other considerations justifying her entry to the UK, it is incompatible with her position for there to be any major delay in the resolution of her case.
13. For that reason, and with the agreement of the Sponsor and the Respondent, I determined that the Decision should be re-made in this Tribunal. However, in light of the comments I make above about the unsatisfactory nature of the evidence, I agreed that I would make directions for the production of further evidence from the Appellant to deal with the evidential deficiencies which I have identified and to update the Tribunal on the current factual position.

**DECISION**

**The First-tier Tribunal Decision involves the making of a material error on a point of law. I therefore set aside the First-tier Tribunal Decision of Judge R G Walters promulgated on 2 August 2017 and make the following directions for the re-making of the decision.**

**DIRECTIONS**

1. **Within 28 days from the promulgation of this decision, the Appellant is to file with the Tribunal and serve on the Respondent any further evidence on which she wishes to rely at the resumed hearing (taking into account my comments above about the sort of evidence which is likely to be required).**
2. **The appeal will be relisted for a resumed hearing on the first available date after 28 days from the date of promulgation of this decision with a time estimate of half day.**

Signed  Dated: 23 April 2018

Upper Tribunal Judge Smith