



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/22388/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 31<sup>st</sup> January 2014**

**Determination**

**Promulgated**

**On 3<sup>rd</sup> July 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL**

**Between**

**MISS BOIPELO KATLEGO MOIKETSI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms S Lloyd (Counsel)

For the Respondent: Mr P Deller (Senior Home Office Presenting Officer)

**DETERMINATION AND REASONS**

1. The appellant's appeal against a decision to refuse to vary her leave was allowed by First-tier Tribunal Judge Wiseman ("the judge") in a determination promulgated on 18<sup>th</sup> November 2013. The judge found that the requirements of paragraph 297 of the rules were met. He allowed the appeal on this basis and also under Article 8 of the Human Rights Convention.

2. The Secretary of State made an application for permission to appeal. It will be convenient to continue to refer to her as “the respondent” and to Miss Moiketsi as “the appellant” in this determination. In the application, it was contended that the judge made a material misdirection in law as paragraph 297 of the rules was “not deemed to be appropriate at the date of application” as the appellant was, so the author of the grounds suggested, 18 years of age. Furthermore, the appellant, now over the age of 18, could return to Botswana. The judge erred in finding that the requirements of the rules were met.
3. It was also contended that the judge erred in allowing the appeal under Article 8. The appellant arrived here as a visitor, had no legitimate expectation that she will be able to remain and any ties established here in the United Kingdom were done so while she had precarious status. There were no exceptional or very compelling circumstances that would result in an unjustifiably harsh outcome and so the judge erred in allowing the appeal.
4. Permission to appeal was granted on 5 December 2013 on the basis that it was arguable that the judge erred as paragraph 297 relates to entry clearance cases and when the First-tier Tribunal introduced the issue, the appellant was too old to qualify.
5. A response was made on the appellant’s behalf under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. As at the date of the appeal hearing, on 25<sup>th</sup> October 2013, the appellant was still aged 17. She was accompanied by her aunt and uncle. The appellant did not give evidence but her close relatives did. The judge properly took into account evidence that the appellant’s aunt in Botswana was alcoholic and he was entitled to make the findings he did. Although the application for leave was not made under paragraph 297 of the rules, the judge did not err in law in considering the operation of that particular rule. This was relevant in the proportionality assessment he made. The appellant’s application was made when she was 16 years old and a delay of one year and three months followed before the adverse decision was made. The judge took into account evidence regarding the appellant’s life in Botswana, her best interests as a child in the light of section 55 of the 2009 Act and reached conclusions that were open to him.

### **Submissions on Error of Law**

6. Mr Deller said that the issues could be narrowed usefully. It was clear that the appellant was not 18 at the date of decision. Secondly, although the judge granting permission observed that paragraph 297 applied in entry clearance cases, paragraph 298 contained nearly identical requirements. Thirdly, paragraph 2 of the written grounds was abandoned. In the Secretary of State’s letter giving reasons for the adverse decision, attention was drawn to the apparent lack of evidence about the aunt’s

condition but the judge had looked at the evidence and made a finding that was open to him. What was left was the way in which the Tribunal dealt with the case and reached a conclusion that the appeal fell to be allowed.

7. When the application was made, within the period of leave given to the appellant as a visitor, there was no possibility that the aunt here could act as a sponsor in a settlement case. Indeed, leave was applied for in form FLR(O), outside the rules, because of the domestic circumstances in Botswana. The application was made on 15<sup>th</sup> March 2012. The rules were changed substantially on 9<sup>th</sup> July that year, the Secretary of State taking a particular stance on Article 8 and related matters. Another relevant change in circumstances was the grant of indefinite leave to the appellant's aunt. This meant that she was capable of acting as a sponsor under the settlement rules.
8. Mr Deller said that the Secretary of State's files showed that a first decision was made in August 2012. The caseworker was aware that the sponsor had indefinite leave to remain. There was no provision in the rules enabling a child to remain with her aunt and so the caseworker indicated that all that could be considered were private life ties. The requirements of the rules were not met as the appellant had been present here for less than seven years. That decision was challenged in grounds which included an assertion that the sponsor now had indefinite leave. When the case came to court, the Presenting Officer noted that the Secretary of State had not considered section 55 of the 2009 Act and so the decision was withdrawn. Under the procedure rules, that brought the appeal to an end.
9. Another decision was then made, six months later. This gave rise to the present appeal. The grounds of appeal prepared on the appellant's behalf were broadly similar to the first set of grounds. The application for leave was made in form FLR(O), outside the rule, in reliance upon Article 8. At the hearing, the judge invoked the settlement rules. He mentioned paragraph 297 whereas the correct rule should have been 298. The judge observed that there was no reason why he could not consider the rules. The Tribunal was a creature of statute. Paragraph 298 required, of course, an appropriate form of application which was not completed in this case. Matters concerning leave outside the rules fell to be considered. There was another possibility in the light of AS (Afghanistan) and the judgment of the Supreme Court in Patel [2013] UKSC 72. If it were contended that the decision under appeal was not in accordance with the rules because certain requirements of the rules were, in fact, met, the Tribunal might have a duty to determine that issue. The adverse decision made in May 2013 contained notice under section 120 of the 2002 Act. The judge was required to consider whether the settlement rules were met, after all.
10. The determination showed that the point took hold and the judge did consider the settlement rules. The Presenting Officer appears to have gone along with that, even though the correct formalities – the correct

application form in particular – were not complied with. In any event, the rule contained in paragraph 298 might have been relevant in the proportionality assessment that the judge undertook. In light of the grounds of appeal against the first decision, supplemented by the knowledge that the Secretary of State already had that the sponsor had indefinite leave, an application under the rules might have been invited. However, the Secretary of State did not take this step. Did the judge in fact allow the appeal under the rules? The author of the grounds to the Upper Tribunal asserted that the requirements were not met on the date of application, as the sponsor did not have indefinite leave, or at the date of promulgation, as the appellant was over 18. It was pertinent to consider how the judge felt able to consider paragraph 297 or 298 of the rules, rather than weighing the evidence in those contexts as factors going to proportionality.

11. Stepping back, given the sponsor's indefinite leave, which was known to the Secretary of State when the first decision was withdrawn, and the six months' delay in making the second decision, the section 120 notice should be given proper recognition so that paragraph 298 did fall to be considered. Looking at the requirements of that rule, in play was paragraph 298(i)(d), requiring serious and compelling family or other considerations making the exclusion of the child undesirable. The determination showed that the judge did indeed find that serious and compelling circumstances were present. Home Office guidance fell to be considered where the requirements were in play. The judge had in mind circumstances in Botswana and circumstances here. Even though the judge's treatment of other matters might be described as rather cursory, he did have these factors clearly in mind. If the First-tier Tribunal properly weighed the evidence against the requirements of paragraph 298, the judge concluding that the appeal fell to be allowed, that might be the end of the error of law challenge. In the light of AS and Patel, if the judge was entitled to consider paragraph 298, there was nothing of substance in the challenge that he in fact referred to paragraph 297. It might be said that the judge failed to properly identify why he felt he could consider the immigration rule and the determination showed that Article 8 seemed to be the main basis of his analysis. Nonetheless, proper consideration of the section 120 notice might provide the answer.
12. Ms Lloyd said that the sponsor's indefinite leave was expressly raised in the grounds of appeal. It was fair to observe that the solicitors did not expressly refer to paragraph 298 of the rules. Nonetheless, chapter 8 of the appropriate guidance revealed that serious or compelling considerations fell to be assessed by decision-makers. Overall, the issues were canvassed before the judge. The guidance was contained in Annex M to the IDIs, in chapter 8, section 5A. This governed applications by children and specifically where serious and compelling reasons were said to be present.

### **Conclusion on Error of Law**

13. In substantial acceptance of Mr Deller's analysis and Ms Lloyd's complimentary submissions, I conclude that no material error of law has been shown. By the time the appeal was heard, a combination of the circumstances in which the first decision was withdrawn, the sponsor's indefinite leave, the section 120 notice in the second decision and the way in which the case was put to the judge all combined to enable him properly to consider the immigration rules. No material error is shown in his identification of the correct paragraph as 297 rather than 298.
14. The determination shows that the judge had the correct guidance before him (paragraph 14), as he did the evidence of circumstances both in Botswana and in the United Kingdom. He accepted the appellant's sponsor and her husband as credible witnesses. He was entitled to find that the appellant would be at risk on return to Botswana, in the light of the evidence regarding her aunt there. He made a brief assessment of the best interests of the appellant as a child, without overlooking that at the date of the hearing, she was just short of her majority. His approach was pragmatic and sensible. He found that in reality, the appellant would be dependent upon her sponsor here for some time to come.
15. I conclude that the proportionality assessment made by the judge, with his conclusion at paragraph 45 of the determination, was open to him on the evidence. Whether or not he was entitled to allow the appeal under the rules, his conclusion on Article 8 was not vitiated by error. Even if he did err in relation to the rules, the error is not material.
16. The decision of the First-tier Tribunal shall stand.

## **DECISION**

The decision of the First-tier Tribunal contains no material error of law and shall stand.

## **ANONYMITY**

No application for anonymity has been made at any stage in these proceedings and I make no direction on this occasion.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell