Upper Tribunal
(Immigration and Asylum Chamber)

Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 00088(IAC)

THE IMMIGRATION ACTS

Heard at Field House

On 22 January 2013

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Before

MR JUSTICE BLAKE

UPPER TRIBUNAL JUDGE DAWSON

Between

LAURENT WA MUNDEBA

Appellant

and

ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation :

For the Appellant: Mr Rene instructed by Mountain Partnership

For the Respondent: Mr Norton, Senior Presenting Officer

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: see also SG (child of a polygamous marriage) Nepal [2012] UKUT 265 (IAC) [2012] Imm AR 939 .

DETERMINATION AND REASONS

Introduction

1.
The appellant, who is a minor born 14 December 1995, lives in Kinshasa in the Democratic Republic of Congo (DRC). His father, a soldier, separated from his mother in 2001/2002 and took with him both the appellant and his older sister. The appellant's other sister, Blandine, the sponsor in this appeal, remained with her mother until she died and thereafter came to the United Kingdom in 2005.

2.
The sponsor heard nothing further about her father or other siblings following her arrival in the United Kingdom. In March/April 2010 a friend of hers, Mr Lumeto, came across the appellant in an orphanage on one of his visits to the DRC. The sponsor learned on making contact with her brother that their father, the appellant and her sister had moved to an area called Bukavu. The appellant became separated from them when fighting broke out some time in late 2008/early 2009. The appellant had been taken from Bukavu to Kinshasa by a woman who thought she was bringing him to join other members of his family. When she realised that the mother was dead and his sister had left Kinhasa she handed him to the Girl Guides Association who have been taking care of him since 13 January 2009.

3.
The sponsor, who was born on 18 July 1990, was refused asylum by the Secretary of State in 2005 but was granted leave to remain on a discretionary basis. It is assumed that this was because of her age. On 30 March 2010 she and her daughter (who was born on 12 March 2007), were granted indefinite leave to remain on an exceptional basis outside the Immigration Rules.

4.
On 20 March 2011 the appellant made application for entry clearance to settle with the sponsor in the United Kingdom. This was refused on 19 May 2011 for a number of reasons, including:

(i)
An insufficiency of evidence that he was related to the sponsor, with reference to paragraph 297(i) of the Immigration Rules.

(ii)
There was no evidence such as a court order that the sponsor held sole responsibility for his care.

(iii)
The appellant had provided no official verifiable evidence to confirm the statement by the sponsor that the appellant's mother had died and that his father's whereabouts were unknown.

(iv)
There was no evidence to show the sponsor had visited him or that there was ongoing contact and no evidence that she had played a significant part in his upbringing. For this reason the Entry Clearance Officer was not satisfied that Blandine had had sole responsibility for the appellant's upbringing as required by paragraph 297(i)(e).

(v)
The appellant had provided no evidence that he was living alone outside the United Kingdom in the most exceptional, compassionate circumstances, or that he was experiencing particular problems such as health or social issues.

(vi)
The application had been considered under paragraph 352 of the Immigration Rules relating to family reunion and as a sibling, the appellant did not qualify. Although the sponsor had been granted leave to remain as a refugee for five years from November 2005, she no longer held refugee status as she had since been granted indefinite leave to remain exceptionally outside the Rules.

(vii)
Account had been taken of Article 8 of the Human Rights Act and although it was accepted the decision constituted limited interference with Article 8, it was a qualified right and the decision was justified and proportionate in the interests of maintaining an effective immigration control.

The First –tier hearing

5.
Pausing there, it is immediately apparent that the decision was flawed by a number of errors, both as the relevant requirements of the immigration rule that applied in the case of the appellant, his sister's status in the United Kingdom, and the very fact of their relationship. These were resolved by the time the appeal was heard before First-tier Tribunal Judge Talbot on 23 March 2012. On that occasion the presenting officer explained that reliance was not placed on the sole responsibility provisions under paragraph 297(i)(e) and furthermore, she conceded that DNA evidence produced by the sponsor supported the relationship.

6.
The sponsor gave oral evidence, adopting two statements. The judge recorded her as having said that she had been subsequently granted asylum. That appears also to have been the understanding of the Entry Clearance Officer. This aspect was clarified before us by Mr Norton, who produced copies of the relevant letters from the Secretary of State confirming the position as stated above (paragraph [3]).

7.
The sponsor explained as recorded in her first statement how Mr Lumeto, who works for a charity, travels to DRC to try and help trace people's relatives. It was he who discovered that the appellant was being cared for by the Girl Guides Association in about April 2010. The sponsor and appellant had been in contact since then. The person who had brought the appellant from the fighting to Kinshasa was called Leti. This had been done with a view to the appellant being reunited with his mother and sister. He had been unaware that his mother had died and his sister had left the country and so the

decision was made to leave him in an orphanage run by the association. Contact is maintained by the sponsor using a mobile phone she had bought for him. They speak about four to five times a week and she also speaks to members of the charity to discuss his welfare. He is very lonely and was very happy when the sponsor made contact. He has no other family now and will be able to stay with the Association until he is 18. He does not receive any education as the charity only provides him with food, accommodation and medical care. He cries a lot when he speaks to the sponsor who sends him money through Western Union.

8.
The sponsor herself is a single parent, has a four year old child who suffers from sickle cell anaemia and she is studying health and social care for which she undertakes work experience. She is supported through income support and DLA for her child, living in Housing Association accommodation. She has been unable to visit the appellant as she is too scared to go back and does not believe it would be safe for her or for her young daughter who has to see a doctor regularly.

9.
Submissions made by the presenting officer argued that the letter from the Girl Guides Association did not actually confirm the appellant was living with them and there was no evidence from Mr Lemuto. It was argued the appellant may have other relatives in the Democratic Republic of Congo and the telephone records did not show that contact with the sponsor was on a daily basis as claimed. It was not believable the sponsor would not have gone over to the DRC to visit her brother.

10.
By way of response Ms Wangui invited the judge to find the appellant credible and reminded him why the sponsor had not visited her brother in the DRC, where there was no one to protect him and there was a risk arising out of the recruitment of child soldiers.

11.
In reaching his conclusions, the judge correctly directed himself that the relevant provision was paragraph 297(i)(f) of the Rules. He was satisfied that the sponsor and appellant were in regular telephone contact and that she sends him money on a regular basis despite her own slender means. He accepted that she is genuinely emotionally committed to her brother and wants him to join her in the United Kingdom. He was also satisfied he had been given credible reasons for her not having been to visit him in the DRC since they resumed contact. Noting (inaccurately) that the sponsor had been granted refugee status, there was no reason to doubt that she and other members of the family had endured very difficult circumstances against a background of violence and it was understandable that the parties would like to be reunited as the only surviving members of the family.

12.
Thereafter, the judge directed himself that the requirements of paragraph 297(i)(f) will only be met if "… there is sufficient evidence of the actual circumstances in which her brother is living in DRC". At [22] he went on to make the following points on the evidence before him.

(i)
The letter from the Association dated 2 March 2011 gave only very limited information, stating that the appellant had lived in a situation of family "rupture" since 13 January 2009 and that he benefited from psycho-social and medical care by the Association.

(ii)
The letter did not specifically confirm that he was living in their orphanage.

(iii)
It did not clarify whether or not he was receiving education.

(iv)
It did not mention whether or not there were any extended family members taking responsibility for him.

13.
The judge also observed the absence of evidence from Mr Lumeto. The sponsor had explained to him that he lived in Bromley but she had not realised that she should produce evidence from him.

14.
It was not clear to the judge what the conditions were in which the appellant was living in Kinshasa at the date of decision, nor as to the amount of support and care he received from the Girl Guides Association. He considered he had only been given a "very sketchy account of the circumstances in which he [the appellant] was brought to Kinshasa and the Association['s] …[agreement] to take over responsibility for his care". If such further information could have been obtained from Mr Lumeto who is a friend and had been so helpful in locating the appellant, it is unfortunate that he did not provide a statement or attend a court. This was a matter of surprise to the judge. These matters led the judge to conclude that the appellant had failed to discharge the burden of proof under the Rules.

15.
The judge thereafter turned to the Human Rights Convention and was not satisfied based on the evidence which was lacking that a claim under Articles 2 or 3 had been made out. Turning to Article 8, after directing himself as to the familiar Razgar test (as well as directing himself as to the relevant authorities), the judge accepted that the relationship between the sponsor and appellant came within the definition of family life as understood under Article 8. The decision amounted to interference and was of sufficient gravity to engage Article 8. In considering proportionality, the judge noted that there were clearly compassionate factors at play but reminded himself that he had not been given a sufficiently clear account of the appellant's circumstances in the DRC to satisfy him that the decision would amount to sufficient interference to outweigh the legitimate aim in maintaining a proper system of immigration control, and so dismissed the appeal on human rights grounds.

Grounds of Appeal

16.
The grounds of application for permission to appeal argue that the judge had failed to take into account the sponsor's witness statement which provided the evidence that the judge had considered lacking as to the extent of care provided by the Girl Guides Association, the absence of education or of anyone to take care of the appellant apart from the sponsor, and the evidence in a second statement that the appellant had not had any contact with any other family members and was continuing to receive care from the Girl Guides Association. It is argued that had the judge taken into consideration the witness statements of the sponsor, whom he had found to credible, he would have come to the conclusion that there were serious and compelling family or other considerations which made exclusion of the appellant undesirable. This was in the light of the quality of the relationship recognised by the judge.

17.
The second error of law argued is that the judge had failed to give reasons or any adequate reasons for findings on material matters. He had failed to take into consideration the judgment in the case of

Sen v Netherlands [2001] 36 EHRR 81, requiring the state to strike a fair balance between the appellant's interests in their own right. The family rights of the sponsor could not be enjoyed in the country of origin due to the fact that there was a civil war going on.

18.
Permission to appeal was granted on 11 May 2012 on the basis that it was arguable that the judge had failed to properly engage with paragraph 297(i) or (iii), had failed to make adequate findings of fact as to what the appellant's circumstances were and had overlooked the sponsor's witness statement (although which is not specified). It was also arguable the judge had failed to consider the absence from paragraphs 352A-352FI of the Immigration Rules of any provision that relaxes the requirements of paragraph 297 for a sibling sponsored by a refugee. We pause here to observe that First-tier Tribunal Judge Holmes appears to have based this aspect on a continuing misunderstanding that the sponsor had been granted refugee status.

19.
A response has been made pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, opposing the appeal. It is argued that the judge had made a series of findings as to why the appellant had not discharged the burden. The judge had noted deficiencies in the evidence and the absence of clear evidence of the situation led to the conclusion that there would not be disproportionate interference. Although no longer relevant, the notice also deals with the issue raised in respect of paragraphs 352A to 352F.

The hearing before the UT

20.
We observed to Mr Rene that the immigration decision did not address the maintenance and accommodation requirements of paragraph 297. He rightly observed that these had not been flagged up, but rather than dwell on the implications of this, we invited argument on the core issue raised in the first limb of the application for permission. In particular we asked why he considered the circumstances of the appellant, if all matters were taken into account, made his exclusion from the United Kingdom undesirable?

21.
Mr Rene submitted that the answer to this question was because of the absence of relatives in Kinshasa and the fact that the appellant is still a child. He referred us to paragraph [22] of the determination in which the judge identified the deficiencies in the letter from the Girl Guides Association and the absence of evidence from Mr Papi Lumeto. He argued that the judge had not taken into account the statements from the sponsor. The age of the appellant was relevant, and he referred us to the Immigration Directorate Instructions which specifically provides that the provisions in paragraph 297(i)(f) have the objective to allow a child to join a parent or relative in this country only where that child could not be adequately cared for by parents or relatives in his own country.

22.
Mr Norton relied on the rule 24 response. He argued that the provisions of the IDI referred to by Mr Rene were not a blanket assumption that somebody who was orphaned with a sibling in the United Kingdom should be granted leave and referred us to paragraph 1.2 (which we refer to in more detail below). He argued it was difficult to see how the appellant could succeed on maintenance grounds as the income received by the sponsor was from the state.

23.

By way of response, Mr Rene argued that the IDIs were not ambiguous. If a child did not have family (in the country of origin) and a relative in the United Kingdom, that would meet the compelling family circumstances required by the Rule.

The Immigration Rules and the IDI

24.
Paragraph 297 of the Rules is in these terms:

“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.”

25.
The law is settled as to the proper approach to the construction of the Rules. As observed by Lord Brown in Ahmed Mahad v ECO [2009] UKSC 16 at paragraph [10]:

“There is really no dispute about the proper approach to the construction of the Rules. As Lord Hoffman said in Odelola v Secretary of State for the Home Department [2009] 1 WLR 1230, 1233 (paragraph 4):

‘Further, like any other question of construction, this [whether a Rule change applies to all undetermined applications or only to subsequent applications] depends upon the language of the Rule, construed against the relevant background. That involves a consideration of the Immigration Rules as a whole and the function which they serve in the administration of immigration policy.’

That is entirely consistent with what Buxton LJ (collecting together a number of dicta from past cases concerning the status of the Rules) had said in Odelola in the Court of Appeal [2009] 1WLR 126 and indeed, with what Laws LJ said (before the House of Lords decision in Odelola) in the present case. Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or statutory instrument but, instead sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State’s administrative policy. The respondent’s Counsel readily accepted that what she meant in her written case by the proposition ‘the question of interpretation is … what the Secretary of State intended his policy to be’ was that the court’s task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended. After all, under s.3(2) of the Immigration Act 1971, the Secretary of State has to lay the Rules before Parliament, which then has the opportunity to disapprove them. True, as I observed in Odelola (paragraph 33): ‘The question is what the Secretary of State intended. The Rules are her Rules’. But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State's intention to be discovered from the Immigration Directorates' Instructions (IDIs) issued intermittently to guide immigration officers in their application of the rules. IDIs are given pursuant to paragraph 1(3) of Schedule 2 to the 1971 Act which provides that:

‘In the exercise of their functions under this Act immigration officers shall act in accordance with such instructions (not inconsistent with the immigration rules) as may be given them by the Secretary of State …’ (emphasis added).”

26.
We have before us the IDIs dated July 2011, chapter 8 section 5 Annex M. Both Mr Rene and Mr Norton accepted that it is unlikely there would have been a material change to the IDIs in force earlier that year when the immigration decision in this appeal was made.

27.
Mr Rene asked us to have particular regard to the opening paragraphs in part 1:

“1. Serious and compelling family or other considerations.

S.55 of the Borders, Citizenship and Immigration Act 2009 requires the UK Border Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions.

Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to s.55. The UK Border Agency instruction “arrangements to safeguard and promote children’s welfare in the United Kingdom Border Agency” sets out the key principles to take into account in All agency activities.

Out statutory duty to children includes the need to demonstrate:

• fair treatment which meets the same standard as a British child would receive;

• the child's interests being made a primary, although not the only consideration;

• no discrimination of any kind;

• asylum applications are dealt with in a timely fashion;

• identification of those that might be at risk from harm.

This paragraph relates to the considerations referred to in paragraphs 297(i)(f) … of the Immigration Rules.

The objective of this provision is to allow a child to join a parent or relative in this country **only** where that child could not be adequately cared for by his parents or relatives in his own country. It has never been the intention of the Rules that a child should be admitted here due to the wish of or for the benefit of other relatives in this country.

This approach is entirely consistent with the internationally accepted principle that a child should first and foremost be cared for by his natural parent(s), or, if this is not possible, by his natural relatives in the country in which he lives. Only if the parent(s) or relative(s) in his own country **cannot** care for him should consideration be given to him joining relatives in another country. It is also consistent with the provisions of the European Convention on Human Rights, and the resolution of the harmonisation of family unification agreed by EU members in June 1993."

28.
Mr Norton reminded us of the provisions at paragraph 1.2 as follows:

"1.2 Where the sponsor is not a parent

If the sponsor is not a parent but another relative, e.g. an aunt or grandparent, the factors which are to be considered relate only **to the child** and the circumstances in which he lives or lived prior to travelling here. These circumstances should be exceptional in comparison with the ordinary circumstances of other children in his home country. It would not, for instance, be sufficient to show that he would be better off here by being able to attend a state school. The circumstances relating to the sponsors here (e.g. the fact that they are elderly or infirm and need caring for) are **not** to be taken into account."

29.
Putting the IDI on one side, we turn back to paragraph 297(i)(f). In deciding what is meant by the rule the words need to be given their natural and ordinary meaning. The 'serious and compelling family or other considerations' need to be considered only in the context of whether exclusion of the child is undesirable.

30.
Paragraph 297(i)(f) is the last of six criteria, one of which needs to be met where a child of a parent, parents or a relative is seeking settlement. Although the reference to a relative suggests anyone who is related to the claimant, the context of the rule suggests that the relative must be able to provide suitable care for the child of the sort that a parent would.

31.
In Macdonald's Immigration Law and Practice 8 th Edition there is discussion at [11.97] as to what is meant by serious and compelling from which we quote:

“The phrase ‘compelling, compassionate reasons’ in the Refugee Family Reunion policy has been interpreted by the Court of Appeal to mean reasons ‘which would compel, not merely invite, an objective decision maker to feel compassion’. This interpretation has application to the ‘serious and compelling considerations’ requirement in the Rules.”

32.
The footnote is a reference to Chengjie Miao v SSHD [2006] EWCA Civ 75 and Senanayake v SSHD [2005]EWCA Civ 1530. In the first case the court was concerned with the Home Secretary’s published policy for family members who wished to be reunited with a person in the United Kingdom who had been recognised as a refugee. This predated the introduction of paragraph 352A-E of the Immigration Rules. That policy provided:

“Only pre-existing families are eligible for family reunion, i.e. the spouse and minor children who form part of the family unit prior to the time the sponsor fled to seek asylum.

We may exceptionally allow other members of the family (e.g. elderly parents) to come to the UK if there are compelling, compassionate reasons.”

33.
In Seynanake the court was concerned with the effect of ‘compassionate’ in the above policy and also in paragraph 317 which includes provisions for adult children. ‘Compassionate circumstances’ is not the test in paragraph 297(i)(f) and we are not persuaded that compassion has a role in interpretation of this rule. This does not exclude however a humanitarian approach being taken.

34.
In our view, ‘serious’ means that there needs to be more than the parties simply desiring a state of affairs to obtain. ‘Compelling’ in the context of paragraph 297(i)(f) indicates that considerations that are persuasive and powerful. ‘Serious’ read with ‘compelling’ together indicate that the family or other considerations render the exclusion of the child from the United Kingdom undesirable. The analysis is one of degree and kind. Such an interpretation sets a high threshold that excludes cases where, without more, it is simply the wish of parties to be together however natural that ambition that may be.

35.
The terms of s.55(1) and the decision of the Upper Tribunal in T (s.55 BCIA 2009 – entry clearance) Jamaica [2011] UKUT 00483 (IAC) [2012] Imm AR 346, made it clear that s.55 only applies to children who are in the United Kingdom. The requirement therefore in the IDIs we have quoted above that officers must not apply actions set out in the instruction without having regard to s.55 inaccurately states the legal position, although as the Tribunal noted at [18] that the statutory guidance asks “staff working overseas to adhere to the spirit if the duty and make enquiries when they have reason to suspect that a child may be in need of protection or safeguarding or present welfare needs that require attention” .

36.
The exercise of the duty by the Entry Clearance Officer to assess the 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. 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”. 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.

37.
Family considerations require an evaluation of the child’s welfare including emotional needs. ‘Other considerations’ come into 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 background and developmental history and will involve inquiry as to whether:-

(i)
there is evidence of neglect or abuse;

(ii)
there are unmet needs that should be catered for;

(iii)
there are stable arrangements for the child’s physical care.

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

38.
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: see also SG (child of a polygamous marriage) Nepal [2012] UKUT 265 (IAC); [2012] Imm AR 939.

Error of law

39.
Our first task is to determine whether the judge erred in law in his determination. In essence the appellant is arguing that the judge did not take all the evidence into account and, had he done so, in the light of his positive findings about the relationship, he would have found that the requirements of paragraph 297(i)(f) would have been met. It is also argued that the judge failed to make findings on material matters. As part of the second ground the judge’s proportionality assessment under Art 8 is challenged on the basis of the failure to consider whether the family life could be enjoyed elsewhere.

40.
There is nothing material in the first statement by the sponsor that is not referred to in the judge’s summary of the evidence at [7] to [13]. Despite what is asserted in the grounds, the judge refers to the nature of the care provided by the charity and the absence of any education: [10]. There was also reference at [10] to the appellant no longer having any other family.

41.
As to the second witness statement, here again there is nothing new of a material nature. The situation had not changed. There is no indication in the determination that the judge had believed the evidence to be otherwise.

42.

The judge reached positive conclusions as to the degree and nature of contact between the sponsor and appellant. His observations as to the limitations on the information provided by the Association as to the appellant's precise circumstances were legitimate and as to his observation about Mr Lumeto, the judge did not err in expressing reservations over the absence of evidence from this witness who would have been in a position to explain what he had seen and encountered in Kinshasa when he found the appellant. The burden of proof is to show that there were serious and compelling circumstances on the balance of probabilities.

43.
The criticism made of the determination is that having expressed doubts about aspects of the evidence, the judge did not go on to find what he understood the appellant's circumstances to be. There is no reason to suggest that he found them other than as described by the sponsor, but she has not been to Kinshasa herself and what she told the judge was limited in scope. In effect what we understand the judge to be saying was that on the evidence before him there was insufficient to persuade him that the serious and compelling test was met. Persuasive detail as to the nature of the accommodation, the social circumstances of the appellant's life, his health and other needs as recorded by someone who has seen him in person and in context, might have led to another outcome.

44.
Our conclusion is that on the evidence before him, it was fully open to the judge to conclude that the threshold in paragraph 297(i)(f) had not been reached. We doubt whether he could have lawfully concluded that it had been reached. It is not the case that any 15 year old orphan who has a sister in the United Kingdom must be admitted, irrespective of his actual circumstances or the prior history of the relations between the appellant and the proposed carer.

45.
Even if we had been persuaded that the judge had not accepted the sponsor's evidence on this issue and had erred on the basis alleged, we do not consider that this was an error that would need the decision to be set aside. Taking the circumstances of the appellant at its highest, he is being looked after by the Girl Guides Association who are meeting his basic needs including, significantly, medical care which we suspect may not be available to many orphans displaced by the civil war in the DRC. Although the appellant is not receiving an education, we do not consider, having regard to his age at the date of application and his age now, that this of itself is sufficient to create a serious and compelling consideration. The lack of opportunities that might exist for a teenager in the United Kingdom are unlikely to be of any relevance unless the cumulative effect is to undermine a child's welfare needs. In addition he has a mobile phone supplied by his sister, and receives regular remittances from her. Doubtless there are emotional exchanges between them given their family history and their re-discovery of each other but that is not sufficient to amount to serious and compelling circumstances that make his exclusion undesirable. In so far as a comparison is made with other children in his country of origin, it is a factor (albeit not a conclusive one) that his circumstances would appear to be reasonably catered for despite the loss of his parents.

46.
We turn to Art 8 and the argument that the judge had failed to give adequate reasons why the interference was proportionate given that the appellant's family life could not be enjoyed elsewhere. The judge found that family life existed and that article 8 as a consequence was engaged.

47.

We are satisfied that the judge correctly directed himself as to the law relating to Article 8 and reached a permissible conclusion on proportionality open to him on the findings that he had made. Although not referring specifically to the best interests of the child the judge clearly had these in mind observing at [33] with reference to s.55 of the Borders, Citizenship and Immigration Act 2009 that "… section 55 of the BCIA 2009 does not apply to entry clearance cases but that not dissimilar considerations should be taken into account under Article 8."

48.
The judge found earlier in the determination that he was satisfied that the sponsor had given credible reasons for not having been to visit the appellant, even if the judge was under the impression that she had been a refugee. Having accepted that the sponsor could not be reasonably expected to have visited the appellant there is no reason to believe that the judge did not have this in mind when assessing the proportionality of interference. However, this was not a case where the sister had previously cared for the appellant and could not no longer do so save by his being admitted to the United Kingdom. She had never cared for him; they had been separated for years; and they were now maintaining by electronic means an active relationship normal for siblings who lived in different countries. In any event on what we now know there is no bar to the sponsor making short visits to Kinshasa: her status will not be undermined if she does so, and the times when it will be unsafe to visit at all will be limited.

49.
In carrying out the proportionality exercise, the judge clearly had all the relevant issues before him and the reasons given for weighing this against the appellant was for the same reason as under the rule. In so far as there was uncertainty as to his circumstances that was because a sufficiently clear and comprehensive account had not been provided. Where Article 8 is relied on to secure the admission of a child to reside with a relative who has never previously cared for him, whether the case is examined from the perspective of the positive obligation to respect family life or the negative one not to interfere with it save for justified and proportionate reasons of public interest, we doubt that Article 8 adds significantly the basic criteria of the family admissions rules.

50.
Again, we emphasise the appellant is not being denied re-union with a previous carer, or needs admission in order to supply a basic unmet need of his. The material advantages of life in the United Kingdom is not the test; the loss of his cultural roots in the society in which he has grown up to date is a relevant factor. There is no evidence that he is at risk of harm where he is. There is no error of law in the judge's conclusions and certainly no material one as taking the case at its highest we would have reached the same decision on the material before us.

51.
By way of conclusion therefore, we are satisfied that the decision by the First-tier Tribunal judge did not contain an error of law. The appeal by the appellant in the Upper Tribunal is accordingly dismissed.

52.
Both members of the panel have contributed to this decision.

Signed Date 9 February 2013

Upper Tribunal Judge Dawson