



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/18521/2019 (V)**

Appeal Number:

THE IMMIGRATION ACTS

Heard at a remote hearing

On the 10 September 2021

**Decision & Reasons
Promulgated**

On the 09 November 2021

**Before
UPPER TRIBUNAL JUDGE REEDS**

Between

**M S
(ANONYMITY DIRECTION MADE)**

AND

Appellant

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Miss Vidal, Counsel on behalf of the appellant.

For the Respondent: Mr Bates, Senior Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge Chana (hereinafter referred to as the "FtTJ") promulgated on the 2 March 2021, in which the appellant's appeal

against the decision to refuse his application for entry clearance on Article 8 grounds was dismissed.

2. The FtTJ did not make an anonymity order however an order should be made before the Upper Tribunal in the light of the appellant's status as a child.
3. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of a minor. Unless and until a Tribunal or court directs otherwise the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.
4. The hearing took place on 10 September 2021, by means of *Microsoft teams* which has been consented to and not objected to by the parties. A face- to- face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the appellant's mother ("the sponsor") and her husband who were able to see and hear the proceedings. There were no issues regarding sound, and no problematic technical problems were encountered during the hearing, and I am satisfied both advocates were able to make their respective cases by the chosen means.
5. I am grateful to Miss Vidal and Mr Bates for their oral submissions.

The background:

6. I shall summarise the background to this appeal. The appellant is a citizen of Nepal and is a child applicant. On 24 July 2019 the appellant submitted an application for entry clearance as the child of her mother, the sponsor, who holds limited leave as a spouse of her husband who has indefinite leave to remain in the United Kingdom.
7. The factual background to the application was that the appellant's parents were married on 16 October 2003, but they divorced in 2011. The sponsor's claim was that from that date she had sole responsibility for the appellant and that the appellant's father was not in contact with her and did not want to be involved in her life or assume any responsibility.
8. The appellant's mother remarried in 2011 and the appellant lived with her and her stepfather until he returned to the UK after the wedding.

9. In March 2013 the appellant's mother came to the UK to live with her husband and has been living in the UK since that date. The appellant stayed with the maternal grandparents in Nepal. The sponsor stated that it was not possible to sponsor the appellant at the same time as her husband did not have sufficient finances to do so and that both she and her husband had the intention to sponsor their daughter to join them in the UK once they were able to do so.
10. On 3 August 2016, the sponsor gave birth to their son who is a British citizen and half-sibling of the appellant.
11. The sponsor's claim was that she had made all the "big and small decisions" in her daughter's life and was worried that without having her parents in Nepal, the appellant may start focusing on the wrong things in life. She stated that she had provided proof of sole responsibility including visits to Nepal, payment of school fees, medical fees regular money transfers and regular contact.
12. As regards the maternal grandparents, it was said that they were not able to continue to look after the appellant given their relative ages and medical conditions.
13. In respect of the appellant, the sponsor stated that the effects on their daughter could be seen by the grandparents and that she missed the presence of her mother in her life and also her half sibling who has met her only twice. The appellant's circumstances were set out comprehensively in a letter which accompanied the application.
14. The application was refused in a decision letter dated 16 October 2019.
15. The decision letter begins with a consideration of EC-C1.1 of Appendix FM. The Entry Clearance Officer (hereinafter referred to as the "ECO") noted that under paragraph EC-C 1.1. (d) the appellant did not meet all of the eligibility requirements and identified the eligibility relationship requirement under E-ECC 1.2-1.6. It was acknowledged that the sponsor was issued with a settlement visa on 7 February 2013 and was currently in the UK with limited leave to enter or remain expiring on 27 November 2021 as the partner of her husband. It was noted that the appellant's mother's partner under Appendix FM was not her parent and therefore did not meet the requirements of E-ECC.1.6 (a). It was acknowledged that the birth certificate demonstrated that the appellant was the child of the sponsor, but the ECO was not satisfied that the appellant had demonstrated that her mother had and continues to have sole responsibility for her upbringing. In reaching that conclusion the ECO considered the fact that the sponsor had lived in the UK since 2013 and that her father remained in Nepal. The ECO took into account the appellant's claim that she did not have contact with her biological father but that she

had submitted limited evidence of her circumstances in Nepal and had provided no information regarding her father's current whereabouts. Thus the appellant could not meet the requirements of E-ECC 1.6 (b).

16. The ECO also reached the conclusion that the appellant had not demonstrated that there was serious and compelling family or other considerations which made her exclusion undesirable.
17. The application was therefore refused under Appendix FM paragraph E-ECC 1.2 to 1.6. It was noted that the appellant met the eligibility financial requirement of paragraphs E-ECC 2.1 to 2.4, and the application did not fall for refusal on grounds of suitability.
18. The ECO considered the case outside of the rules but concluded that on the information provided he was not satisfied that the application raised any "exceptional circumstances" to warrant a grant of entry clearance outside of the rules. The application was therefore refused.
19. The ECM undertook a review on the 3 February 2020 but was satisfied that the original decision to refuse the application was correct and was not prepared to exercise discretion in the appellant's case. The review noted the duty to safeguard the best interests of children under section 55 of the 2009 Act and whilst the appellant resided in Nepal and was not present in the UK, it was confirmed that the ECM adhered to the spirit of statutory duty when conducting the review. In light of the supporting documents submitted and the assertions in the grounds of appeal as to the circumstances of the appellant, the ECM was satisfied that the decision to refuse entry clearance was in the child's best interests.
20. The appellant appealed that decision, and it came before the FtT on 25 February 2021 before FtTJ Chohan. In a decision promulgated on 2 March 2021 the appellant's appeal was dismissed. The FtTJ heard oral evidence from the appellant's mother (the sponsor) and her mother's husband.
21. Having summarised the evidence advanced by each of the parties, the FtTJ set out her analysis of that evidence at [33]-[60] and her assessment of Article 8 at [61] - [65].
22. The FtTJ was not satisfied that the appellant's mother and stepfather had given consistent and thus truthful evidence about the appellant's biological father. The judge also found that the sponsor had provided "last-minute evidence" concerning the circumstances of the appellant's father having abdicated all responsibility. The judge concluded that due to inconsistent evidence, the appellant's biological father had not abandoned his daughter and that the sponsor had left the appellant with him and her grandparents when

she left Nepal to come to the United Kingdom (at [51]). The judge recorded that even if the appellant's mother had sent money to the appellant that did not mean that she had sole responsibility and that this was only a factor. The FtTJ concluded at [53] that it was not established on the balance of probabilities that the appellant's mother and stepfather has had sole responsibility for the appellant because there was "insufficient evidence before me upon which I can conclude on a balance of probabilities that she has not been looked after by her father and grandparents. On the evidence in this case, I find at best that responsibility is shared with either her father, grandparents or others."

23. The judge address the issue of whether there were any "serious and compelling family or other considerations" making the exclusion of the appellant undesirable. Having considered the earlier evidence, the judge found that the appellant was now 17 years of age although 15 at the time of the application and was being looked after in a home with her grandparents, if not her father. The sponsor had been in the United Kingdom for 9 years and had left the appellant in the care of others. The judge took the view that she must have been confident that the appellant would have been looked after well. The judge also reached the conclusion there was no evidence that she was not living in suitable accommodation and that her needs were not being fulfilled. Any problems in the school report would be resolved when a decision had been made on this appeal. The judge therefore concluded that there were no serious or compelling family or other considerations which made her exclusion undesirable.
24. When considering Article 8, the judge again referred to the appellant as being 17 years of age. The judge took into account that she never lived in the United Kingdom and therefore had no existing family life in this country and that the sponsor had made a decision to leave her daughter in Nepal and that this was not a decision imposed upon her. She had left her daughter at the age of 9 and was confident that the appellant will be looked after. The judge concluded at paragraph [64] that there were "no exceptional circumstances in this appeal where the appellant should be granted entry clearance when she cannot meet the requirements of the immigration rules". Consequently the judge found that the decision was lawful and proportionate and dismissed the appeal under the "immigration rules" and on article 8 grounds.
25. Permission to appeal was issued on the 5 March 2021 and on 5 May 2021, permission to appeal was refused by UTJ Martin but on renewal to the Upper Tribunal Judge Kamara granted permission on the 21 May 2021.

The hearing before the Upper Tribunal:

26. In the light of the COVID-19 pandemic the Upper Tribunal issued directions indicating that it was provisionally of the view that the error of law issue could be determined without a face- to- face hearing and directions were given for a remote hearing to take place and that this could take place via Microsoft teams. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties with the assistance of their advocates.
27. Miss Vidal on behalf of the appellant relied upon the written grounds of appeal.
28. The 1st ground relates to the credibility findings made by the FtTJ. The grounds make reference to the credibility assessment of the appellant's mother and her stepfather at paragraphs 35 - 43 and concluded that they were "not credible". The written submissions and paragraph 6 submit that notwithstanding the lack of consistency in that part of the evidence of the appellant's mother and stepfather, the judge was wrong in law to reject the credibility of both witnesses as the core of their account remained consistent and there was independent corroboration of their account in relation to contact with the appellant, financial support, her education and the ill health of the appellant's grandparents.
29. In her oral submissions, Miss Vidal submitted that those earlier findings were confined to the issue of whether her ex-husband (the appellant's father) was alive, but the findings permeated the rest of the decision. Thus the credibility findings made on this issue affected the rest of the findings as to the evidence on the key issue of sole responsibility. She submitted that there was a lot of evidence as to sole responsibility.
30. Miss Vidal referred to the finding at [41] which referred to the appellant's mother's evidence that her previous husband "tortured her and the appellant". The judge found that it was the 1st time at the hearing that she had suggested an explanation as to why the appellant's father was not in contact with his daughter, and this was because she claimed the appellant was tortured and beaten by her father. The FtTJ dismissed this evidence on the basis that it was last-minute evidence which attempted to explain the appellant's father's abdication of responsibility. However, Ms Vidal submitted that this was not "last-minute" and whilst the appellant did not give evidence, there was documentary evidence in the bundle at C322 and 323 and it formed the basis of the closing submissions. The document was dated March 2011 and therefore was not a recent document. Thus she submitted the credibility finding was not sustainable against that evidential background. The reference in the document to mistreatment was the "torture" referred to by the witness and therefore there was evidence before the judge.

31. Miss Vidal submitted that it went to the overall consideration of the credibility assessment of the sponsor and went to the issue of the father not being in his daughter's life and the issue sole responsibility. The failure to make a finding on the divorce document at C322 - 323 was a material error of law.
32. Ms Vidal further submitted that there were further documents which the FtTJ failed to take into consideration.
 - (1) She identified the 1st document as the divorce document referred to above.
 - (2) The 2nd document related to the wishes of the child concerned and set out in a letter exhibited at A6-A7 of the bundle. She submitted that this is a clear expression of the appellant's wishes and relevant to the issue sole responsibility and article 8. The judge was obliged to consider what was in the best interests of the child and what her own wishes and desires were. The written grounds at paragraph 20 refer to the decision of ZH (Tanzania) and the duty to consult children applying the Convention on the Rights of the Child.
 - (3) The 3rd document identified is the letter of support from the grandparents at C326.
 - (4) The 4th document is at C 319 from the municipality which refers to the circumstances of the grandparents and the circumstances of the divorce. The judge made no finding on this document which stated that the appellant had stayed with her mother in the maternal home and that they had lived as a family unit. This went to the issue sole responsibility. There was no reference to any joint responsibility or of any involvement of the appellant's father.
 - (5) The 5th document is also at C317 which provides a picture of the family unit.
33. Ms Vidal also submitted that there was evidence in the form of "chats" between the appellant and her mother which was evidence of substantial contact between them, but the judge made no reference to that evidence. She submitted that there was substantial documentation as to the family background, but the adverse credibility findings were made in a vacuum with no reference to the documentary evidence. This was demonstrated by the FtTJ's finding that the appellant's mother had made up evidence at the last minute which was not the position as evidenced by the documents in the bundle.
34. Miss Vidal submitted that this linked to the key issue of sole responsibility and that overall there was cogent evidence which demonstrated that sole responsibility rested with the appellant's

mother. In this context she referred to the evidence of contact between mother and stepfather at C 27-C 249, the photographic evidence at C31 showing the appellant in a school uniform, discussions about exams at C 37 and guidance given by the appellant stepfather at C243. At section D of the bundle there was evidence showing exchanges between the appellant and her stepfather such as D33 wishing her a happy birthday, D39 showing requests for money. There was evidence of regular money transfers to the appellant.

35. Miss Vidal referred the tribunal to C 319 and the letter from the municipality (parish council) and that the evidence needed to be considered in the context of the finding made at [51] that the appellant's biological father had not abandoned his daughter and that the appellant left with him and her grandparents when she left Nepal to come to the United Kingdom. Ms Vidal submitted that that finding was untenable against the background of the evidence from the appellant and the parish council which provided a different picture of the circumstances and the appellant's father not being present in her life. The divorce document also demonstrated that there were issues between the appellant's mother and father and provided no foundation for them to be involved with each other. Thus she submitted if taken altogether it pointed to the appellant's mother having sole responsibility and the appellant's father not having any input into her life. None of that evidence was considered by the FtTJ in reaching her conclusions.
36. Miss Vidal submitted there was an overlap between the findings of serious and compelling circumstances and article 8. She submitted that the FtTJ had not adopted a child centred approach to the evidence and reached findings without reference to all of the documentary evidence. For example at C317 the documents show that the family unit comprised of the grandparents, the appellant and her mother until her mother left the country and did not cover any other relationships. The appellant's wishes were set out in a letter that she wanted to live with her mother and her half- brother, but no reference was made by the judge to these matters.
37. Miss Vidal submitted that these were material errors of law which went to the heart of the decision.
38. She further submitted that there was a general lack of scrutiny by the judge. She highlighted factual errors that were made for example the age of the appellant is incorrectly recorded as being 17 whereas at the date of the hearing she was 16 years and 7 months, and this was set out at paragraphs 19, 25 and 31. A further factual error was the date of the divorce which was stated to be 2013 (see paragraphs 35 and 37 but the documents show that it was March 2011.
39. Mr Bates relied upon the Rule 24 response filed on behalf of the respondent dated 17 June 2021 where it was submitted that the

grounds are in disagreement with the findings of the judge. It states that there were clear issues with the evidence of the witnesses regarding the appellant's father which went to the core of the issue relating to sole responsibility. It therefore open to the judge to find that they were not being told the truth about the position of the appellant's father in the appellant's life. Furthermore the evidence as to what decisions she took with respect to the appellant was very vague and it was open the judge to find that she was not satisfied that the sponsor had sole responsibility.

40. In his oral submissions Mr Bates submitted that the central issue was that of sole responsibility and that the judge set out the case law at [45]. The judge did not dispute that the appellant's mother had contact and had visited the appellant and whilst the chats were not translated, this evidence was not challenged before the FtTJ. The FtTJ had been looking at the key question of sole responsibility at [45] and whether the parent (the sponsor) had continuing control and direction of the appellant's upbringing. The FtTJ set out the correct legal test at paragraphs 45 - 46 when dealing with the sponsor's evidence of the continuing control and on the issue sole responsibility. The judge recorded the appellant's mother was unable to provide oral evidence and this was set out at paragraph [47]. He submitted that this was the difficulty in the appeal. It was therefore open to the judge to determine what weight attached to the oral evidence which was tested against the documentary evidence which referred to matters of contact and remittances.
41. As to the other issues, at paragraphs [35 - 41], there were clear discrepancies in the evidence as to what role/contact the appellant's father had. There were clear inconsistencies set out in the evidence by the FtTJ and there was nothing irrational in the judge being concerned with that inconsistent evidence and for the judge to reach the conclusion that there was in fact shared responsibility and that he was not just the biological father and that the appellant had been left with him and also the grandparents. The judge did not say that she was living with her father but when the sponsor left the country she had left the appellant with the grandparents and the biological father and was not satisfied that the appellant's father was not in the country.
42. Mr Bates responded to the submission made that the FtTJ did not have regard to the divorce document at C322-323. He questioned whether there was any dispute that the appellant's mother was a victim of domestic violence. He submitted that the judge was not making any finding against the sponsor, but the judge had taken the point that the historical divorce was now being put forward as an explanation as to why there was no contact with the biological father and that this was the first time it was raised.

43. It was not in dispute that the parties were in contact with each other and therefore the “chat evidence” did not demonstrate sole responsibility.
44. Mr Bates further submitted that Counsel had not referred to the issue of serious and compelling circumstances but had referred to article 8. The other documents referred to did not take matters any further. The judge did not challenge the fact that the appellant lived with her mother before she left therefore the document from the parish council did not address the factual issue after the appellant’s mother had left the country.
45. He further submitted that the appellant’s letter did not deal with the issue of sole responsibility. The appellant stated that she wants to be with her mother. He submitted that the judge was looking at the balancing exercise and balanced the appellant’s desire and her mother’s desire but was not satisfied that there was any sole responsibility but in fact the status quo was a shared responsibility. The appellant had lived all of her life in Nepal and had continuity of care which would be interrupted if she left to enter the United Kingdom. The judge found that her father may still have a role to play and that there were other close-knit family relatives (at paragraph 58).
46. Mr Bates submitted that the appellant could not meet the test of whether there were “compelling or compassionate circumstances” which indicates the appellant was facing an uphill task to succeed on article 8 grounds when sole responsibility had not been established. He submitted that a different judge may have come to a different conclusion but there was no material error of law, the judge provided adequate reasons and there was no irrationality in the assessment made.
47. Miss Vidal by way of reply made the following submissions. Whilst it had been submitted that there was no dispute on certain parts of the evidence, that was not the position. She submitted that the presenting officer could not point to the evidence where those documents were referred to. The judge had not referred to material evidence before the tribunal which went to the evidential issues overall and also that of sole responsibility.
48. The fact that the sponsor did not recall that the divorce documents in the bundle did not mean that it was not there, and the lack of response should not have been taken as a negative given the submissions that were made concerning that document. Thus she submitted the judge had not adopted a holistic approach to the evidence when reaching her overall decision.
49. As to the issues of credibility even accepting the inconsistencies as to the appellant’s father, this was not an issue that went to sole

responsibility in the light of the other evidence that was before the tribunal including the documents from the parish council where reference is made to the appellant's father not being involved in her care, the appellant being left with mother and grandfather and there was no evidence before the judge to make any finding that the appellant's father was involved in her care. The evidence of the appellant was also relevant to the issue sole responsibility and that evidence was never acknowledged by the FtTJ which was set out at A6 in the bundle. There was reference that her father did not want to see her in that document. There was evidence of contact and the responsibility that the appellant's mother had for her, and that evidence should have been engaged with. It was not sufficient to say that it was not in dispute but ought to have been actively considered.

50. Miss Vidal submitted that given the lack of engagement with the documentary evidence, the decision cannot stand and should be set aside.
51. At the conclusion of the hearing I reserved my decision which I now give.

Discussion:

52. I have given careful consideration to the grounds of challenge in the context of the decision of the FtTJ and the evidence before the tribunal.
53. The only statutory ground available to the appellant was that the decision of the ECO was unlawful under Section 6 of the HRA 1998. In reaching that assessment the appellant's ability to meet the requirements of Appendix FM for entry clearance as a child was a relevant consideration in the balance of proportionality. The FtTJ did not make reference to Appendix FM but set out Paragraph 297. No point is taken by Miss Vidal on this, and it is accepted that the issue of "sole responsibility" and whether there were serious and other compelling circumstances were relevant considerations when seen in the context of the Article 8 assessment.
54. The decision of the Tribunal relevant to this appeal is TD (Paragraph 297(i)(e): "Sole Responsibility" Yemen [2006] UKIAT OOO49 where the Tribunal considered the leading cases relevant to the issue of "sole responsibility" and produced a helpful summary at paragraph 52 of their decision. The FtTJ set out that decision at paragraph [45] of her decision.
55. At paragraph [51] the FtTJ found on the evidence before her that the appellant had not established that the appellant's mother and sponsor had sole responsibility because there was "insufficient evidence" to conclude on the balance of probabilities that she has not been looked after by her father and grandparents. The judge also

found that at best responsibility was shared with either the appellant's father, grandparents or others.

56. That overall conclusion is challenged on the basis that the assessment and thus the factual findings reached failed to take account of material evidence relevant to the factual background which in turn affected the consideration of "sole responsibility" and thus the overall Article 8 assessment.
57. The factual findings made which underpinned that omnibus conclusion are set out at paragraphs 33 – 53 of the decision. The FtJ considered the position of the appellant's father. The sponsor's evidence in a witness statement was that the appellant's father following their separation had not played a part in her daughter's life and had abdicated responsibility (see paragraph 2). At paragraph [35 – 40] the judge set out her assessment of the oral evidence of the sponsor and her husband and identified the inconsistent evidence given by each of them as to whether there had been any contact with her ex-husband. The sponsor's evidence was that she had not heard about the appellant's biological father since 2013 whereas the stepfathers evidence was that the appellant's father had gone to her school and talk to the headmaster in 2019. As the judge recorded at [38] the evidence of the witnesses was inconsistent. The judge concluded at [40] that she had not been told "the whole truth about the appellant's biological father".
58. There is no challenge those findings of fact and I can see no basis upon which those findings could be challenged given the discrepant evidence given by the witnesses. It was therefore open to the judge to reach the conclusion that she had not been told the whole truth about the appellant's biological father.
59. What is challenged are the findings made thereafter at paragraphs 41 – 42. Miss Vidal submits that those findings are not sustainable, and they are contrary to the documentary evidence submitted on behalf of the appellant and exhibited in the bundle of documents. In essence, it is submitted that the FtJ failed to have regard to material evidence which impacted on the factual assessment of the family's background and in turn was likely to have affected the assessment of the issue of sole responsibility and thus the Article 8 assessment.
60. At paragraphs 41 – 42 the judge rejected the sponsor's evidence concerning the circumstances of her separation from the appellant's father in 2011 and that the appellant's evidence that she and the appellant had been "tortured" was "last-minute evidence" and was an attempt to explain why the biological father had abdicated all responsibility for the appellant. The judge took this as a further adverse credibility finding against the sponsor and the appellant leading to the overall conclusion set out at paragraph 51 that her father had not abandoned his daughter and that the sponsor had left

the appellant with him and her grandparents when she came to Nepal.

61. Having considered the submissions of the parties and in the light of the evidence I am satisfied that the FtJ fell into error in the way Miss Vidal has submitted. There were a number of documents before the FtJ concerning the circumstances of the separation of the appellant's parents. The document at C322-323 plainly set out the sponsor's allegation of domestic abuse during the marriage. Whilst the word "torture" was not used, the description given in the divorce document refers to "hating, mistreating," and also that he had assaulted her and forced her out of the home and that it was this which had led her to leaving the family home with her daughter. The document also sets out who would be caring for the appellant post separation and at C323 the document sets out the agreement that the sponsor would take on the care of her daughter as her guardian. There was no reference to any continuing contact arrangement made between the sponsor and her former husband.
62. Consequently the documentary evidence did lend support to the sponsor's oral evidence that the parties had separated as a result of domestic abuse and that this was the reason for the lack of contact thereafter. Thus when it was put to the sponsor in cross examination that there was no evidence in the bundle of "torture" or "beating" this was based on an incorrect factual premise. I accept the submission made by Miss Vidal that the lack of reference by the sponsor in cross examination cannot be taken to mean that there was no evidence. Furthermore the sponsor did in any event refer to the circumstances of the divorce in her evidence in chief which was recorded at paragraph [22].
63. There was also supporting evidence in the documents from the municipality or as Miss Vidal refers to the "parish council" (I refer to the document at C324). This also refers to the past history and whilst it does not expressly refer to domestic abuse it does refer to the parties "not getting on well together" and that the parties lived separately after the divorce and that the appellant's mother (the sponsor) kept her daughter "in her custody". A similar document exhibited at C319 referred to the parties divorce and that the appellant thereafter stayed with her mother until she left to settle with her new husband in the UK in 2013.
64. Miss Vidal identified other material evidence exhibited at C317 setting out the family unit, where there is no picture of the appellant's father, the letter from the grandparents at C326 which could also be viewed as supportive evidence and also the evidence from the appellant in a letter at A6 referred to her having no contact with her father. There is no reference in any of those documents to the appellant's father playing any part in the appellant's care or upbringing either following the divorce or at any time thereafter.

65. The failure to undertake an assessment of all the material evidence that was before the tribunal which was potentially relevant to the factual background in my view rendered the findings not only at paragraphs 41 - 42 to be unsustainable but also the omnibus finding at paragraph [51] that the appellant had not abandoned his daughter and that the sponsor had left the appellant with her husband and their grandparents when she left Nepal to come to the UK. I cannot exclude the possibility that had the judge considered all of the material documentation that a different view of the factual circumstances of the parties concerned may have been taken. The failure to take account of all the relevant material undermines the factual assessment as to the circumstances of the appellant.
66. Having considered paragraphs 41 - 42 I am also satisfied that the judge appeared to have been labouring under a mistake of fact from the evidence. The judge appears to refer to the sponsor's evidence concerning her husband's conduct as an explanation as to why the appellant's father had abandoned the appellant. However when looking at the evidence given by the sponsor and set out earlier in the decision, the evidence recorded at paragraph [22] referred to domestic abuse as the reason for the divorce. It is correct to say that the sponsor also referred to the appellant having been treated badly but I can see no reference to this being advanced as an explanation for her ex-husband's abandonment of the appellant. Nor does the cross examination reflect this as set out at paragraph 26. As set out earlier, paragraph 26 refers to the point put to the sponsor that there was no evidence in the bundle of "torture" which was factually incorrect in light of the document at C322-323.
67. I am therefore satisfied that the judge did not consider all the material evidence in reaching her overall conclusions as to the factual circumstances of the appellant and that this had the effect of undermining the conclusions reached at [51] that the appellant's father had not abandoned his daughter and that the sponsor had left the appellant with him and her grandparents. I am also satisfied that it had the effect of undermining the conclusion at paragraph [53] concerning the issue of sole responsibility on the basis that there was "insufficient evidence" to conclude that she had not been looked after by her father and grandparents.
68. Whilst Mr Bates submitted that this was not material to the outcome in view of the finding made at paragraph [47] where the judge recorded the sponsor's inability to articulate in evidence the decisions she made for the appellant and therefore relevant to the issue of care and control, I am satisfied that this finding was made without taking into account other material evidence identified by Miss Vidal which was also relevant to the issue of sole responsibility which should be viewed holistically.

69. In the witness statement of the sponsor she gave an account of the decisions made for example her contact with the appellant's school, the payment of school fees and there was support for this in the documents from the school setting out the level of contact that they had with the sponsor not only from the UK but also when she came to Nepal. There was evidence of substantial contact between the parties in the form of chat evidence that was spanning a period of years and there were also visits made to Nepal by the sponsor and her husband. There was also relevant evidence in the appellant's letter at D6.
70. Whilst the judge did take into account the financial remittances made at [52] none of the other material was taken into account. The submission made by Mr Bates that this evidence was not challenged does not in my view mean that the evidence was irrelevant to the assessment of sole responsibility. This was relevant and material evidence to be taken into account when reaching an overall conclusion as to whether the sponsor had shown that she had retained responsibility for the appellant's upbringing and provided not only the financial support but also the emotional support and had the continuing care and control despite the grandparents retaining day-to-day care.
71. I take into account that the judge did make an adverse credibility finding at paragraph [40] and this was open to the judge to make on that evidence. However that finding is not an absolute answer to the overall assessment of the evidence relating to the appellant's circumstances and the issue of sole responsibility and the conclusions reached regarding article 8 of the ECHR.
72. I am also satisfied that when considering Article 8, the FtTJ took no account of the evidence from the appellant herself set out at A6 and her evidence concerning her circumstances in Nepal. Those wishes and feelings would not be determinative but should at least have been factored into the assessment.
73. For those reasons I have reached the conclusion that the decision of the FtTJ discloses the making of an error a point of law and I therefore set aside the decision.
74. I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case

to be put to and considered by the First-tier Tribunal; or
(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

75. In my judgement the appeal falls within subparagraph (b) as the judicial fact finding will be required. This will require the tribunal to hear the evidence and to consider the documentary evidence in its totality. It will be necessary to make factual findings as to the appellant's circumstances and those of the sponsor. I therefore find that in light of those matters that it is consistent with the overriding objective to remit the case to the First-tier Tribunal for a fresh hearing with none of the findings to remain.

Notice of Decision.

76. The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision of the FtT shall be set aside and shall be remitted to the First-tier Tribunal for a rehearing.

Signed Upper Tribunal Judge Reeds

Dated 13/10/ 2021.