



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2022-006278**  
**First-tier Tribunal No:**  
**HU/51420/2022**  
**IA/02248/2022**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 23 May 2023**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**TCAV**  
**(ANONYMITY ORDER MADE)**

Appellant

**and**

**AN ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellant: Ms Cleghorn instructed by Dues Nexus Solicitors.  
For the Respondent: Ms Young, a Senior Home Office Presenting Officer.

**Heard at Phoenix House (Bradford) on 5 May 2023**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.**

**DECISION AND REASONS**

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Lodato ('the Judge') promulgated following a hearing at Bradford on 7 December 2022, in which the Judge dismissed the appellant's appeal against the refusal of her application for leave to enter the United Kingdom to join her mother ('the Sponsor'), under the Immigration Rules and Article 8 ECHR. The Judge noted the appellant's case that her mother had sole responsibility for her which she exercised from the UK, that her father played no part in her life, and that there are serious and compelling circumstances that render her continued exclusion

- from the UK undesirable as those who had cared for her were no longer able to do so due to old age and physical ill health.
2. The appellant is a citizen of Vietnam born on 17 June 2006.
  3. The Judge noted the existence of a previous determination by First-tier Tribunal Judge Wood ('Judge Wood') promulgated in February 2021. The Judge records findings from the earlier decision at [16] of the decision under challenge, including noting that Judge Wood found the Sponsor's evidence that the appellant's father was no longer involved in his daughter's life lacked credibility and reliability, that her evidence was found to be deeply unimpressive generally, that the appellant had failed to establish that the father was absent from her life, and there were no serious or compelling circumstances as the appellant was adequately cared for in Vietnam. The claim the relatives were unable to do so was rejected. The appeal was dismissed both under the Immigration Rules and Article 8 ECHR.
  4. Judge Wood's findings formed the starting point of the assessment by the Judge in accordance with the Devaseelan principles.
  5. At [17] the Judge sets out details of the appellant's case, noting that the factual case remained that her mother exercised sole parental responsibility for her in the long-term absence of her father and that her grandmother and aunt were no longer able to look after her day-to-day needs. The Judge writes "*An important change in the factual case advanced was the underlying roles played by her parents. [The Sponsor] provided a new witness statement and gave oral evidence that she had been raped by the appellant's father and that her departure for the UK was arranged by him and his wife after she found out about the child. I address the new evidence, which was argued to stand as a foundation to depart from Judge Woods decision, in the findings section below.*"
  6. The Judge's findings are set out from [21] of the decision under challenge. In light of the nature of the grounds of challenge I set out paragraphs [23 - 28] as they appear in the Judge's decision:
    23. I accept as a general proposition that it is often very difficult for a survivor of rape to overcome feelings of shame and the fear of being disbelieved before making a disclosure. These feelings may be even more acute when engaged in a judicial process with strangers, several of whom are men. [The Sponsor's] oral evidence was plausible that it was only when in the company of female representatives that she was able to summon the courage to talk about such sensitive and painful matters. However, I also note that [the Sponsor], at paragraph 6 of her April 2022 witness statement used a similar rationale to explain why she did not disclose a fear of political persecution before the previous appeal hearing. In any event, I must do more than assess the plausibility of the delay in making this disclosure. An important task I must perform in this appeal is to decide whether the underlying factual claim is credible on the balance of probabilities. The claim that the appellant was conceived in an act of rape is the centrepiece of the argument that I should depart from the findings of fact reached by Judge Wood. If I were to find this background to be credible it would cast into new light the non-existent role said to be played by the appellant's biological father. If she was the product of rape, it would not be at all surprising that the father, with a pre-existing family, would not be inclined to have any involvement with her and this would in turn lend credibility to the claim of sole responsibility.
    24. I must keep in mind that [the Sponsor's] credibility as a witness has previously been considered in the context of a very recent and similar claim. This remains my starting point and it causes me to treat her evidence with considerable caution. I have summarised the findings of Judge Wood in some detail above to give a sense of just how emphatically he rejected her credibility. Parts of her evidence were tainted by significant inconsistency and found to be implausible. He was unable to treat the document purportedly

endorsed by the father as a reliable document. Importantly, [the Sponsor's] evidence, that she had fled Vietnam due to political persecution and that the risk to her persisted because of her political activism against the regime, was treated as a recent fabrication to explain away her absence from Vietnam for so many years. This narrative was continued in [the Sponsor's] witness statement, dated 21 April 2022 [see paragraph 5], prepared for these proceedings. In her most recent statement, and in oral evidence, this morphed into fears of returning which were founded on returning to the place where the man who raped her lived - this was an entirely new factual dimension to the appeal and I note that as recently as April 2022 [the Sponsor] referred [at paragraph 4 of her witness statement] to a relationship with the father that broke down before her departure for the UK. In this statement there is not the slightest hint of such a serious sexual offence.

25. During the hearing, I asked [the Sponsor] if this was the case, was she not afraid to make arrangements to approach this very same man to formally attest to his relinquishment of parental rights over his daughter - a document adduced in the 2021 proceedings. The answer she gave was that she was not scared at that time because he had since retired and would not be aware of her whereabouts. This struck me as decidedly odd and very much out of step with her evidence that she could not even bring herself to return to Vietnam for fear of triggering memories of her trauma.
26. A further dimension of the claimed background which I found difficult to reconcile was that the appellant's father and his wife had arranged for [the Sponsor] and her eldest daughter to leave Vietnam for the UK, but not his daughter. I was unable to understand why he would go to the trouble of assisting [the Sponsor] and her other daughter to leave the country but do nothing to facilitate his own daughter going with them. It was her birth after all which led to him and his wife taking these extreme steps in the first place. There was a fundamental tension in the evidence that the appellant's father and his wife were so threatened by his daughter's arrival that he arranged for her mother and half-sister to leave the country and yet did nothing to do the same for her. This becomes even more surprising when it is considered that he supposedly wanted to have nothing to do with his daughter. If that were true, it becomes even more difficult to understand why he would not try to send her away with her mother when he had the chance.
27. It is now clear that Judge Wood's instincts were entirely correct when he rejected the claims made about political persecution. [The Sponsor] came close to accepting as much during the hearing before me. I asked whether the claims of political persecution were untrue. Her response, which I found to be evasive, was that it did not represent the whole truth as she did indeed fear the appellant's father's wife who was a senior figure in the communist party. She also indicated that her evidence before Judge Wood may have been misunderstood because of the hearing taking place over CVP. I found these responses to be wholly unsatisfactory. There seemed to be a reluctance to accept that the claims of political persecution were a fiction - a proposition that finds support in the findings of Judge Wood and in the new narrative which has squarely turned the focus to the claimed sexual abuse which it is now claimed led to the appellant's conception.
28. The question I must ask myself is whether the apparent lies told by [the Sponsor] about the risks of political persecution in Vietnam should undermine her credibility generally. I remind myself that lies can be explained by any number of reasons which do not necessarily mean that the entirety of a witness' evidence falls to be rejected. The difficulty I have in brushing aside the apparent lies told in the context of the previous and the present proceedings is that these assertions were said to explain why there was such a lengthy period when [the Sponsor] had not visited her daughter despite having the means to do so. This went to the heart of whether she truly exercised sole parental responsibility. A good reason would be needed to explain why a parent with sole responsibility would not visit her daughter between 2008 and 2019 when, at times, she had the means to travel. The

claims of political persecution were clearly designed to fill that gap in the evidence and explain something that was otherwise inexplicable on the appellant's fundamental case. It is against that backdrop that I consider the recent claims. This struck me as yet another recent invention to not only explain away such a lengthy absence from Vietnam but also to account for why a false narrative of political persecution was advanced before Judge Wood and, until recently, in these proceedings. I find that the evidence is such that not only are the findings in the previous determination about [the Sponsor's] credibility my starting point, there is now even more reason to fundamentally doubt the truthfulness of her evidence. Like Judge Wood, I too find [the Sponsor] to be a witness entirely lacking in credibility.

7. At [31] the Judge finds that considering the totality of the evidence there was nothing that would justify a departure from the findings reached by Judge Wood and that the concerns he noted about the Sponsor's credibility "*have only hardened with the fresh evidential developments in the proceedings before me*". The Judge finds the appellant had not established that her mother has sole responsibility.
8. In relation to the serious and compelling circumstances which make the appellant's exclusion from the UK undesirable element, the Judge considers this from [32]. The Judge notes this aspect of the appeal focused on the ability of those with day-to-day responsibility for the appellant's care to be able to continue to do so. The Judge noted that fresh evidence had been provided in relation to this aspect which was not before Judge Wood, but having assessed that evidence concluded that it was not accepted that the appellant's aunt was so incapacitated that she could not continue to perform the role she has played for a considerable period of time, and that it had not been established that the appellant's continued exclusion from the UK is undesirable because of serious and compelling circumstances [34].
9. The Judge considered Article 8 ECHR but found, having balance the competing interests, that the decision was proportionate.
10. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal, Judge Mills, on 11 January 2023.
11. The Secretary of State opposes the appeal. In a Rule 24 response dated 25 January 2023 it is written:

2. First tier Tribunal Judge Mills grants permission to appeal in this matter finding it arguable that the conclusions were unsafe in particular on the basis of the sponsor's potential vulnerability. It being unclear whether he bore that vulnerability in mind when considering the substance of her evidence or the question of whether he could depart from the findings of the previous judge.
3. It is respectfully submitted that the Grounds are unmeritorious and permission should not have been granted in this matter.
4. The judge accepted initially, only insofar that allowances would be made when taking evidence, the appellant's claim to have been assaulted prior to her coming to the UK.
5. It is clear from a holistic reading of the determination that the NEW evidence relating to the rape was rejected for the reasons given by the judge.
6. It will be submitted that it would be irrational for a Tribunal to be called into error of law in circumstances where the credibility of new evidence had not been tested and ultimately rejected by the judge.

7. The Judge sets out his findings [from 21] firstly, directing himself to the issue of credibility which was foremost in his mind as the previous tribunal had found the sponsor to be lacking in reliability and had emphatically rejected her credibility [24]
8. The judge proceeded to consider the late disclosure, and only new basis for the appeal, at length [25 onwards] concluding that late evidence of rape and trauma to be entirely lacking in credibility [28]
9. Detailed reasons were given by judge Lodato for this finding and for refusing to depart from the findings made by the previous tribunal being that the sponsor did not have sole responsibility for the appellant.
10. Compelling circumstances were considered [32] and the conclusions drawn by the judge that the grandmother's role in caring for a 16 year old girl has been replaced by the aunt are findings open to the judge to make without irrationality or error.
11. The judge considers the appeal outside of the Immigrations rules which he has found not to be met from [35] reaching conclusions on proportionality open to him to make.
12. The respondent opposes the appellant's appeal. In summary, the respondent will submit inter alia that the judge of the First-tier Tribunal directed himself appropriately.

### **Discussion and analysis**

12. Ground 1 asserts a failure by the Judge to consider the Sponsors evidence as a potentially vulnerable witness, sufficient to amount to a procedural irregularity. This ground does not dispute that the Judge's findings may well have been open to him but argues that would only be so if the Judge directed himself properly.
13. At [12] the Judge refers to preliminary and procedural matters, referring specifically to narrative witness statements and letters but also, described as of the greatest significance, the Sponsor's witness statement in which she claimed that the appellant was conceived as a result of a sexual assault. The Judge put the matter back for the Presenting Officer to consider this new evidence. The evidence was admitted and the Judge specifically writes "*I concluded that the new evidence went to matters of substance in the appeal and that the sensitive nature of the disclosure made in the sponsor's witness statement provided an arguably cogent reason why there might have been delay in this fresh evidence coming to light.*" The Judge records at [13] being invited to treat the Sponsor as a vulnerable witness which he agreed to.
14. As noted, the Judge was clearly aware of the fact that individuals may not wish to disclose matters such as being victims of rape and it was plausible that the ability to discuss matters with a female solicitor may have enabled the Sponsor to speak about these matters. It is not made out the Judge treated the Sponsor as anything other than a vulnerable witness, but a vulnerable witness, like all witnesses, is expected to tell the truth.
15. The Judge found that the Sponsor was not credible and was not telling the truth. In suggesting that the Judge was wrong in that findings, and that the Sponsor was telling the truth and that claimed events did happen is, on the face of it, disagreement with the Judge's findings that otherwise in the case. Claiming a child can be hidden, couple of other points made in the grounds seeking permission to appeal, appears to be an attempt to reargue the appeal rather

- than providing examples of errors made by the Judge, especially as there is no reference to evidence adduced before the Judge in relation to these issues.
16. From the starting point of the disclosure made to a female solicitor and female counsel (it is noted there was no request for an all-female court) the Judge did what was required of him, to factor these aspects into the assessment of the evidence as a whole. The Judge may not have set out relevant parts from the Presidential Guidance on the treatment of Vulnerable parties and witnesses, but it is not made out the Judge was unaware of or failed to apply the relevant principles. It was only when assessing the evidence holistically, including the findings of Judge Wood and a new factual matrix presented, that the Judge concluded that he was not being told the truth. Those are findings properly open to the Judge and no material legal error is made out in relation to Ground 1.
  17. Ground 2 asserts the Judge conflated plausibility and credibility. It is important to read the decision as a whole. The task of the Judge was to assess all the evidence and, having done so, to decide what weight could be placed upon the various factors, and to set out the findings made as a result thereof. The grounds set out various thoughts of the author in relation to the plausibility or otherwise of what occurred including at [6] questioning “why any mother would leave her toddler removed the other side of the world”. In many societies in the world, such as Vietnam, many mothers leave their children to come seeking employment, trafficked or otherwise, leaving the children in the care of relatives. There is mass movement of populations in other parts of the world and this is often a question that is answered solely on the basis of economics and the ability to improve the situation of the family left behind through remittances. It was not for the Judge to speculate in relation to any matters. The Judge was obliged to consider the evidence. That is what the Judge did. It is not made out the Judge conflated plausibility and credibility to the extent that the adverse credibility findings are infected by material legal error.
  18. Ground 3 asserts the Judge failed to consider cultural norms but, again, the Judge was only required to consider the material that had been provided in evidence. The suggestion at [9] the Judge’s findings may have been open to him if he considered evidence as to political persecution was not necessarily inconsistent with previous evidence, suggests the Judge erred either in relation to the consideration of the evidence or, alternatively, challenges the weight the Judge gave to that evidence. Again, it is clear having assessed the material that the Judge factored all relevant issues he was asked to consider into the determination.
  19. A reader of the determination is able to understand not only the findings made by the Judge but also the reasons why such findings have been arrived at on the evidence. Moreover, whilst the author of the grounds suggests that the Judge should have set out more in the body of the determination, or adopted a different approach to the assessment of the evidence, failure to do so rendering the findings unsafe, I do not find this submission has been established when the evidence, determination, grounds, grant of permission to appeal, and submissions made at the error of law hearing are considered.
  20. The Court of Appeal has made it clear that appellate judges, including themselves, should not interfere with a decision of a court below unless grounds establish genuine legal error material to the decision under challenge. I do not find on the basis of the evidence and information available in relation to this appeal that the appellant has satisfied that test. Disagreement with the Judge’s findings on the evidence or the outcome and suggesting alternative findings preferred by the appellant does not establish the findings actually made are outside the range of those reasonably open to the Judge on the evidence.
  21. In particular I find no merit in the submission that was made that the Judge made no findings upon whether the Sponsor was raped or not, as alleged. To the

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contrary, the Judge makes a specific finding that the Sponsor is not a credible witness and that her evidence could not be relied upon. That will include the allegation of rape.

**Notice of Decision**

22.No material legal error in the decision of the First-tier Tribunal has been made out. The determination shall stand.

**C J Hanson**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**15 May 2023**