



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal Number: UI-2022-002783**

**HU/52705/2021 [IA/07517/2021]**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On the 14<sup>th</sup> September 2022**

**Decision & Reasons Promulgated  
On the 11<sup>th</sup> October 2022**

**Before**

**UPPER TRIBUNAL JUDGE KEITH  
DEPUTY UPPER TRIBUNAL JUDGE SKINNER**

**Between**

**'HSN' (Vietnam)  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE ENTRY CLEARANCE OFFICER**

Respondent

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure  
(Upper Tribunal) Rules 2008**

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. The anonymity direction is made as the appellant is a minor.

**Representation:**

For the appellant: Ms Mac, Solicitor, of Mac & Co solicitors

For the respondent: Mr S Whitwell, Senior Home Office Presenting Officer

**DECISION AND REASONS**

## **Introduction**

1. These are the approved record of the decision and reasons which were given orally at the end of the hearing on 14<sup>th</sup> September 2022.
2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Gillespie (the 'FtT'), dated 23<sup>rd</sup> May 2022, by which he dismissed the appellant's appeal against the respondent's refusal on 21<sup>st</sup> May 2021 of his application for leave to enter to settle with his mother and stepfather. That decision had in turn refused the appellant's application on the basis that the appellant's mother (the 'sponsor') only had limited leave to remain as a partner until 21<sup>st</sup> June 2023, and the respondent was not satisfied that his mother had sole responsibility for his upbringing, as is required by paragraph E-ECC.1.6(b) of Appendix FM to the Immigration Rules. This was in light of two Vietnamese court orders. The first, in 2009, indicated that the appellant's father had been awarded custody until the appellant reached maturity. The second, dated 15<sup>th</sup> May 2020, referred to the appellant's father having been imprisoned and the appellant being cared for, on a day-to-day basis, by his paternal grandmother, upon his father's incarceration.
3. Aside from the issue of sole responsibility, there were not, in the respondent's view, any serious and compelling or other considerations which made the appellant's exclusion from the UK undesirable. The respondent considered, but also rejected, the appellant's application by reference to sub-paragraphs GEN.3.1 and GEN.3.2 of Appendix FM, as a refusal would not result in unjustifiably harsh consequences for the appellant, notwithstanding his best interests as a minor.

## **The FtT's decision**

4. The FtT referred himself to the well-known authority of TD (Paragraph 297 (i) (e): "sole responsibility") Yemen [2006] UKAIT 00049, at §5. At §§6 to 7, the FtT considered the two court orders; the father's imprisonment; the sponsor's improved financial circumstances; and the appellant's paternal grandmother becoming older and weaker. The 2020 order reflected that the parties agreed to change the person 'rearing' the appellant. At §8, the FtT noted:

"As can be seen, reference is made to the appellant being raised by his biological mother from the time of his imprisonment but to his paternal grandmother getting older and weaker, the clear inference being that he was in her care at the time of the court order."
5. The FtT recorded the sponsor's evidence that the appellant's father had been imprisoned in July 2009 and the appellant had been brought up by the sponsor until July 2015, when she came to the UK unlawfully. She put the appellant in the care of her mother-in-law, whom she knew would "do a good job". The situation changed in January 2019, when the sponsor had wished to place the appellant with her own mother, as the paternal

grandmother's eyesight had deteriorated. The sponsor's mother had made it clear she did not want to look after the appellant. The FtT noted at §15 that the appellant's narrative was not reflected in the 2020 order, which referred to the appellant's father having parental responsibility and the appellant being in the day-to-day care of the parental grandmother. At §16, the FtT noted that the improvement in the sponsor's financial circumstances had been the motivation for obtaining the 2020 order, which she acknowledged in oral evidence. The FtT concluded, at §17, that the appellant had not proved his father had abandoned him or had abdicated responsibility, and had instead delegated day-to-day care to the sponsor and the child's paternal grandmother. The fact that the appellant's father agreed to the consent order in 2020 was consistent with him continuing to exercise responsibility. The FtT did not accept it was more probable than not that the sponsor had sole responsibility for the appellant.

### **The grounds of appeal and grant of permission**

6. The appellant lodged grounds of appeal, the gist of which is as follows: the FtT had impermissibly focused on the two court orders whilst ignoring evidence that the sponsor had exercised *de facto* sole responsibility long before the 2020 order. The appellant's father been in prison from July 2009 to 2015, which had been reflected in the 2020 court order, and which had also referred to the appellant been "reared" by the sponsor.
7. The sponsor's evidence had been that she had entrusted care of the appellant to her mother-in-law and had started sending remittances after August 2016. There was a transfer of care, in 2018, to the sponsor's own mother. The FtT had ignored this evidence when referring, at §8, to the paternal grandmother caring for the appellant at the time of the 2020 order. Contrary to the FtT's findings at §15, the 2020 order had not indicated the appellant's father continued to have parental responsibility.
8. The FtT had erred in ignoring the paternal grandmother's medical record, which indicated that she was blind; and the school records which indicated that the appellant's maternal grandmother was "rearing" him.
9. The FtT had also failed to consider the appellant's best interests under sub-paragraphs GEN.3 1 and 3.2 of Appendix FM, which the respondent had considered.
10. First-tier Tribunal Judge Handler granted permission on 17<sup>th</sup> June 2022. The grant of permission was not limited in its scope.

### **The hearing before us**

#### **The respondent's concession**

11. At the beginning of the hearing, Mr Whitwell drew our attention to the respondent's Rule 24 response dated 1<sup>st</sup> July 2022, which had been filed and served on the appellant. This confirmed that the respondent did not

oppose the appellant's application for permission to appeal and invited the Tribunal to determine the appeal with a fresh hearing. Mr Whitworth added that that a rehearing would need to consider not only sole responsibility but also whether there were other circumstances which rendered the appellant's exclusion from the UK undesirable etc. Regrettably, the Rule 24 response had not been relayed to us until the morning of this hearing. There is no criticism of either legal representative.

12. While the concession is expressed as not opposing the application for permission to appeal, rather than the appeal itself, given that the Rule 24 response postdates the grant of permission, the only sensible reading of it is that it was intended to relate to the error of law appeal itself. Nonetheless, we canvassed with Mr Whitwell whether he maintained the respondent's concession or sought to withdraw it. He confirmed that he maintained the concession and also referred to the potential prejudice to the appellant, were that concession to be withdrawn at such a late stage, as the appellant had come to the hearing prepared for a remaking of the appeal, not to argue whether there was an error of law.
13. In the circumstances, there was no reason for us not to allow the appellant's appeal against the FtT's decision, in light of the respondent's concession. We accordingly conclude that the FtT erred in law, such that his decision is not safe and cannot stand. None of the FtT's findings are preserved, and the evidence and facts will need to be considered afresh.

### **Decision on error of law**

14. We conclude that there are errors of law such that the First-tier Tribunal's decision must be set aside.

### **Disposal**

15. Ms Mac was under the misapprehension that the witnesses' evidence, which was not new, could be considered with their statements being taken as read and without the need for any live evidence. For his part, Mr Whitwell made clear that he would wish to cross-examine the witnesses, one of whom would require an interpreter. No arrangements had been made for an interpreter. In any event, we concluded, by reference to paragraph 7.2 of Senior President's Practice Statement and the necessary fact-finding, (i.e. requiring an analysis of all of the evidence, and a fresh assessment of, among other things, the witnesses' credibility), that this is clearly a case that has to be remitted to the First-tier Tribunal for a complete rehearing.
16. The remittal shall involve a complete rehearing of the appeal. All aspects of the claims must be addressed, with no preserved findings of fact.

### **Notice of Decision**

**The decision of the First-tier Tribunal contains errors of law and we set it aside.**

**We remit this appeal to the First-tier Tribunal for a complete rehearing.**

**Directions to the First-tier Tribunal**

**This appeal is remitted to the First-tier Tribunal for a complete rehearing, with no preserved findings of fact.**

**The remitted appeal shall not be heard by First-tier Tribunal Judge Gillespie.**

**The anonymity directions continue to apply.**

Signed **J. Keith**

Date: 14 September 2022

Upper Tribunal Judge Keith