



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-000473
First-tier Tribunal No:
HU/07172/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 9 August 2023

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MISS NGHINH HAN DAO
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Solomon, instructed by RFB Legal
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard at Field House on 12 April 2023

DECISION AND REASONS

1. The appellant appeals against a decision of the respondent made on 5 August 2020 to refuse her application for entry clearance as a child of a British citizen. Her appeal to the First-tier Tribunal against that decision was dismissed for the reasons set out in a decision promulgated on 12 August 2021. For the reasons set out in the decision of the Upper Tribunal dated 10 August 2022 (a copy of which is annexed to this decision) that decision was set aside.

Background

2. The appellant is a Vietnamese national born in January 2003. Her mother, Gia Van Tang (“the sponsor”), left Vietnam to come to the United Kingdom on 9 August 2009 where she married her present husband, Mr Thein An Doan, on 9 September 2009.
3. The appellant’s first application for entry clearance made on 16 June 2012 was refused on 26 September 2012. Her appeal was dismissed by First-tier Tribunal Judge Dearden on 2 July 2013. She made a second application on 31 October 2017 which was refused on 24 January 2018. That appeal was also dismissed on 19 December 2018 by First-tier Tribunal Judge Moxon. Her third application was made on 6 May 2020, refused by the respondent on 5 August 2020 and her appeal was dismissed on 12 August 2021.
4. The core of the appellant’s case is that since the appeal was dismissed on 19 November 2018 by Judge Moxon, the situation has changed as:-
 - (1) her father has no role in her life, having become addicted to drugs and being ordered to attend a drug detoxification centre, and
 - (2) her godmother and god-aunt are no longer able to care for her.
5. Further, on 4 August 2022 the appellant’s grandmother, Chung Quy, who had looked after her, died. The god-aunt, Ly Ngoc Thanh, is now 71 years old; the god-grandmother was 93 when she died. The god-aunt has underlying health conditions but is refusing to get treatment.
6. The Secretary of State’s case is, broadly, that the circumstances had not changed since Judge Moxon’s decision; that the appellant’s mother although she has some responsibility for her, does not have sole responsibility; and, given previous adverse findings, the evidence of the father’s being in drug rehabilitation is unreliable.

Remaking the decision - the hearing on 12 April 2023

7. I heard evidence from Ms Doan who adopted her witness statements from 4 May 2020, 17 March 2021 and 20 March 2023. She gave evidence in Cantonese with the assistance of the court interpreter. Asked about the letter from a lawyer in Vietnam (Hong Thuan Law Limited Company) she confirmed that this was a lawyer she had instructed and the letter was based on what she had told him. She said she had always had sole responsibility for her daughter and that although the father had relinquished his responsibility in 2013, she had not realised that she needed a letter to that effect which is why she had not got it from the lawyer previously.

8. She denied that she misled the authorities as to who had responsibility. She said that there was not much contact between the appellant and her father's family; the father's second wife had been to see the daughter as she needed information from her. The second wife had needed that to visit her husband because the marriage had been ended legally by that point. She said that she was not sure when her former husband had married and had had his own son.
9. Asked about what she had said in her 2021 witness statement at [11] that the godmother had had to sell the house in 2013, she confirmed that she had been deceived by her own granddaughter and she had not previously obtained a letter from the godmother because they did not see why this would affect the application of the daughter to come to the United Kingdom. She said as the house did not belong to her she had not seen how it would affect the application.
10. Ms Doan said that she thought that the god-aunt had not mentioned this in her witness statement as she thought this because it was not related to this appeal. She explained that the granddaughter had told the grandmother the property had been rented out but she had in fact sold it.
11. She confirmed that the god-aunt is refusing treatment. Asked about why the documents showed a prescription to her she said this was in relation to a previous condition, not the current condition and that currently she was refusing treatment for a heart problem. She denied saying that this was untrue.
12. Ms Doan said that she had not always travelled to Vietnam with the whole family, that she and her husband had been working, her most of the time working but bringing up two children as well. She said she had not made an application until 2012 to have her daughter join her as she needed to apply for permanent residence and then citizenship. She said that she had waited a year and a half after the 2019 appeal had failed, she wanted to sort everything out in better condition.
13. I then heard evidence from the sponsor's husband. He said that they had delayed making the first application until 2012 as they had wanted to get their financial circumstances in better condition first. They had bought their first property then decided to apply. He said he had not always gone to Vietnam with his wife and that most of the time he had done so but he needed to work. For that reason he had stayed three to four weeks each time but she had stayed longer. He said that, contrary to what what Judge Moxon had held in his decision, neither he nor his wife had sought to mislead the authorities about the issue of sole responsibility.
14. Mr Wain submitted that, little weight should be attached to the new evidence asking me to note the judge had placed significance on conflicts with the sponsor's evidence in his decision. He submitted that the attention to mislead was material. He submitted that it was important to note that the initial narrative put forward by the sponsor was that the

father was not involved and that that had now changed (see Judge Moxon's decision at [17(c)]).

15. Mr Wain submitted that it was relevant that the letter from the drug rehabilitation centre did not say that the appellant's father was staying there and that this indicated there was still some contact, contrary to the narrative that he had no role. He submitted further that the lack of evidence that the godmother had been deceived was relevant to the general credibility and that there was no proper basis on which there should be a departure from the earlier findings.
16. Mr Wain submitted that there were no serious and compelling family circumstances such that the requirements of paragraph 297(1)(f) of the Immigration Rules were met and that the decision was proportionate.
17. Mr Solomon relied on his skeleton argument noting that the earlier decisions accepted that the mother had some role, accepted that the appellant does not live with her father but found that the responsibility was shared between the sponsor, father and the rest of the family. He submitted that the evidence that the father was a drug addict was significant, as was the fact that the god-grandmother is now dead. That, and the god-aunt's illness, proved that on balance the sponsor has had sole responsibility.
18. Mr Solomon submitted that the evidence from the sponsor and her husband was credible and that the previous adverse findings were not determinative, it being necessary to view the evidence in the round. He submitted further that it was significant here that the daughter said at all times stayed with the mother's relatives, not the father's relatives, and that he had married, had another child and was unable to play an active part in her life. He had no income, had provided proof of his drug addiction and attendance at a detox centre, and the only reason for contact was that the household document was needed so that his new wife could get to see him.
19. Mr Solomon submitted that the god-aunt acts on instructions from the mother and the evidence regarding her heart condition was not implausible. He submitted further that there had been lots of regular visits, involvement with the school and with the doctor in Vietnam. There was also evidence of financial support for over a decade, transfer vouchers being at first to the father which was explained, and more recently it was to the god-aunt and god-grandmother.

The Law

20. Paragraph 297 of the Immigration Rules provide, so far as is relevant, provides as follows:-

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

21. I note from TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 at [34]:

These cases are largely concerned with the issue of "sole responsibility" arising between a UK-parent and relatives who are looking after the child in the country of origin. In many of the cases, the other parent has disappeared from the child's life totally or plays so little part as to have, in effect, abdicated any responsibility for its upbringing. What emerges is a concept of "authority" or "control" over a child's upbringing which derives from the natural social and legal role of an individual as a parent. Whilst others may, by force of circumstances, look after a child, it may be that they are doing so only on behalf of the child's parent. The struggle in the case law is to identify when the parent's responsibility has been relinquished in part or whole to another such that it should be said that there is shared rather than sole responsibility. By contrast, where both parents are active in the child's life, the involvement of the parent in the country of origin is significant - perhaps crucial - in assessing whether the parent in the UK has "sole responsibility" for the child.

22. I bear in mind that there have been two previous appeals in this case. Clearly, on that basis, the decision in Devaseelan is relevant but care must also be taken when applying Devaseelan to recall the factual matrix which arose in that case. The starting point principle is not a legal straightjacket and permits subsequent judicial factors to depart from earlier decisions or the principles and properly reasoned basis: R (on the application of MW) v SSHD (Fast track appeal: Devaseelan guidelines) [2019] UKUT 411. I remind myself also of the judicial headnote in TD (Yemen):

"Sole responsibility" is a factual matter to be decided upon all the evidence. Where one parent is not involved in the child's upbringing because he (or she) had abandoned or abdicated responsibility, the issue may arise between the remaining parent and others who have day-to-day care of the child abroad. The test is whether the parent has continuing control and direction over the child's upbringing, including making all the important decisions in the child's life. However, where both parents are involved in a child's upbringing, it will be exceptional that one of them will have "sole responsibility".

23. I bear in mind also what was said at paragraphs [49] to [50]:

49. Where one parent has disappeared from the child's life and so relinquished or abdicated his (or her) responsibility for the child, the starting point must be that it is the remaining active parent who has "sole responsibility" for the child. The fact that the remaining active parent is in the UK makes no difference to this. Of course, the geographical separation of the parent from the child means that the day-to-day care of the child will necessarily be undertaken by others - relatives or friends abroad - who look after the child. Here, the issue under the immigration rules is whether the UK-based parent has, in practice, allowed the parental responsibility for the child to be shared with the carer abroad. This is, of course, the question we see most frequently in the case law.

50. The cases, particularly Nmaju and Cenir in the Court of Appeal, make clear that the touchstone of "sole responsibility" is the continuing control and direction by the parent in the UK in respect of the "important decisions" about the child's upbringing. The fact that day-to-day decision-making for a child - such as "getting the child to school safely and on time, or putting the child to bed, or seeing what it has for breakfast, or that it cleans its teeth, or has enough clothing, and so forth" (Ramos, per Dillon LJ at p 151) - rests with the carers abroad is not conclusive of the issue of "sole responsibility". However, if the UK-based parent has allowed the carer abroad to make some "important decisions" in the child's upbringing, then it may readily be said that the responsibility for the child has become "shared".

24. As was noted in Nmaju v SSHD [2001] INLR 26 it is evident that there may well be a change in circumstances. Thus it is clear that the question of whether sole responsibility is exercised by the mother needs to be answered as at the date of decision.

25. Judge Dearden noted in his findings at 17(1) that the appellant had ceased to live in the house owned by the godmother in 2013 as it had been sold because "the godmother's son and daughter got into financial difficulties with a business that they were running and asked their mother for monies in order to pay off the persons to whom they owed money". He noted no evidence of the sale of the house and he did not find it credible that an elderly person would agree to sell a house simply to bail out children who had engaged in a risky financial venture. He noted also an interview with the appellant's father who indicated that he consents for her to join a school excursion, he visits her when he is free and sees her once a week, sometimes every two to three days and lives just fifteen minutes away. He said that some of the witnesses had made statements

which contradicted what is recorded in the telephone conversations without any proper explanation. He found that the child's mother, the child's father and extended family in Vietnam share the responsibility for the child's upbringing.

26. In his decision, Judge Moxon observed [17] that Judge Dearden had set out matters upon which he did not believe that he was told the truth. He set out his findings from paragraph 26 onwards. He observed that the evidence from the school and the doctors did not positively assert that they have had no contact with the appellant's father in five years [27]. He wrote:-

"28. (a) The credibility of the witnesses has been significantly undermined previously by Judge Dearden and save for witnesses reasserting that the appellant's father has never had significant involvement with her upbringing, there has been no further evidence adduced to show that his conclusions were incorrect. The fact that the sponsor and others have sought to mislead the authorities previously about who has responsibility for the appellant is significantly material when considering their present assertions".

27. He found it incredible that the appellant's father who had been found to have an involvement in her upbringing for the first few years of her life would then stop having any contact with her, noting that his letter to that effect was rejected by Judge Dearden. He was not satisfied by the explanation for the delay between 2014 and the next application in 2017 was made. He also found [29] "I find it is as a fact to a high standard that on the account of the appellant's father abandoning her it is an invention designed to seek to circumvent the Immigration Rules".

28. I bear in mind it is for me to consider the evidence in the round and that I am not bound by the findings of the previous two judges. I bear in mind also as noted above that situations may change.

29. That said, I consider that a further account of what happened to the grandmother's house has now been provided. That, has not been adequately explained.

30. Taking that into account, and the findings made by previous judges, and , bearing in mind that the appellant has had the opportunity to adduce further evidence to explain the previous inconsistencies, I am not satisfied that the evidence now adduced is sufficient as part of the evidence overall to cause me to depart from the credibility findings made by Judges Moxon and Dearden. If anything, the addition of another explanation for what happened to the house - and this time fraud - undermines the explanation put forward. I find that

31. Viewing the evidence as a whole, including that of the sponsor's husband, I find that the sponsor is not a witness on whose testimony I can rely. That is relevant as I am dependent on the evidence of the sponsor that the god-aunt is no longer able to look after the appellant owing to a

heart problem for which she is not seeking treatment. As Mr Wain pointed out, there is no evidence contained in the medical reports to confirm that condition, either as to medication or to the nature of the problem.

32. Further, it does not necessarily follow that because the appellant's father is undergoing drug rehabilitation that he does not maintain any contact with her. The explanation for the father's second wife making contact with the appellant is again dependent on the evidence of the sponsor which is unreliable. It is said that the wife is now divorced from the husband which is why she needed documents showing family relationship in order to be able to visit him. This is not supported by any of the other documentary evidence.
33. I accept from the documentary evidence provided that the grandmother, Chung Quy, has died. A death certificate has been provided. It is also clear that the family travelled to Vietnam for the purposes of the funeral, and I find it difficult to accept that they would have gone to such lengths to demonstrate something that is untrue. That said, the death appears to have occurred in August 2022 after the sponsor had left the United Kingdom. It is, however, clear that the sponsor's husband travelled later. As did their children.
34. Drawing all these factors together, I am not satisfied that I have been told the truth about the appellant's situation in Vietnam. I am not satisfied that the situation has changed since the last time that the matter was decided such that the appellant's mother has now acquired sole responsibility for her.
35. I have no reason to doubt that the appellant wishes to be in the United Kingdom with her mother, and her half-siblings. Her most recent witness statement dated 16 March 2021 explains the close ties she has with the family but says little of assistance in assessing sole responsibility. Accordingly, I am not satisfied that the appellant has shown that her mother has sole responsibility for her.
36. I turn next to the situation of whether there are compelling family circumstances such that the appellant should be granted entry clearance. Given the appellant's age at the date of the respondent's decision, and as I am not satisfied that she has no one to care for her, to the extent needed, given that even then she was very nearly an adult. The sponsor supports her, and is able to visit. They are able to keep in contact. There is insufficient evidence to demonstrate that she is at risk of harm.
37. That said, I do accept that she has grown up separately from her half-siblings. That is a factor which is very much in her favour, but equally, that is the status quo. There is little or no evidence of any actual harm occurring to any of those involved, and the half-siblings in the UK are able to travel to visit her. Taking all of these factors into account, I am not satisfied that there are compelling family circumstances such that the appellant should be granted entry clearance.

Article 8 outside the rules.

38. I apply section 117B to the facts of this case. Significant weight has to be placed on the fact that the appellant does not meet the requirements of the immigration rules which involved an assessment of whether there are compelling family circumstances. I accept that there is a family life between the appellant and her mother and stepfather, but refusing entry clearance is maintaining the status quo. I find that the interference with that family life is proportionate, although I am prepared to accept she speaks English and would not be a burden on public funds. I find that there is insufficient material to demonstrate that there are sufficiently compelling circumstances such that in all the circumstances of this case, the need to maintain immigration control is outweighed.
39. For these reasons, I dismiss the appeal on all grounds.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remake the decision by dismissing the appeal on Human Rights Grounds.

Signed

Date: 21 June 2023

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW DECISION

UPPER TIER TRIBUNAL

(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: IA/00473/2022

THE IMMIGRATION ACTS

Heard at Field House
On: 30 June 2022

Decision and Reasons Promulgated On

Before
Upper Tribunal Judge Rintoul
Deputy Upper Tribunal Judge Mailer

Between

MS NGHINH HAN DAO
ANONYMITY DIRECTION NOT MADE

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms F Dell, counsel (instructed by Ronald Fletcher Baker LLP)

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

DECISION AND REASONS ON ERROR OF LAW

1. The appellant is a national of Vietnam born on 26 January 2003. She appeals with permission of the Upper Tribunal against a decision of First-tier Tribunal Judge R Hussain promulgated on 12 August 2021, dismissing her appeal against the decision of the respondent made on 5 August 2020, refusing her application for entry clearance of as the child of her sponsor, a British citizen. She had made two previous applications, both of which had been refused and which were upheld on appeal.

Immigration History

2. The appellant's mother and sponsor entered the UK on 9 August 2009. She married her husband, Mr Ththien An Doan on 9 September 2009 in the UK. The sponsor was granted ILR on 21 March 2012.
3. The appellant's first application for entry clearance made on 16 June 2012 was refused on 26 September 2012. Her appeal was dismissed by First-tier Tribunal Judge Dearden on 2 July 2013. She made a second application on 31 October 2017 which was refused on 24 January 2018. That appeal was also dismissed on 19 December 2018 by First-tier Tribunal

Judge Moxon. Her third application was made on 6 May 2020, refused by the respondent on 5 August 2020 and her appeal was dismissed on 12 August 2021.

4. Judge Hussein recognised that these findings were his starting point [12]. He directed himself in accordance with the Tribunal's decision in TD (paragraph 297)(1) (e): "Sole responsibility") Emnyemen [2016] UKAIT 00049.
5. He noted at [14] that it was not disputed that the appellant was left in the care of her godmother and god-aunt after her sponsor mother came to the UK and married Mr Doan. He referred to the earlier decisions of the Tribunal where it was found that the sponsor's father retained parental responsibility and that he also had some role in the appellant's life.
6. He referred at [15] to the contention that the appellant's father has no role in her life relying on his statement as confirmation. There was also additional evidence adduced that her father had been ordered to attend a drug detoxification centre from 14 June 2019. That was said to constitute further evidence that her father is incapable as well as unwilling to take care of the appellant. He stated at [15] as follows:

"I do not accept that this document means that the appellant's father is incapable of taking care of the appellant. This is because it does not suggest that the drug detoxification program requires him to reside at this or any other centre or whether the father's attendance is as a visiting outpatient. Furthermore, the letter does not state how long this program requires the father's attendance. Notwithstanding this, there is nothing to suggest that by virtue of this drug treatment order the appellant's father has lost his parental rights for the appellant".
7. He stated at [16] that he was not satisfied that there is sufficient evidence for him to conclude that the earlier decisions were incorrect or that there had been a "sufficient change whereby the sponsor mother now has sole responsibility".
8. He also dismissed the appeal under the provisions of paragraph 297 (i)(f) of the rules.
9. With regard to Article 8, he was satisfied that family life exists insofar as the appellant is a child of her sponsor mother. As that the date of decision she was now over 18 years of age. She continued to live with her god-aunt. He was not satisfied that the impact of the decision was sufficient to engage the potential operation of Article 8. He referred to the provisions of section 117 B of the 2002 Act and referred to "the absence of any evidence that the appellant or sponsor mother would face any significant difficulties in maintaining and furthering their family life with each other in continuing the current arrangements or in making a future application for entry clearance to the United Kingdom" [20].
10. The decision of Judge Hussain was challenged on several grounds.
11. Permission to appeal was refused by the First-tier Tribunal but was granted by Upper Tribunal Judge Pickup on 5 April 2022.
12. We heard oral submissions from the representatives as to whether the decision of Judge Hussain contains material errors of law.

13. Ms Allen, who did not appear for the appellant for the First-tier Tribunal referred to the grounds in support of the application for permission to appeal to the Upper Tribunal. There were three issues which had to be determined, namely whether the appellant satisfied the provisions of paragraph 297 (1)(e) and/or (f) of the Immigration Rules and for Article 8 outside the rules, or whether there are compelling or exceptional circumstances not have recognised under the rules.
14. Ms Allen submitted that although the Judge correctly treated the previous terminations as a starting point, he erred when applying the guidelines in Deevaseelam v SSHD [2002] UKAIT 702 by searching for evidence which showed that the previous determinations were incorrect or that there has been a sufficient change in circumstances [16]. The starting point principle is not a legal straitjacket and permits subsequent judicial fact finders to depart from earlier decisions on a principled and properly reasoned basis: R (on the application of MW) v SSHD (Fast track appeal: Deevaseelan guidelines) [2019] UKUT 411.
15. Whilst finding that the appellant's father "is not incapable of taking care of the appellant" [15] he failed to reach proper or any adequate findings on material matters including whether her sponsor has continuing control and direction over her upbringing including making all the important decisions in her life.
16. In particular although referring to appellant's father's statement in which he stated that he has no role in the appellant's life - bundle page 109 – he failed to engage with the contents of that statement in which he stated that he is married with a child and has been unable to play a part in the appellant's life since 2013. Nor did he seek to give any adequate or any reasons for rejecting that.
17. Nor did the Judge have proper regard to the evidence before him including proof of regular visits, gifts that had been sent between 2010 and 2020, school letters confirming that the sponsor is the only parent organising the fees, uniform and books and that is she who contacts the school about the appellant's progress; and doctors' letters confirming that she is registered as the appellant's mother and guardian, as well as proof of contact including telephone calls, web chat and photographs produced in the appellant's bundle on pages 252 - 343.
18. Whilst the Judge accepts that extensive evidence was produced regarding her involvement in the appellant's life, he failed to give any adequate reasons for finding that responsibility is shared with the appellant's father.
19. Ms Allan also contended that paragraph [15] of the decision has conflated two separate issues, namely the sole responsibility with the serious and compelling family or other considerations making the exclusion of the appellant undesirable.
20. In summary, Ms Allen submitted that the Judge did not consider all the evidence so that it is difficult to understand why, especially with regard to [16], why the extensive evidence which was produced was insufficient and why it failed under paragraph 297 (i) (e) of the rules.

21. Although the appellant was 17 ½ years old at the date of the decision, the two people looking after her were elderly. She resided with her god-aunt, who was 69 years old at the date of the hearing. Her god-grandmother was 93 years old. A medical letter was produced dated 23 April 2020 confirming the god-aunt is not in good health as she suffers from hepatitis and acute gastritis.
22. Moreover her father is a drug addict as confirmed by the document from the detoxification centre, produced at page 121.
23. Moreover, inadequate account was taken of the factors identified under Article 8 outside the Rules.
24. The Judge wrongly assessed the appellant's living circumstances as at the date of decision rather than the date of hearing contrary to section 85 (4) of the 2002 Acts. That affected his consideration of exceptional circumstances. He concluded that she would not face any difficulties making a future application for entry clearance. Although the appellant was 17 years at the date of decision, she was already 18 years at the date of hearing and would not be able to apply again under paragraph 297 as she is now over age.
25. On behalf of the respondent, Mr Whitwell referred to the respondent's Rule 24 response.
26. He submitted that the Judge did engage with the case that the sponsor was solely responsible for the appellant at [14-16]. He submitted that the Judge has provided reasons, taking into account the previous decisions and assessing the evidence as a whole. He concluded that the assertion that her father abandoned the appellant as a child was a fiction.
27. He submitted that although the decision and reasons are brief, no material errors have been made out.
28. Notwithstanding evidence of the father having drug treatment, the Judge was not satisfied that he had abandoned his parental responsibility for the appellant.
29. With regard to whether there are serious and compelling circumstances, there is open to the Judge to conclude that the appellant was living in a stable condition, albeit that it was not preferred, notwithstanding the health issues of her carer, or their own responsibilities. She did not meet the threshold for serious and compelling circumstances.

Assessment

30. We find that the Judge has failed to provide adequate reasons as to why, applying the Deevaseelan principles, there was no reason to depart from previous findings. He noted at [16] that extensive evidence was submitted of the sponsor's involvement in the appellant's life. He went on to state that he wasn't satisfied that there was sufficient evidence to conclude that the earlier decisions were incorrect or all that there had been a sufficient change whereby the sponsor now had sole responsibility.

31. This was the wrong question in the circumstances. The conclusion at [16] amounts to a statement to that effect as noted by Upper Tribunal Judge Pickup, but the basis for that finding is not reasoned. The appellant accordingly is unable to understand why she failed on the appeal.
32. Moreover the issue was not whether the appellant's father had lost his parental rights for the appellant as stated by the Judge at [15] but whether or not there was sufficient evidence that he had joint responsibility with the appellant's mother for the appellant's welfare. The issue was not whether her father was incapable of taking care of her. The issue is whether or not there was evidence that he did participate in and was involved in her life and shared responsibility for important decisions made on her behalf. He has accordingly conflated the issue of sole responsibility with the issue of his ability to take care of the appellant.
33. We also find that there has been inadequate reasoning concluding that there are no serious and compelling family or other considerations which make exclusion of the appellant undesirable. He has again failed to take into account relevant factors including her father's drug addiction, the fact that her god-aunt is no longer able to take care of her and that her own health is poor and that she has a family of her own to look after including her elderly and frail mother aged 93. As noted, no consideration was given to the letter from her doctor or the supporting letter from the god-aunt herself.
34. We accordingly set aside the decision of Judge Hussein to dismiss the appellant's appeal under paragraph 297 (i)(e) and (f). None of the findings are preserved.
35. The sponsor and the appellant may wish to give updating evidence which may well be needed to be tested in cross examination before any conclusions can be drawn on the issues.
36. We accordingly direct that a continuance hearing be held in the Upper Tribunal in respect of the claims under paragraph 297 (i)(e) and/or (f) of the rules and under Article 8 of the Human Rights Convention.

Notice of Decision

The First-tier Tribunal Judge made a material error of law and his decision dismissing the appeal is set aside.

A continuance hearing will be held in the Upper Tribunal of the appellant's claim under paragraph 297 of the Rules and under Article 8 of the Human Rights Convention.

No anonymity direction is made.

Signed

Date

Deputy Upper-tier Tribunal Judge Mailer

