IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003644

First-tier Tribunal No: HU/55620/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 3 October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MS DVN
(ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Ms I Mahmud, Counsel instructed by Turpin Miller LLP
For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

Heard at Field House on 6 September 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) 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 (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Background

1. The appellant, a citizen of Zimbabwe who was 7 years old at the date of the hearing of the First-tier Tribunal, Judge Row ('the judge) on 16 May 2022, appeals to the Upper Tribunal against the decision of the First-tier Tribunal to dismiss the

appellant's appeal. The appellant had appealed against the refusal of the respondent to grant her entry clearance, that decision dated 30 August 2021, following an application on 26 May 2021 as the daughter of Miss DN, the sponsor, under paragraph 297 of the Immigration Rules.

Grounds of Appeal

2. The appellant appealed to the Upper Tribunal with permission of the First-tier Tribunal on the following grounds in summary:

(1) It was argued that the judge erred in failing to consider the totality of the evidence and in assessing the sponsor's role in light of the test in **TD (Paragraph 297 (i): "sole responsibility") Yemen) [20069] UKAIT 0004**.

(2) It was argued the judge erred in not considering all of the evidence including the witness statement, WhatsApp messages, call records and photographs.

(3) It was further argued that the judge erred in concluding that the important decisions would be made by the sponsor's aunt and the judge's findings at [26] were criticised and it was noted that there was no evidence that the sponsor's aunt has any custody or takes the major decisions with the school letter stated the sponsor is in regular contact with them.

(4) It was further argued that the judge erred in casting doubt on the authenticity of the doctor's letter in the absence of evidence to the contrary, at [19] of the determination and erred in failing to consider that the sponsor came to the UK as the dependent child of her mother and did not at that stage meet the requirements to bring the appellant to the UK until she was granted indefinite leave to remain and that there was no provision in the Immigration Rules for a grandchild to accompany and/or join grandparents in the UK.

(5) It was additionally argued that the First-tier Tribunal erred in not giving the reasons why the judge was not satisfied that the sponsor's evidence in relation to the appellant's father's involvement in her life was not accepted when there was no adverse credibility findings against the sponsor, [24].

(6) It was argued that there was an error in the best interests consideration including that the aunt had provided a letter and the school letter had detailed the negative impact on the appellant and the well-established principle of the best interests of a child is to remain with one of its parents.

(7) It was finally argued that the conclusion on proportionality and public interest test was wrong at [39] to [44] of the decision.

3. The appeal came before me and I heard oral submissions on behalf of both parties.

Discussion

4. Although it was argued that the judge failed to take into consideration and make findings on all of the evidence, it is trite law that the judge does not need to set out every piece of evidence considered and that the mere fact a piece of

evidence has not been specifically mentioned does not mean it has been overlooked.

5. I have reminded myself of the authorities which set out the distinction between errors of fact and errors of law and which emphasise the importance of an appellate tribunal exercising judicial restraint when reviewing findings of fact reached by first instance judges. This was summarised by Lewison LJ in **Volpi & Anor v Volpi [2022] EWCA Civ 464** at [2] as follows:

> "i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
> ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

6. The judge in her holistic determination considered all of the evidence before her and was not disputing that the appellant had contact with her daughter. However, the judge was entitled to make the findings she did, including at paragraph [20] that the evidence before her did not establish that the appellant "has now or ever had sole responsibility for the child".

7. The judge was taking into account the particular circumstances of this case, including that when the appellant was born the sponsor was only 15 years old and in the judge's findings at [20] which has not been specifically challenged, the judge found that the decision had been made by the sponsor's parents that the child should live with her mother's sister where she has lived ever since and in the judge's findings the sister, CW "appears to have made a competent job of her care".

8. The judge went on to find at [21], that when the sponsor came to the UK the decision was made by the sponsor's parents, that the appellant would not accompany her and the appellant stayed in the custody of CW. Whilst the grounds of appeal expand on the reasons for that decision, the judge was aware of those reasons but was entitled to take into consideration the decisions made, including that the sponsor came to the UK leaving the appellant with CW.

9. The judge was also entitled to take into account, at paragraph [22] that the statement from CW at page 25 of the appellant's bundle (and I accept the judge's page references are different, but nothing turns on this), which whilst it specifically recorded that the appellant misses her mother (which the judge notes at [22] contrary to the grounds of appeal which argued that the judge had not taken this into consideration) the judge found it significant that CW did **not** say that the sponsor made all the decisions in the child's life. Rather, the judge noted that CW said that she had custody of the child. Although the grounds argue that there was no evidence from any authority that the sponsor's aunt has custody of the appellant, it was the sponsor herself who confirmed that she had custody and it was open to the judge to accept that evidence.

10. It would appear that such would have been the only conclusion open to the judge, including given that the letter from CW references the appellant's claimed difficulties when the appellant makes contact with her mother but makes no reference to the sponsor making any of the decisions in the appellant's life, or any of the factors that might be relevant as set out in **TD (Yemen).** I note that the letter from CW also references CW's concern that the appellant's performance in school is deteriorating due to her tiredness from having sleepless nights after contact with her mother, further underlining CW's role of control and direction over the child's upbringing.

11. I have taken into account including what was said in **HA (Iraq) v SSHD [2022] UKSC 22** including at paragraph 72 that judicial restraint is required and that when it comes to reasons given by the Tribunal a court should not assume that the Tribunal had misdirected itself. There is no indication in a well-structured decision, that the judge has not considered all of the evidence in the round and as observed in **Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC)**:

> "It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and it is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost."

12. That is what the judge in this case did. Whilst paragraph 7 of the grounds argued that the judge "failed to consider" that her mother's maternal aunt is looking after her physical day-to-day care and that the sponsor retained the ultimate responsibility, that is merely a disagreement with the judge's findings, which were that the evidence demonstrated the opposite, that the sponsor did not have ultimate responsibility and CW, her mother's maternal aunt had continuing control and direction over the child's upbringing.

13. The grounds also take issue with the judge's findings, in relation to the doctor's letter, at paragraph [19] of the decision. The judge at [19] was not specifically disputing the authenticity of the letter from the child's doctor, rather the judge considered the letter and decided to attach little weight on it including that it was difficult to see, on the evidence before the First-tier Tribunal, why a doctor should need to contact the 17 year minor in another country rather than the person who had actual custody and guardianship of the child was in Zimbabwe and an adult capable of giving consent for removing a boil. Those findings were entirely open to the judge.

14. The judge also reached findings open to her, at [26] including that whilst the letter from the appellant's school records that the appellant's mother contacts the school it refers to the child as living with her guardian, and such findings are supported by the fact that the letter references the sponsor as trying 'in her best ability' to know about her daughter's progress, whereas it is clear from the letter that CW, whom the appellant lives with, is considered by the school as her guardian, albeit that the school references her as the 'temporary guardian'.

15. Whilst the grounds criticise the judge for allegedly not considering evidence to the appellant's advantage, including the witness statement of the sponsor's mother, WhatsApp messages, call records and photographs, it has not been established that the judge did not consider all the evidence in the round, and as indicated above, it is generally unnecessary and unhelpful for judges to rehearse every detail or issue raised. The judge, including at [20] found that 'the evidence before me does not indicate' sole responsibility and the judge at [8] had set out where and how she had accessed the appellant's evidence and what it consisted of. Weight is a matter for the judge, and whilst she also had evidence before her demonstrating contact between the appellant and her mother (with references to schools/exams in that contact) and would have had that in mind in reaching her findings, she was also entitled to take into account all of the evidence including that the sponsor had left the appellant in Zimbabwe when the appellant was four months old (and the sponsor was 16) and has only been back once for a visit.

16. Whilst the grounds at paragraph [10] argued that the judge failed to consider the reasons why it was said that no application was made for the appellant including that there was no category for the appellant to enter to the UK and that the sponsor did not meet the requirements to bring the appellant to the UK until she was granted indefinite leave to remain, again it has not been established that this was not part of the judge's holistic consideration. Equally, there was no evidence to suggest and such was not argued in the grounds of appeal, that the appellant had, for example, ever made an application for entry clearance on Article 8 grounds outside of the Immigration Rules.

17. Whilst it was argued that no adverse credibility findings were made specifically in relation to the sponsor's credibility, that does not mean that the judge has to accept that the appellant has proved all of the aspects of her case on the balance of probabilities, including with respect to the involvement or otherwise of the appellant's father in her life.

18. As the judge referenced in her decision, the respondent Entry Clearance Officer noted that no evidence had been provided in relation to the appellant's father and their whereabouts. The respondent specifically accepted and acknowledged that the father had not been named on the birth certificate but noted that no evidence had been provided of any attempts made to locate the father or to show that the sponsor obtained legal responsibility for the appellant and as such the respondent was not satisfied that the father played no role in her life or that the appellant's circumstances were as claimed. The appellant and sponsor were on notice of those concerns. Whilst it may be argued that it is difficult to prove a negative and it was argued that there was no way for the sponsor to prove that he was not involved, the judge was entitled to be concerned, as one factor in the judge's findings, that there was no evidence in relation to the father and the judge noted that the father had not been named by the sponsor (and it was not the sponsor's evidence that she did not know the name of the father). The judge was entitled to reach findings that the appellant had not established that the

sponsor had no means of contacting the appellant's father and did not know where his relatives where.

19. In relation to paragraphs 12 to 14 of the grounds, and the submissions on behalf of the appellant including that **Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 00088(IAC)** reminded that as a starting point the best interests of a child are usually best served by being with both or at least one of their parents, the judge had to consider the specific circumstances of this case including an appellant who had lived away from her mother, who was a child herself when the appellant was born, for almost all of her life, from the age of approximately 4 months. The judge took into account, including at [31] that a 'child would normally accompany its parents' but in careful findings from [31] to [35] the judge provided more than adequate reasons why, in this case, where the appellant has lived in Zimbabwe all her life and will have developed friendships there and where moving to the UK will remove her from CW who has 'effectively been her mother for 7 years', it was in the child's best interests to remain in Zimbabwe with CW. Those adequate reasons were rationally open to the judge.

20. It was also properly open to the judge to take into consideration, as she did as part of the Article 8 proportionality assessment, that the sponsor had the option of returning to Zimbabwe to live with her child. The judge was not stating that the sponsor should be forced to leave the UK as suggested at paragraph 15 of the grounds. Whilst it was argued that there was no specific finding that the sponsor has no means to maintain and accommodate the appellant in the UK without recourse to public funds, the appellant could obtain no benefit from such a finding.

21. The judge conducted an appropriate proportionality assessment under Article 8 including considering the balance sheet approach under **Hesham Ali v SSHD [2016] UKSC 60** and taking into account the factors that she had to have regard to under Section 117B of the Nationality, Immigration and Asylum Act 2002 and that the appellant could speak English and would be financially independent, such being no more than a neutral factor.

22. The decision of the First-tier Tribunal does not contain an error of law and shall stand.

M M Hutchinson

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 September 2023