



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

**Case No: UI-2023-004662**  
**First-tier Tribunal No:**  
**HU/51217/2023**  
**(LH/03179/2023)**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 14 December 2023**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JARVIS**

**Between**

**CRYSTAL RAI**  
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**THE ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellant: Mr A. Badar, Counsel instructed by Direct Access  
For the Respondent: Ms H. Gilmore, Senior Home Office Presenting Officer

**Heard at Field House on 29 November 2023**

**DECISION AND REASONS**

**Introduction**

1. The Appellant appeals against the decision of First-tier Tribunal Judge CAS O'Garro (hereafter "the Judge") who, in a decision promulgated on 20 September 2023, dismissed the Appellant's appeal against the Respondent's decision to refuse the Appellant's application made on 9 September 2022 by way of a decision dated 11 January 2023.
2. Permission to appeal was granted on limited grounds by Judge Austin on 16 October 2023.

**The relevant background**

3. At the time of the application the Appellant was 17 years old; she applied for Indefinite Leave to Enter (“ILE”) under paragraph 297 of the rules on the basis of her claim that her mother, Mrs Pratima Mabo (who in 2018 gained settlement in the United Kingdom as the dependent child of former Gurkha, and hereafter the “Sponsor”) had sole responsibility for her upbringing.
4. In the refusal, the Respondent raised a number of points of challenge which included not accepting that the Appellant’s father was totally absent from her life.

### **The Judge’s decision**

5. In the decision, the Judge noted that the Appellant was born out of wedlock and so because of cultural reasons, was given to her aunt to be looked after until she was 14 years old when she then attended a boarding school, (para. 7).
6. The Judge also noted, at para. 6, that the Appellant’s case was that her aunt was now too old to provide care and that, in any event, the Sponsor had sole responsibility for her on the basis that her father had played no active part in her life at all since she was born.
7. In respect of the refusal points raised by the Respondent, the Judge accepted that the Appellant and Sponsor are related as claimed (para. 23); she also found that the Sponsor had given a plausible explanation for why she had not mentioned the Appellant when she applied for ILE.
8. The Judge therefore focused upon the further issue of whether the Sponsor had *sole responsibility* for the Appellant’s upbringing.
9. Firstly, the Judge accepted that the evidence before her was sufficient to establish on balance that the Sponsor had been sending money to the Appellant for support since she (the Sponsor) came to the United Kingdom, (para. 28).
10. The Judge however concluded that there were material inconsistencies in the documentary evidence supplied to show that the Appellant’s father had abandoned any involvement with the Appellant since she was born. The Judge contrasted the affidavit of Mr Rai (the Appellant’s father) in which he stated that the Appellant had been living with her mother the whole time and that the Sponsor has full custody for her parenting (para. 29), with the Sponsor’s letter to the Respondent in which she stated that the Appellant was cared for by a family friend (Ms Dilmaya Tawa Mabo) from the time the Appellant was born until the age of 14 (para. 30); the Judge also assessed the letter from Ms Dilmaya Tawa Mabo herself which the Judge interpreted as stating that she had been looking after the Appellant since the Sponsor left for the United Kingdom in 2018, (para. 32).

11. Furthermore, the Judge made reference to another letter from Ms Dilmaya Tawa Mabo (8 September 2022) in which she stated that she was only looking after the Appellant temporarily and that this arrangement started in 2022.
12. The Judge ultimately found that the Sponsor was not credible (para. 34) and questioned why the Appellant's father would provide an affidavit consenting to her leaving Nepal if he was not in fact involved in the child's life, (para. 35)
13. The Judge therefore concluded that the Appellant had failed to credibly establish that her mother had sole responsibility for her upbringing and also found that there were no serious and compelling circumstances which would otherwise justify the admission of the Appellant to the UK.
14. The Judge dismissed the appeal under Article 8 ECHR.

### **The error of law hearing**

15. During preliminary discussion, Mr Badar accepted that Mr Dingley (who drafted the grounds and had been present during the First-tier Tribunal hearing) had not sought to appeal Judge Austin's refusal of permission in respect of ground 2 directly to the Upper Tribunal and that therefore he was not pursuing the point.
16. In respect of the arguments before me, I also had sight of the Respondent's r. 24 reply (dated 16 November 2023) and Mr Dingley's skeleton argument for the Upper Tribunal proceedings dated 17 November 2023.
17. In respect of the two available grounds of appeal, the Appellant argued that: ground 1, the Judge materially erred in requiring the Appellant to prove a negative at para. 37 of the decision. In arguing this point at para. 4, the Appellant cited a range of documentary evidence speaking to the Sponsor's sole responsibility which was contained in the evidence before the Judge and relied upon in the hearing.
18. In ground 3, the Appellant contended that there had been procedural unfairness on the basis that the Judge made a number of findings in circumstances where the relevant issue had not been put to the Sponsor during the hearing, and which should have been done in order to ensure a fair hearing.
19. In making this argument in writing, Mr Dingley invited the Upper Tribunal to listen to the recording of the First-tier Tribunal hearing of its own motion and to agree with his description of procedural unfairness.

20. In the r. 24 reply, the Respondent quoted the hearing note written by counsel who represented the Respondent at the First-tier Tribunal hearing in which it is stated that he made the submission that the Appellant's father was playing a role in her upbringing; that the letter from the Appellant was self-serving and that there was no medical evidence to support the assertion that the Appellant's aunt is ill.
21. After helpful discussion with both representatives, to whom I am grateful for their help in this appeal, it was agreed that there was no need for the Tribunal or the parties to listen to the recording of the hearing. Ms Gilmore accepted that there was no indication in counsel's hearing note (as quoted in the r.24) that the Sponsor was cross-examined about the issues raised by Mr Dingley in his ground 3 but she relied on the fact that counsel had made relevant submissions to the Judge.
22. Equally Mr Badar accepted that Mr Dingley had not contested the accuracy of the Respondent's counsel's hearing note of his submissions to the Judge and equally did not provide a witness statement to the Upper Tribunal asserting that he had objected to those points being made in submissions without the relevant questions being asked during cross-examination.
23. I should also record that after the error of law hearing, the administrative staff in the Upper Tribunal indicated that they had obtained the audio recording of the First-tier Tribunal hearing. I should explain that I have not listened to the recording and that I agree with both representatives that it is simply not necessary to do so. I should add however that it was not appropriate for Mr Dingley to invite the Upper Tribunal to listen to the recording of its own motion in the absence of a request for the recording or transcript and in the absence of the parties. The decision of the AAC upon which he relied (MC v SSWP and TM (CSM) [2020] UKUT (AAC)) does not establish any principle in respect of this and is, importantly, a decision from an inquisitorial jurisdiction relating to an unrepresented appellant.
24. As I indicated to Mr Badar during the hearing, the grounds and skeleton argument from Mr Dingley lacked focus and structure. Mr Badar very helpfully assisted the Upper Tribunal by synthesising the rather discursive nature of Mr Dingley's written representations into a clear argument both in respect of grounds 1 and 3.
25. In respect of ground 1, Mr Badar emphasised that it was broken down into two parts which, to some extent, overlapped with ground 2 (for which permission was refused).
26. Mr Badar asserted that the Judge had erred by requiring the Appellant to prove a negative and by overlooking much of the evidence which the Appellant had provided to establish that her mother had sole responsibility. Mr Badar particularly relied upon the letters from the Appellant's schools and her doctor/pharmacy which the Judge had not shown any reference to in her conclusions.

27. Ms Gilmore submitted that the Judge had focused on the right question; that she had directed herself appropriately to TD (Paragraph 297(i)(e): “sole responsibility”) Yemen [2006] UKAIT 00049 and had made sustainable findings.

### **Findings and reasons**

28. Having heard from both representatives, I concluded that the Judge had materially erred on the basis of her failure to show any express engagement with the school and pharmacy evidence which was in the evidence bundle before her.

29. In coming to that conclusion, I reject the Appellant’s initial argument that the Judge required the Appellant to prove a negative and agree with the Respondent that the Judge’s self-direction at para. 37 was simply poorly phrased.

30. I have however concluded that the Judge materially erred in her findings that the Sponsor does not have sole responsibility for the Appellant. I fully accept that the Judge was entitled to look at the documents provided by the Appellant, and also fully entitled to highlight discrepancies in that evidence as part of her assessment.

31. However, the difficulty with the Judge’s approach was that she looked at only part of the documentary evidence and did not take into account other relevant documents which also speak to the issue of sole responsibility: the letter from Annal Jyoti Boarding School (27 March 2023) identifies the Sponsor as the Appellant’s primary carer; the same is said in the Ace Higher Secondary School letter (24 March 2023) and the Shaina Pharmacy letter (24 February 2023).

32. It is true that none of these pieces of evidence can be said to be determinative of the issue of responsibility for the Appellant’s upbringing, but they are clearly materially relevant and were before the Judge. The same can be said of the Appellant’s witness statement dated 4 April 2023.

33. Overall then, I find that the Judge materially erred in failing to take into account materially relevant evidence and therefore failing to decide what weight, if any, should be given to those documents.

### **Notice of Decision**

34. I therefore conclude that this error is material to the outcome and that the decision of the Judge should be set aside.

**Remittal to the First-tier Tribunal**

35. The effect of the material errors is that the decision must be set aside, and the decision remade in its entirety at the First-tier Tribunal.

**DIRECTIONS**

- (1)The substantive appeal is to be heard in the First-tier Tribunal by a judge other than Judge CAS O'Garro.
- (2)The Tribunal is to provide a Nepalese interpreter.
- (3)The appeal also involves a former minor child and should be expedited if possible - I therefore also direct that the remaking appeal is conducted via CVP.
- (4)The remaking appeal is to be listed for 2 hours.

***I P Jarvis***

Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber

8 December 2023

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