Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07230/2018
HU/07231/2018

THE IMMIGRATION ACTS

Heard at Field House at a hybrid hearing	**Decision & Reasons Promulgated**
On Thursday 15 July 2021	**On Friday 13 August 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

(1) MISS BERNICE KUMEAH YIRENKYI
(2) EMMANUEL LARBI YIRENKYI

Appellants

-and-

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Mr L Youssefian, Counsel instructed by Adam Bernard solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. By a decision promulgated on 8 March 2021, I found an error of law in the decision of First-tier Tribunal Judge P S Aujla, itself promulgated on 20 February 2019, dismissing the Appellants' appeals against the Respondent's decisions dated 21 February 2018. By those decisions, the Respondent refused the Appellants entry as the dependents of

their mother, Georgina Asante ("the Sponsor"). My error of law decision is annexed hereto for ease of reference.

2. In my error of law decision, I also gave directions for the filing and service of further evidence on which the Appellants wished to rely and for skeleton arguments to be filed and served. On 14 April 2021, the Appellants filed an appeal bundle consisting of a skeleton argument, the documents before Judge Aujla and additional documents. I refer to documents in that bundle hereafter as [AB/xx].

3. My directions envisaged that the resumed hearing would take place on a face-to-face basis. However, I was informed just before the hearing that the Sponsor had been directed to self-isolate and would not be able to attend in person. It had been intended that she would give oral evidence at the hearing. For that reason, the Tribunal set up a link via Microsoft Teams enabling the Sponsor to attend.

4. As it was, I did not need to hear evidence from the Sponsor as Mr Walker indicated that he did not have any questions for the Sponsor. The Sponsor was asked questions about her current accommodation and earnings by Mr Youssefian. Mr Walker then indicated that he accepted that the Appellants had made out their case on sole responsibility within the Immigration Rules ("the Rules"). He informed me that since the Respondent in these appeals is the Entry Clearance Officer, he was unable to concede the appeals entirely in the sense of agreeing to the grant of entry clearance. Nonetheless, he did not oppose the appeals.

5. I confirmed that, in light of that concession, I would allow the appeals and would provide my decision in writing which I now turn to do.

DISCUSSION AND CONCLUSION

6. I do not need to say much about the factual background to these appeals. I have summarised the facts at [2] and [3] of my error of law decision. The Appellants are now adults but made the applications which led to the decisions under challenge when they were still children. As such, I need to consider those applications within the Rules as at the date of application.

7. Paragraph 297 of the Rules ("Paragraph 297") reads as follows so far as relevant:

> "**Requirements for 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**
> 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:
>
> …

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

(ii) is under the age of 18; and

(iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and

(v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; and

(vi) holds a valid United Kingdom entry clearance for entry in this capacity; and

(vii) does not fall for refusal under the general grounds for refusal."

8. Although I have cited Paragraph 297(i)(f) for completeness, the Appellants rely on Paragraph 297(i)(e). As such the essential question is whether the Sponsor has (or had at the relevant time) sole responsibility for the Appellants. There is no dispute that the Appellants' father plays no part in their lives. The Appellants were left by the Sponsor in the care of her brother, Mr Kwabena Anane. The issue to be determined therefore is whether responsibility at the time of the application was shared between the Sponsor and Mr Anane or whether the Sponsor had sole responsibility.

9. The Tribunal has provided guidance in relation to the assessment of sole responsibility in TD (Paragraph 297(i)(e): 'sole responsibility') Yemen [2006] UKAIT 00049 as follows:

> "'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'".

10. Mr Walker has conceded that the evidence shows that the Sponsor had sole responsibility for the Appellants at the relevant time. For completeness, I record what the evidence shows.

11. The Sponsor left the Appellants in the care of Mr Anane in 2011 when she came to the UK to marry her former husband, Mr Asante. The Sponsor has one child with Mr Asante who is her second husband. That child is British. The Sponsor has indefinite leave to remain ("ILR").

12. The Sponsor's second marriage broke down as she became a victim of domestic violence. Thereafter, her immigration status was precarious and she was reliant on State benefits so that she could not meet the entry clearance requirements. She did not make an application for entry clearance for the Appellants until her situation was sorted. The precariousness of her own situation at the time also prevented her from visiting the Appellants. She was also prevented from so doing because her British child did not have a passport and she was unable to obtain one as the child's father had already applied for and been given one.

13. The sponsor was granted ILR in February 2014. She now works as a healthcare assistant with the NHS. Her oral evidence is that she earns £20,000 plus benefits together totalling £26,552. The applications which led to the decisions under appeal were made in November 2017 at which time both Appellants were still minors.

14. As part of the further evidence submitted on behalf of the Appellants, there is a letter from Mr Anane dated 31 March 2021 ([AB/237] which describes the arrangements made for care of the Appellants as follows:

> "I, Mr Kwabena Anane wish to inform you that Georgina Asante is my younger sister. Before her departure to the United Kingdom we decided that her two kids Bernice Kumeah Yirenki and Emmanuel Larbi Yirenki should stay with me at my residence in Asare Botwe in the Adenta Municipal Assembly.
> Since 2011, I have been taking the day-to-day care of the kids such as,
> - Provide three meals a day for them
> - Ensure that they attend church services
> - Ensure they attend extra classes when they are on vacation holidays
> - Decide with the mother to choose a school for them
> - Do celebrate their birth days and,
> - Ensure they do not associate themselves with bad friends.
>
> However, their mother (Georgina Asante) is the sole sponsor for such purposes, that require money.
> Attached are samples of receipts of money sent to me."

15. That evidence tends to suggest that Mr Anane was responsible for some of the decision making in relation to the Appellants, such as choice of schools. It will be recalled that the evidence about this was in some doubt at the time of the First-tier Tribunal hearing and was considered in my error of law decision.

16. Sole responsibility is not just about providing finance. It is about responsibility for decisions taken about children. The letter from Mr Anane might suggest that such responsibility was shared between him and the Sponsor.

17. I have however had regard to what is said in the witness statement of the Appellants about their mother's involvement in their lives as follows (taken from the First Appellant's statement at [AB/1(I)]):

> "..16. Appellant's mother keep sending them money for all their maintenance and expenses and remain in contact to look after them, but the appellants are insisting to be with their mother and are not ready to live without her anymore.
> 17. The appellant's guardian is worried and has no other alternative relative in Ghana to shift guardianship responsibility except mother.
> 18. Appellant's mother has always spent time on inquiring about friends and the associations we are living with, and also spend time inquiring about education from the teachers and the church if we are attending regularly. She mostly have to approach our doctor to find out about health issues if any. She has to spend most of her energy on our attention.
> 19. The appellant request that the honourable judge to consider that, the mother have to concentrate on our daily activities and have to make decisions where their guardian is not able to do so. We need our mother's patronage at every steps of our life.
> 20. The appellant's mother has to keep an eye on our clothings, food, daily routine, sleep which is one a loveable action by her and we always await to see her affection in such a way she performs in our life and this effect would be more better once we are united."

The Second Appellant's statement is in identical terms.

18. Whilst the drafting of those statements leaves something to be desired in terms of professionalism and clarity, read with the letter from Mr Anane it appears that the Sponsor has had responsibility for decision making in relation to the Appellants' upbringing but Mr Anane has had day-to-day care for them and has made decisions in that regard. Mr Anane's responsibility for the Appellants' day-to-day care however does not mean that the Sponsor has abdicated any of her responsibility for the Appellants' upbringing. The issue is whether she has "continuing control and direction over [the Appellants'] upbringing, including making all the important decisions in [their lives]".

19. Based on the foregoing evidence and also on the other evidence showing regular communication between the Appellants and Sponsor and maintenance payments, and accepting Mr Walker's concession, I find that the Sponsor has (or had at the relevant time) sole responsibility for the Appellants.

20. That is not of course the end of the matter as the only ground of appeal on which I can allow the appeals is that the Respondent's decisions breach the Appellants' human rights. I turn therefore to consider that issue.

21. I accept that the Appellants remain financially and emotionally dependent on the Sponsor. There is ample evidence that she meets their financial needs and messages showing regular contact. Notwithstanding the lack of face-to-face contact for a period of ten years (for the reasons I have set out above), and that the Appellants are now both adults, I am prepared to accept that the Appellants enjoy family life with the Sponsor and vice versa.

22. I also accept based on the statements of the Appellants and the Sponsor that they wish to continue that family life in person in the UK. Although that might be thought to go

without saying, I am aware that, in the years between the applications for entry clearance and the hearing of these appeals, the Appellants have embarked on studies in their home country. For example, the letter at [AB/316] shows that the First Appellant is enrolled in a degree programme which is not due to be completed until June 2023. There will for that reason be some interference with the Appellants' private lives occasioned by their move to the UK. They also have no familiarity with the UK never having visited this country.

23. Nonetheless, I accept that the interference with the Appellants' family lives if they are prevented from entering the UK is more significant. They have had no parental affection from their father throughout their lives. It appears from their statements that they crave the affection of their mother and the opportunity to experience that affection at first hand rather than remotely. Equally, as they say, the Sponsor has experienced hardship since coming to the UK, particularly having suffered domestic violence at the hands of her second husband. She too will benefit from having her family in the UK with her.

24. Against that interference, I have to balance the public interest. I have regard to the factors in Section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B") so far as relevant. The Appellants meet the Rules in the category in which they applied to enter. There is therefore no public interest in refusal of entry based on the maintenance of effective immigration control (Section 117B(1)). They have applied from outside the UK in accordance with the Rules and meet the Rules.

25. It appears from the Appellants' statements and communications with their mother that they are fluent in English. They therefore satisfy Section 117B(2).

26. Mr Walker did not take any issue with the Sponsor's ability to maintain and accommodate the Appellants without recourse to public funds. Although that is a point raised in the Respondent's decisions under appeal based on lack of evidence, Mr Walker did not seek to challenge the evidence in this regard nor to suggest that the accommodation and earnings evidence was insufficient to show that the requirements are met.

27. The evidence in this regard appears at [AB/40-197] and although that is somewhat dated, it shows that the Sponsor remains renting under a secure tenancy a flat which can accommodate five persons. At present, she lives there alone with her minor daughter. It also shows that she earns broadly the amount she claims to earn and is in receipt of child benefits for her daughter. Her bank statements show reasonably healthy balances and, as I have already pointed out, the Sponsor has been paying for the maintenance of the Appellants in Ghana so will be able to divert funds for their maintenance in the UK. I am therefore satisfied that Section 117B(3) is met. In any event, the Appellants will not be entitled to have recourse to public funds under the Rules.

28. The remaining sub-sections of Section 117B have no bearing in these appeals.

29. Balancing the interference with, in particular, the Appellants' and Sponsor's family lives against the public interest, taking into account in particular the finding (and concession) that the Appellants meet the Rules for entry as the Sponsor's dependents, and having regard to Section 117B, I am satisfied that the decisions to refuse the Appellants entry clearance amount to a disproportionate interference with their Article 8 rights.

30. For those reasons, I allow the Appellants' appeals.

DECISION

The Respondent's decisions under appeal to refuse the Appellants entry clearance amount to a disproportionate interference with the Appellants' Article 8 rights and are therefore in breach of section 6 Human Rights Act 1998. The appeals are allowed on human rights grounds.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 26 July 2021

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07230/2018 (V)
HU/07231/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business
On Thursday 25 February 2021

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE SMITH

Between

(3) MISS BERNICE KUMEAH YIRENKYI
(4) EMMANUEL LARBI YIRENKYI

Appellants

-and-

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Mr L Youssefian, Counsel instructed by Adam Bernard solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellants appeal against the decision of First-tier Tribunal Judge P S Aujla promulgated on 20 February 2019 ("the Decision"). By the Decision, the Judge dismissed the Appellants' appeals against the Respondent's decisions dated 21

February 2018 (maintained on 21 November 2018) refusing them entry as the children of their mother, Georgina Asante ("the Sponsor"), who is settled in the UK.

2. The Appellants are nationals of Ghana. They are now aged respectively twenty-one years and nineteen years. The applications for entry clearance were made in November 2017 when they were respectively just under eighteen and sixteen years. The Sponsor, also a national of Ghana, came to the UK in 2011 to join her husband and gave birth in 2012 to a child who is a British citizen. The Sponsor was granted indefinite leave to remain ("ILR") in February 2014.

3. When the Sponsor left Ghana, the Appellants were left in the care of the Sponsor's brother ("the Guardian"). The Sponsor sent money to the Guardian for the Appellants' upkeep. She has not visited them in Ghana since she left.

4. The Respondent refused the applications on the basis that she was not satisfied that the Sponsor had sole responsibility for the Appellants and that there were no serious and compelling family or other considerations which made their exclusion undesirable. The Respondent therefore concluded that the Appellants could not meet paragraph 297 of the Immigration Rules ("the Rules").

5. The Judge did not accept as credible some of the Sponsor's evidence. He too concluded that, whilst the Sponsor might have been financially responsible for the Appellants, it was the Guardian who was responsible for their upbringing. He concluded at [30] of the Decision that, "[a]t best, it was a case of responsibility for the Appellants' upbringing shared between the sponsor and her brother". He also found that "there was no credible evidence before [him] that could remotely suggest that there were serious and compelling family or other considerations which made the Appellant [sic] exclusion from the United Kingdom undesirable" ([31]). The Judge found that Article 8 ECHR was not engaged and therefore dismissed the human rights grounds ([32] and [33]).

6. The Appellants appeal on three grounds as follows:

(1) The Judge has materially misdirected himself as to the facts or has failed to take into account material facts. The Appellants rely in this regard on Counsel's note of the proceedings and the evidence there recorded.
(2) The Judge has adopted a wrong approach to the issue of sole responsibility.
(3) The delay in promulgation of the Decision renders it unsafe.

7. Permission to appeal was refused by First-tier Tribunal Judge Davidge on 12 June 2020. Following detailed reasoning, she concluded as follows:

> "..4. I find that there is no arguable merit in the grounds. The matters raised in the grounds are an argument for a different interpretation of the assertive evidence which was presented. None of the evidence was determinative of the issues. The judge's conclusions were open on the evidence. The evidence about the schooling has been isolated in these grounds, but reading the decision and the grounds it is clear that the

> judge was entitled to find that the brother was involved in the decision making process, and the brother's formal status as guardian carried weight. The evidence of the sponsor taking responsibility for the children since she left was limited. The judge has done sufficient to explain to the Appellants why their appeals did not succeed."

8. On renewal of the application to this Tribunal, permission was granted by Upper Tribunal Judge Coker on 7 August 2020 in the following terms:

> "It is arguable, for the reasons set out in the grounds relied upon, that the FtT judge erred in law in failing to provide adequate reasons for adverse findings made, making significant errors of fact and failing to properly consider the issue of sole responsibility."

9. Judge Coker gave directions permitting the parties to make further submissions in writing. The Respondent filed a Rule 24 reply on 1 October 2020, seeking to uphold the Decision on the basis that Judge Aujla had properly directed himself and that the grounds were mere disagreements with the findings which were open to the Judge on the evidence.

10. So it is that the matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. The hearing was listed to be heard remotely. Neither party objected to that course. The hearing was attended by representatives for both parties. There were no technical issues affecting the course of the hearing.

11. At the outset of the hearing, Mr Walker indicated that he was content that there was an error of law in the Decision. In the course of discussions with both representatives, I accepted that there was an error of law identified by ground one. It was agreed that the Decision would need to be set aside.

12. The representatives accepted, following discussions, that the appeal could remain for redetermination in this Tribunal. It is not necessary to remit it. There are few issues of credibility and the appeal turns mainly on an assessment of the documentary evidence and oral evidence of the Sponsor. Although Mr Youssefian initially indicated that it might be possible to re-make the decision based on the documentary evidence and the oral evidence of the Sponsor recorded in the Decision, I did not consider that to be a viable proposition since ground one raised by the Appellants took issue with the accuracy of some of what is recorded as being the Sponsor's evidence. Moreover, the First-tier Tribunal hearing took place over two years ago (as to which see below). Although updating evidence might not be necessary in relation to the issue under the Rules as a Judge has to consider whether the Sponsor had sole responsibility for the Appellants at the time when the application was made, such evidence might be relevant to the Article 8 ECHR issue which is of course the only actual ground of appeal.

13. I therefore gave directions for further evidence and skeleton arguments orally and indicated that I would provide my reasons in writing for finding an error of law in the Decision which I now turn to do.

DISCUSSION AND CONCLUSIONS

GROUND THREE

14. I can deal very shortly with ground three. Although I accept as indicated in the grounds that the Decision reached the Appellants only in March 2020, that was a re-promulgation, it appears as a result of it being accepted that it was not received on the first occasion it was sent. The Decision on file shows that it was signed by the Judge on 7 February 2019 (the day after the hearing) and promulgated for the first time on 20 February 2019 (about two weeks after the hearing). There was therefore no delay in the writing of the Decision, and it cannot be said that the delay in the Appellants receiving the Decision has rendered it unsafe (see SS (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 1391).

GROUNDS ONE AND TWO

15. The focus of grounds one and two is the evidence recorded at [23] to [29] of the Decision and the Judge's findings and conclusion in that regard. That passage of the Decision reads as follows:

> "23. The sponsor came to the United Kingdom on 10 December 2011 when the Appellants were 11 years 10 months and 10 years old respectively. She came to United Kingdom to live with her husband. There was no evidence before me why the children's father was not involved in their upbringing if that was the case and no information about him whatsoever. Regardless of that, there was no evidence before me to show why the sponsor and her then husband did not make efforts to bring the Appellants to the United Kingdom, before her marriage fell apart, especially as the Appellant claimed that her ex-husband was also sending remittances for their maintenance.
> 24. The sponsor was granted indefinite leave to remain on 12 February 2014. The Appellants still did not apply for entry clearance to come to the United Kingdom until November 2017 when they were 17 years 9 months and 15 years 10 months old respectively. By then they had become near adults before the sponsor decided to sponsor them. Even if she was in receipt of benefits between 2012 and 2016, she had found employment in November 2016. She still did not apply for the children to come to the UK until November 2017. Whilst I accept that she had built up some employment record before she sponsored them, her failure to bring the children to the United Kingdom before her marriage fell apart and the delay in making the application after she found employment counted against her claim that she had sole responsibility for the children's upbringing.
> 25. Furthermore, and most importantly, the sponsor was granted indefinite leave to remain in the United Kingdom on 12 February 2014. She had been absent from the Appellants' lives since 10 December 2011 while they were going through their formative years and needed most support and input from the sponsor as their mother

who was, on her evidence, the only parent responsible for then. The Appellant made no efforts whatsoever to pay a visit to Ghana to see the children. I do not believe for a moment that, even if her account was believed, she would not have visited them, even once if she had sole responsibility for their upbringing. Even if her brother was doing a good job in bringing them up I would have expected her to have had contact with the children at a level much higher than she had claimed, even visiting them at least once if not more often, as evidence of her concern about their well-being and in exercise of her sole responsibility. She had been absent from the children's life for six years before they made the application. There was no credible evidence before me of concerned and regular contact by the sponsor with the Appellants.

26. I carefully observed the sponsor giving evidence. It was clear to me from her demeanour that she was making up the answers as she went along. She talked about the children's ambition of studying medicine and law after their arrival and yet she was not able to put any evidence before me as to their current level of education standards and how they had become so familiar with the university system in the United Kingdom. She was even sure that her son would go to South Bank University to study law. It was clear to me that she was simply making up the evidence.

27. The sponsor stated that she was financially supporting the children from the time that she had come to the UK. She stated that she was sending £500 a month. When it came to light that she was on benefits for 4 years between 2012 and 2016, I asked her to explain how she was able to send £500 a month during that period. I intervened because there was an obvious discrepancy in her evidence and I wished to give her the opportunity of providing an explanation if she had one. It was at that point of time that Mr Youssefian accused me of descending into the arena and I explained to him my reasons for the intervention. The sponsor then changed her evidence and stated that she was sending about £300 a month.

28. The sponsor stated that she chose the school for the Appellants. She chose the particular school because she had attended that school herself. She then made the most startling admission, that when she chose the school, if her brother did not agree they would look for a different school. That admission clearly ran counter to her assertion that she had sole responsibility for the children's upbringing. If the sponsor's brother had a say in choosing the school, the sponsor could not be solely responsible for choosing the Appellants' school.

29. Whilst I accept that the person did not have to be present at the scene to exercise sole responsibility for their children, each and every case had to be looked at in view of its own particular circumstances. The sponsor had almost abandoned her two children when they were very young and going through formative years. She came to the United Kingdom. She had been absent from their lives for six years when the application was made and seven years by now. She was aware from the decision that the Respondent did not accept that she had sole responsibility. The decision was made on 21 February 2018, nearly a year ago. Although the sponsor had been working since November 2016, she made no effort to visit the children, even after the Respondent's decision was made, as part of her exercise of sole responsibility. She had indefinite leave to remain in the United Kingdom since 12 February 2014. She had been in employment since November 2016. She had not taken the trouble of paying even a single visit to Ghana to see the children. If she was a concerned mother who was very much interested in their proper upbringing, it would be reasonable to expect her to visit Ghana to see the children, at least once. She has waited until the children had become near adults which, as submitted by Mr Harvey, ran counter to her claim that she had sole responsibility for their upbringing."

16. Based on the conclusions drawn from the evidence at [29] of the Decision, the Judge went on at [30] of the Decision to conclude that the Guardian had sole responsibility or, at best, that the Sponsor's responsibility was shared with the Guardian.

17. Mr Youssefian was also the Appellants' representative in the First-tier Tribunal. He produced his record of the proceedings, redacted for legal privilege. He did not however provide a witness statement in support of that record nor did he ask to give evidence in that regard. Of course, had he done so, the Appellants would have had to seek the assistance of another barrister to represent them as he could not both give evidence and act as advocate.

18. Notwithstanding the failure properly to give evidence as to what occurred, I am satisfied that Mr Youssefian's record of proceedings is reasonably accurate since it largely accords with the Judge's own record which is on the file.

19. There is one discrepancy in relation to the point about choice of schools. Mr Youssefian's record indicates that, when asked what would have happened if the Guardian disagreed with the Sponsor's choice, she replied that he had agreed with her whereas the Judge's note is as recorded in the Decision that she said that, if he disagreed, they would have looked for another school. I am unable to decide on the evidence which of those two alternatives is the correct one. The Appellants have failed however to show that Mr Youssefian's record is the accurate one.

20. Fortunately, I do not need to need to resolve that dispute. I accept the criticism made of the Judge's comment about the Sponsor's evidence regarding the Appellants' future in the UK. Both records of proceedings show that her evidence was based on a conversation she had with the Appellants regarding their intentions and where they would wish to study. Those intentions were formulated by the Appellants themselves who are of course now adults based on their own online research. Neither record of the evidence indicates that she was making her answers up as she went along.

21. Further, the reason why Mr Walker conceded on this ground is due to what is said about the lack of visits by the Sponsor to see the Appellants in Ghana and the delay in making the entry clearance applications. These issues are a major focus of the Judge's reasoning albeit I would accept those are not the only factors on which his conclusions are based.

22. As indicated at [7] of the grounds, the Sponsor gave two reasons for the delay in making the application. She made the applications one year after starting work. As she points out, that is not an inordinately long period. Moreover, she points out that she had to pay for two applications not just one. She therefore said that she needed to save to pay the fees. The second reason was that her marriage in the UK

broke down due to domestic violence. She said that she could not bring her children to the UK whilst that issue was unresolved.

23. Paragraph [8] of the grounds sets out the three reasons why the Sponsor had not visited the Appellants in Ghana. First, her domestic violence case was ongoing from her separation in 2013 until 2015. Second, thereafter, she needed to get her life in order before going to see the children. Third, having obtained employment in November 2016, she was unable to visit.

24. Whether all of those are or are not cogent reasons for failing to make the applications sooner or not visiting the Appellants before the applications were made or since is not something I have to decide at this stage. The fact is that the Judge has failed to have regard to the domestic violence background to the breakdown of the Sponsor's marriage; in the findings, he records only that the marriage had fallen apart. There is one brief reference to the Sponsor's evidence in that regard at [18] of the Decision and to a submission that the Sponsor could not bring the Appellants to the UK sooner for that reason, but it is not taken into account in the Judge's reasoning on the evidence. The domestic violence history is recorded in a Metropolitan Police letter dated 10 April 2014 at [AB/37-39].

25. It was the Judge's failure to have regard to the evidence about the domestic violence endured by the Sponsor which gave rise to Mr Walker's concession that an error was identified in the Decision on ground one. I accept that the concession was rightly made.

26. That concession having been made and accepted, I do not strictly need to go on to consider ground two. I do so for the sake of completeness. The Judge had regard to the Sponsor's evidence that she had prevented the Appellants going on a school trip and had chosen their school for religious and personal reasons ([17] of the Decision). Although the Judge did not refer to the evidence about the school trip at [28] of the Decision, he did refer to the evidence about choice of school which was the most important but, as indicated above, based on his record of the Sponsor's evidence found it most striking that the Sponsor said that she would have looked at an alternative school if the Guardian disagreed. Based on the evidence the Judge recorded and the lack of sufficient evidence that the Sponsor gave a different answer to that recorded by the Judge, I would not have found any error in that regard.

27. Nor would I have found any error in the Judge's analysis of the Sponsor's financial responsibility for the Appellants given his reasoning on this aspect at [27] of the Decision. There is therefore no failure to follow the guidance given in TD (Paragraph 297(i)(e): "sole responsibility" Yemen [2006] UKAIT 00049 ("TD").

28. Neither do I accept the interpretation which the Appellants seek to place on the guidance given in TD at [15] of the grounds. The guidance reads as follows:

> "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'".

29. As that guidance makes clear, there is no presumptive starting point when only one parent is involved in a child's upbringing. Where another person who is not the other parent is or may be involved in that child's upbringing in the child's home country, the issue of sole responsibility falls to be resolved on all the facts as between the parent who is not physically present in the home country and that other person based on the evidence of "control and direction" over the child's upbringing. That is the exercise which the Judge conducted. I would have upheld the Judge's findings and conclusion based on that guidance had it not been for the failures to have regard to relevant evidence as identified above.

30. For the reasons I have given above, however, I am satisfied that an error of law in the Decision is disclosed by the Appellant's ground one (as conceded by the Respondent). For that reason, I set aside the Decision. As already indicated, I have given directions for the re-making of the decision by this Tribunal. Those are set out below.

CONCLUSION

31. For the foregoing reasons, I am satisfied that ground one discloses an error of law in the Decision. I therefore set aside the Decision and give directions below for the re-making of the Decision.

DECISION AND DIRECTIONS

The Decision of First-tier Tribunal Judge P S Aujla promulgated on 20 February 2019 (and re-promulgated on 11 March 2020) involves the making of an error on a point of law. I therefore set aside the Decision and give directions for the re-making of the decision in this Tribunal as follows:

(1) Within 28 days from the date when this decision is sent, the Appellants shall file with the Tribunal and serve on the Respondent any further evidence on which they seek to rely.

(2) Within 14 days from the filing and service of any evidence in [1] above, the Appellants shall file with the Tribunal and serve on the Respondent a skeleton argument setting out the issues for the Tribunal to determine and any case-law relied upon.

(3) Within 14 days from the filing and service of the Appellants' skeleton argument at [2] above, the Respondent shall file with the Tribunal and serve on the Appellants her written submissions in response.

(4) The appeal will be listed for re-hearing on a face-to-face basis on the first available date after two months from the sending of this decision (time estimate ½ day). No interpreter is required. In the event that the Appellants wish to proceed via a remote hearing rather than a face-to-face hearing, they must inform the Tribunal and the Respondent accordingly within 14 days from the date when this decision is sent.

(5) Documents or submissions filed in response to these directions may be sent by, or attached to, an email to [email] **using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents which should continue to be sent by post.**

(6) Service on the Secretary of State may be to [email] **and on the Appellant, in the absence of any contrary instruction, by use of any address apparent from the service of these directions.**

(7) The parties have liberty to apply to the Tribunal for further directions or variation of the above directions, giving reasons if they face significant difficulties in complying.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 5 March 2021