Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19942/2019 (V)

THE IMMIGRATION ACTS

Heard at a remote hearing	**Decision & Reasons Promulgated**
On the 3 November 2021 and on 16 February 2022	**On 23 February 2022**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

H B
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms K. Wass, Counsel on behalf of the appellant.
For the Respondent: Mr C. Bates, Senior Presenting Officer (for hearing on 3/11/21) and Ms Z. Young, Senior Presenting Officer (for hearing 16/2/22)

DECISION AND REASONS

Introduction:

1. The appeal was listed for a resumed hearing. It is the appeal of HB, a minor and a national of the DRC, who seeks entry clearance to join

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this father ("the sponsor") who lives in the United Kingdom and is a British Citizen.

2. The application for entry clearance was deemed to be a human rights claim, and this was refused by the respondent in a decision taken on 1 November 2019. The First-tier Tribunal (Judge Kelly) in a determination promulgated on the 2 March dismissed the appeal on human rights grounds. The appeal was dismissed on the basis that whilst the FtTJ accepted that the appellant and the sponsor were related as claimed, the appellant had not demonstrated that the sponsor had sole responsibility for him and additionally the FtTJ found that there were no "serious and compelling family or other considerations that rendered his exclusion from the United Kingdom undesirable".

3. The appellant sought permission to appeal that decision and permission was granted was granted by the First-tier Tribunal (Judge Andrew) on the 5 May 2021.

4. The appeal came before the Upper Tribunal on 3 September 2021. The appellant was represented by Counsel, Ms Wass and the respondent by Mr Diwnycz, Senior Presenting Officer. By a decision promulgated on 6 September 2021, I concluded that the First-tier tribunal had erred in law and that its decision should be set aside. The relevant paragraphs are set out at paragraphs [38]-[58] and reproduced below:

> "38.The first issue raised in the grounds relates to that of "sole responsibility". The grounds advanced on behalf of the appellant submit that the judge failed to undertake his consideration of that issue by reference to all the relevant material and by reference to the relevant legal principles. Ms Wass submits that as this was a "one parent" case, the FtTJ was required to consider whether the appellant's relatives with whom he lived had more than day-to-day care and to consider who was exercising control and direction over HB's life.
>
> 39. With regard to the "sole responsibility" test, paragraph 52 of **TD** is of relevance. There among other things it is emphasised that the question of who has responsibility for a child's upbringing and whether that is sole is a factual matter to be decided on all the evidence and the term "responsibility" is a practical one which requires in each case looking at the question of who in fact is exercising responsibility for the child. It may be undertaken by individuals other than a child's parents and may be shared between different individuals but even if there is only one parent involved in the child's upbringing that parent may not have sole responsibility. Day-to-day responsibility or decision making for the child's welfare may necessarily be shared with others such as relatives or friends because of the geographical separation between the parent and a child but that does not prevent the parent having sole responsibility within the meaning of the Rules. The test is not whether anyone else has day-to-day responsibility but whether the parent has continuing control and direction of the child's upbringing, including

making all the important decisions in the child's life and if not responsibility is shared and therefore not sole.

40. When applied to the circumstances of this appeal, I accept the submission made by Ms Wass that the FtTJ appeared to conflate the issue of day-to-day care with the issue of control and direction. The FtTJ considered this issue at paragraph [21] and made reference to the letter from the school and from the church. Then at [28] factored this into his assessment that whilst the sponsor had assumed a substantial degree of responsibility, he had exercised that responsibility jointly and thus could not demonstrate that he had "sole responsibility" under paragraph 297.

41. I do not accept as the grounds assert at paragraph 12, that the judge failed to have regard to the evidence in the appellant's bundle. In fairness, Ms Wass did not seek to rely upon that point in her submissions but that both letters, the letter dated 26/11/2019 from the school and letter from the church dated 2/11/2019, were referred to at paragraph [21] but what was missing was any consideration of the contents of those documents and which were relevant to the issue of sole responsibility and in this case did address who it was who had control and direction of the appellant's upbringing.

42.The letter from the school is referred to by the FtTJ at paragraph [21] however whilst the FtTJ referred to the appellant's sponsor having chosen the school for the appellant; no other reference is made to the contents of that letter. Importantly at paragraph [28] where the judge sets out his analysis of the evidence, there is no reference to the letter's contents in that assessment as to who had or who has control and direction of the appellant's life and make significant decisions.

43. The letter is brief in its contents, but it does identify firstly that the appellant's father pays the school fees for the appellant, and secondly that the appellant calls at the end of each semester for a report and feedback on the appellant's progress. The letter also confirms that the appellant's father attended at the school in 2018 and "exchanged with his child's teacher in a lengthy conversation."

44. Whilst the FtTJ appeared to accept the sponsor had chosen the school for the appellant, none of the above factual matters were factored into the assessment of control and direction of the appellant's life which is relevant to the overall assessment of the issue of sole responsibility.

45. The issue of education was one of the factual issues that had a bearing on who had the continuing control and direction of the appellant's upbringing. I accept that the contents of the letter were not taken into account in that assessment and that was a material error.

46. I further observe that it would have been open to the judge to find that the day-to-day care was undertaken by the appellant's aunt but that this would not necessarily detract from the sponsors case that he had sole responsibility as recognised in the decision of TD (as cited) given the geographical separation of the parties.

47. The 2nd letter is in relation to the church. Whilst it is asserted in the grounds and the oral submissions that the judge failed to consider the contents of that letter, that is not established when looking at paragraph [21] of the decision. The FtTJ stated that the appellant attends a Methodist Church and where he was described as "highly zealous and an active member" and set out his participation in the light of the sponsor's position. The judge recorded the sponsor's evidence that he (the sponsor) would have preferred the appellant to attend Sunday worship at the Roman Catholic Church but accepted as a matter of practicality that the appellant was bound to attend the same church as the other members of the family with whom (the appellant) lived.

48. The reference to the sponsor in the letter was that he was a member of the community and took part in the church services and involved "knowing about the spiritual life of his son". However that does not appear to accord with the evidence recorded in the FtTJ's decision. It seems to me that the inference raised from paragraph [21] is that the issue of the appellant's religion was one taken by the appellant's great aunt and that her wishes were followed rather than the sponsors. However, I would accept that this is not expressly factored into any conclusions reached at paragraph [28] and it is unclear as to what the judge really made upon the issue of religion in the context of sole responsibility and the evidence as a whole.

49. Accordingly, I am satisfied that there are material errors of law in the FtTJ's assessment of the issue of sole responsibility.

50. I now turn to the 2nd ground advanced on behalf of the appellant. Ms Wass submits that the FtTJ did not apply the correct test as set out in the decision of Mundeba (Section 55 and paragraph 297(i)(f)) DRC [2013] UKUT 88. In particular that at paragraph [28] the judge found that the appellant to be "happy and settled in the DRC" and whilst he would no doubt be happiest if his father were to live with him, on this issue the appellant did not satisfy paragraph 297 (f) that there were serious and compelling family or other considerations to render his exclusion from the UK undesirable.

51. Ms Wass submits that the assessment undertaken was from the child's perspective of the situation rather than looking at an objective viewpoint of HB's needs and whether they were unmet.

52. I have considered the submission made on behalf of the appellant in the light of the decision in Mundeba. There is no reference in the FtTJ's decision to that authority. That by itself does not mean that the judge erred in law materially. The question is whether the judge applied the correct principles or as Mr Diwnycz submitted did the judge have in mind the guidance given in that decision? In essence, it is a consideration of the matter of substance rather than form.

53. In the decision of Mundeba (Section 55 and paragraph 297(i)(f)) DRC [2013] UKUT 88 the Upper Tribunal held that "serious" meant that there needs to be more than the party simply desiring a state of affairs to obtain ." "Compelling" in the context of paragraph 297(i)(f) indicates

considerations that are persuasive and powerful. It sets a high threshold, and it excludes cases where, without more, it is simply the wish of the parties to be together, however natural that ambition may be. Family considerations require an evaluation of the child's welfare including emotional needs "other considerations" come into play where there are other aspects of a child's life that are serious and compelling, for example where an applicant is living in unacceptable social or economic environment. "Serious" read with "compelling" together indicate that the family or other considerations render the exclusion of the child from the United Kingdom undesirable. The focus needs to be on the circumstances of the child in the light of his or her age, social background and other history and will involve an inquiry as to whether there is evidence of neglect or abuse, unmet needs that should be catered for, stable arrangements for the child's physical care. The assessment involves consideration as to whether the combination of circumstance is sufficiently serious and compelling to require admission. (See paragraphs 34 to 37 of Mundeba).

54. It is correct as Ms Wass identifies that the judge did refer to the evidence of the sponsor/his submissions at paragraph [28] that it was his case that the appellant was living in "relative poverty", and he recorded that the sponsor had "spoken movingly" about this. Beyond that reference, no further consideration was given to the socio-economic or other considerations that the appellant was living in other than remaining with other family members.

55. Furthermore, the assessment under this head required a consideration of whether the arrangements for the appellant were stable. In this context, there was a letter from the great aunt which had been provided for the appeal dated 26/11/2019 which stated that her health was in a "precarious state" and that "this added to the country's current situation" and it did not allow her to "provide the daily support that the child requires.". The evidence of his present care arrangements was to the effect that she was no longer able to care for the appellant. It would have been open for the judge to reject that evidence but to do so, it would require reasons to be given for following such a course. That evidence was not taken into account in the assessment of paragraph 297 (f).

56. Having stood back and carefully considered the evidence before the FtTJ the test as set out in Mundeba confirms that "compelling" in this context indicates considerations that are "powerful and persuasive" and thus there is a high threshold. The evidence on its face did not appear to reach such a threshold but I accept the submission made that there was evidence relevant to the factual circumstances of the appellant and thus evidence of a material considerations were absent from the overall assessment. Furthermore, the focus is on the circumstances of the child in the light of his age, social background, history and whether his needs were likely to be met in the future, which included taking account of the evidence of the great aunt.

57. I do recognise that the appellant was not legally represented before the FtTJ, nor does it appear that the presenting officer directed the

judge's attention to either of those relevant authorities. However for the reasons that I have set out above, I am satisfied that there are material errors of law in the decision which could have affected the outcome.

58.Accordingly, the decision should be set aside. Both advocates in their submissions indicated that in the event of the decision of the FtTJ involving an error on a point of law that the decision should be set aside and should be remade in the Upper Tribunal."

5. There were a number of factual findings which were not challenged on behalf of the respondent before the FtT. Those findings were to remain as preserved and can be summarised as follows:

(1) The FtTJ referred to the "undisputed facts" which he had set out at paragraphs 4 – 6 of his decision. Those shall remain as preserved facts.

(2) The findings set out at [20]-[23] shall be preserved

6. The FtTJ did not make an anonymity order however an application was made for such an order before the Upper Tribunal in the light of the appellant's status as a child. At a previous hearing, it was agreed by all advocates and the Tribunal that an anonymity direction should be made.

7. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of a minor. Unless and until a Tribunal or court directs otherwise the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

8. The hearings took place on 3 November 2021 and continued on the 16 February 2022 by means of *Microsoft teams* which has been consented to and not objected to by the parties. A face- to- face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the appellant's father ("the sponsor") who was able to see and hear the proceedings. He gave oral evidence in English on the 3 November 2021.There were no issues regarding sound, and no problematic technical problems were encountered during the hearing, and I am satisfied that the sponsor was able to give his evidence without any difficulties and both advocates were able to make their respective cases by the chosen means. Neither advocate required the sponsor to give any further evidence on 16 February hearing.

<u>The background:</u>

9. The factual history is not in dispute and is set out in the decision of the FtTJ and has been preserved as factual findings.

10. The appellant is a national of the DRC. His father, the sponsor was brought up in the DRC together with his 3 siblings.

11. The sponsor's father fled to the UK in 2001 when the sponsor was aged 12 years and was subsequently granted asylum. The remaining family members, including the sponsor, joined him on 20 June 2007 and the sponsor thereafter acquired British citizenship.

12. The appellant's mother is called S. She informed the sponsor that she was pregnant with the appellant by telephone about a week after he had joined his father in the United Kingdom in June 2007. The sponsor had been hitherto unaware of the pregnancy. About 3 months after his birth, S left the appellant with his great aunt. She did this because at the time she was aged only 18 years and was unemployed and felt unable to care for him. To the sponsor's knowledge, S has not played any part in his upbringing, or indeed even visited him, since that time.

13. The appellant resides in the DRC with his great aunt M, together with her husband (named as his guardian in the Visa application form) and their 5 children. The appellant having a very close emotional bond with her youngest child who is of a similar age.

14. The sponsor first visited his son in 2016 when the appellant was aged 8. The sponsor was shocked and upset to see the relative poverty in which his son was living. He again visited him in 2018.

15. On 9 April 2019, he sponsored his son's application to join him in the UK and the appellant made an application to join his father in the UK, relying on Paragraph 297 of the Immigration Rules in the context of Article 8 of the ECHR.

16. The appellant's application was refused in a decision taken on 1 November 2019. As the decision sets out, the appellant originally failed to include a tuberculosis clearance certificate with the application. However that was subsequently addressed and as the FtTJ noted at paragraph [7] that was no longer an issue in the appeal.

17. The decision letter begins with a consideration of Paragraph 297 of the Immigration Rules. The Entry Clearance Officer (hereinafter referred to as the "ECO") noted that the appellant had failed to provide any information or evidence to demonstrate his "stated relationship" with the sponsor or show any kind of contact or other support from him before or since he left the DRC in 2007. This issue was resolved in the appellant's favour as IJ Kelly accepted that the appellant and the sponsor were related as claimed.

18. The ECO noted that sole responsibility of a child's upbringing amounted to more than just financial support and required a constant

and primary involvement in all of the decisions as to life and upbringing to date. There was no information to show any continuous involvement by the appellant's father in the decisions about his life and upbringing. Whilst it was acknowledged that the sponsor may have had some involvement in the appellant's life, this appears to have amounted, "at best", to shared responsibility for his upbringing with his other immediate family members. Moreover, there was nothing to show that the appellant's life and upbringing had been to date "either disadvantaged or underprivileged in any way."

19. Taking that into account, the ECO was not satisfied that " 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 appellant's upbringing; or one parent or 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 the appellant's exclusion undesirable and suitable arrangements are be made for the appellant's care" (paragraph 297 (i) (e) and (f)).

20. The ECO considered the case outside of the rules but concluded that on the information provided he was not satisfied that the application raised any "exceptional circumstances" to warrant a grant of entry clearance outside of the rules. No such circumstances had been identified or put forward and it was noted that the appellant remained in normal contact with his family members with no "discernible advance disadvantages" in his life and upbringing and nothing to demonstrate any "significant or continuous involvement "in his upbringing to date by his stated father. The application was therefore refused.

21. The ECM undertook a review on the 6 February 2020 considering the further evidence that had been provided but was satisfied that the original decision to refuse the application was correct.

22. In a decision promulgated on 2 March 2021 the appellant's appeal before the FtT was dismissed. The FtTJ set out the applicable legal framework at paragraphs [9]-[15]. The FtTJ heard oral evidence from the appellant's father and sponsor.

23. Having summarised the evidence advanced by each of the parties, the FtTJ set out his analysis of that evidence at [19]-[23] and his assessment of Article 8 at [24] – [33].

24. In his analysis he set out the primary facts concerning the circumstances of the appellant's birth, the sponsor having entered the United Kingdom in 2007 as a dependent of his father and that the appellant's mother had left the appellant with the sponsor's great aunt and had played no part in his upbringing or even visited him since that date. The FtTJ accepted the sponsor's evidence that he first

visited his son in 2016 when he was aged 8 and had visited him for a 2nd time in 2018 prior to making the application in April 2019. Furthermore the judge accepted that the appellant resided in the DRC with his great aunt, together with her husband who was named as the appellant's Guardian in the Visa application form and their 5 children. He had a very close emotional bond with the youngest child was of a similar age to him. The judge also accepted that the appellant attended a school chosen by the sponsor and that he attended a Methodist Church. At [22] he accepted the evidence of the sponsor that he and the appellant spoke with each other at least twice a month using the video chat facility on "WhatsApp" and that they had a "strong father and son relationship as it is reasonable to expect in circumstances where they do not share the same household". He further accepted at [23] that the sponsor sent regular maintenance for support of the appellant via western union.

25. In his analysis principally at paragraph [28] the judge found that whilst the sponsor had assumed a substantial degree of responsibility of his son's upbringing, he had exercised that responsibility jointly with his great aunt. Additionally the FtTJ found that there were no "serious and compelling family or other considerations that rendered his exclusion from the United Kingdom undesirable" . Accordingly, the judge found that the appellant could not meet the Rule 297 and that there were no unjustifiably harsh consequences as a result of the decision and the appeal was dismissed.

26. Permission to appeal was issued on the 29 March 2021 and on 5 May 2021, permission to appeal was granted by FtTJ Andrew.

27. By a decision promulgated on 6 September 2021, I concluded that the First-tier tribunal had erred in law and that its decision should be set aside. My error of law decision is set out in the preceding paragraphs. As there were a number of factual findings which were not challenged on behalf of the respondent before the FtT, those findings were preserved findings for the remaking of the decision. They can be summarised as follows: The FtTJ referred to the "undisputed facts" which he had set out at paragraphs 4 – 6 of his decision. Those shall remain as preserved facts and the findings set out at [20]-[23].

The remaking:

28. At the hearing on the 3 November 2021, the evidence before the tribunal consisted of 2 bundles of documents and included the additional witness statement from the sponsor dated 17 October 2021. The respondent relied upon the bundle that filed for the previous proceedings.

29. I heard oral evidence from the sponsor. He confirmed the contents of this witness statement dated 17 October 2021 as his evidence in chief

and no further questions were asked by Ms Wass. He was cross examined by Mr Bates, the Presenting Officer.

30. In cross-examination the sponsor was asked about his witness statement paragraph 17 (page 7) which referred to a telephone conversation about further studies for the appellant speaking directly with the headmaster. The appellant was asked why he did not obtain a letter from the headmaster to confirm the conversation? The appellant stated that he had not obtained a letter because the conversation had taken place after the evidence was received from the DRC but that he had voice messages between himself and his aunt and the specific subjects.

31. He was asked about paragraph 21 of the witness statement. He was asked if he was suggesting that the appellant never talked to the great aunt, uncle and children about emotional concerns? The sponsor replied that the appellant did but when they can't give in to him with what he wants it always calls me to calm him down.

32. Mr Bates asked the appellant to give an example where only he could deal with the appellant. The sponsor stated "they called me one day earlier this year when the appellant did not want to go to school because he was upset that they had not given the clothes he wanted. I don't live there and so I don't know everything that happens on a day-to-day basis. They are sandals which are trendy in which all the kids were wearing. Having made enquiries of the aunt, he had promised them, but he didn't get them. It was a Tuesday and therefore he decided not to go to school but he had to do an exam on that day so they tried to calm him down, but he wouldn't listen. They called me and I was at work, and I said I would send him money at the end of the month, he listened to me, and he went to school."

33. The sponsor was asked how he received the recent documents from the DCR (the church letter at page 18 and the hospital letter at page 19 of the bundle).

34. The sponsor stated that he receive them via email and that he had spoken to both the doctor and the pastor and explained the situation and everything "I deal with on a regular basis". They had given the documents to family members and had forwarded it to him (scanned them over to him).

35. It was suggested by Mr Bates to the sponsor that that was a difficulty for the evidence and that it would be expected to see the original documents and a translation of those documents. The sponsor was asked to confirm if he had proofread them? The sponsor replied "no it was not necessary I proofread what the doctor said in the original letter which was correct in English. I did not change anything from those documents. I can provide the original email from the DRC in French it has the original documents attached to it.

36. The sponsor was asked about the receipt for hospital treatment (page 20; for malaria treatment) and how he paid the bill from the UK? Sponsor stated that the same process applied and that when he sent money to the Congo for his son he would send money to his aunt usually through 1 of her sons and that he would get the money from Western Union and that they would pay the money to the hospital. He stated “I make sure the hospital bills are taken to the doctor. It’s not like the UK where you can trust them. I trust the doctor which is why he’s always gone to this hospital. I speak to him before I send the money so that he knows. You have to pay in advance of treatment in the Congo”.

37. He was asked if he had registered him with the doctor who he had been seeing for a long time. The sponsor stated that it was in his witness statement.

38. The sponsor was asked why there was no evidence before the FtT about the doctor treating the appellant why has it only now come out in evidence? The sponsor stated that he had a letter from the doctor at the 1st hearing but as he was representing himself he thought there was sufficient evidence on the issue of sole responsibility but as he was not believed he provided further evidence. The sponsor explained that he had been solely responsible for the health and education of the appellant and that if he had had legal advice at the time all the evidence would have been provided the first time. “We didn’t know what evidence to provide” and now he was able to provide further evidence to demonstrate that he was in charge of his son’s upbringing in all aspects.

39. The sponsor was asked about his witness statement which he stated that the accommodation the appellant lived in was unsuitable and overcrowded. It was put to him that the aunt did not mention overcrowding and did he have evidence about that such as photographs or a report of the property? The sponsor replied that he had visited Congo twice in 2016 and 2018 and that he did not .need evidence because he’d seen it for himself.

40. It was put to the appellant that the aunt said she was not paid. The sponsor stated that she was trying to say that in general it is well documented that Congo has an ongoing issue; “one major one is an education teachers don’t get paid and they go for months without being paid. What you had as a teacher is not enough and I tried to make it more specific in my witness statement to understand the current situation in Congo and that it is not just teachers but all public departments”.

41. He was asked if the money he sent supported the whole family. The sponsor replied “hundred percent yes. I do a lot for them. I provided with clothes, I send household appliances; recent example was in September I’d sent a box full of clothes and appliances for New Year

day it is a very big celebration in Congo, and everyone has to wear new clothes it is a tradition. I try to do it every year and this is 1 of the examples of things that I do". He also stated that he sent various amounts of money to help with university fees as well.

42. In re-examination, the sponsor was asked to describe the living arrangements that he had viewed himself on his visits. The sponsor stated that the appellant lived in 3 bedroomed house with 8 people living in it. It was not a good ,standard. He stated that he was overjoyed to see his son but was deeply hurt to see the conditions that he was living in and that they would not be acceptable, and it ruined the holiday. He was not aware of where they had slept originally until he visited Congo and he stated that he was "embarrassed and shocked the parent because my parents are my idols and I try to live my life in the way that I've seen them do it. The standard the appellant lived in was embarrassing; my son was sleeping in the living room; one bed was occupied by one person the bedrooms was for the rest of the household and my son was sleeping in the living room and multiple sleeping went on in the bedrooms. When I say bedrooms they were very small and people sharing beds and my son was sleeping in the living room".

43. No further questions were asked.

44. At the conclusion of the oral evidence, issues arose as to the documentation provided by the sponsor and how he had received the documents (from the doctor and the church p.18 and 19 of the bundle). It was not possible at that stage to resolve the issue which had only arisen at the hearing and therefore the hearing was adjourned part heard with directions for the original documents to be filed and for any further submissions made on behalf of the respondent to be received.

45. On the 9 November 202, the appellant's solicitors provided the following documents by an email:

- Pages 18-19 of the Appellant's supplementary bundle.
- The original language version of the documents contained at pages 18-19 of the Appellant's supplementary bundle.
- A snapshot of 'WhatsApp' messages between the Sponsor and his relative in which it is shown that he was sent the originals on Friday, 17 September 2021.

46. Mr Bates on behalf of the respondent sent his position statement by email on the 18 November 2021. He accepted that the appellant had given broadly credible and consistent evidence on the issue of sole responsibility but that in relation to 2 letters that had been provided from the DRC (letter from the Dr. and the church (p18 and 19 of

bundle) had not been provided in their original format and therefore should be considered on the basis set out in the decision of Tanveer Ahmed. Other points raised included that whilst it was accepted that the sponsor has been financially supporting the Appellant it is not accepted the aunt's family finances are as precarious as clamed and there was no evidence from the unt corroborating the sponsor's claim as to overcrowding in the property. It was submitted that on balance emotional support is provided on a shared basis between the sponsor and family members in DRC and that appellant has not satisfactorily established that their sponsor alone was responsible for determining his further studies.

47. Prior to the resumed hearing the appellant's solicitors provided a supplementary bundle with additional evidence which included a further witness statement of the sponsor dated 2/02/22, a witness statement from the appellant's aunt and present guardian, and a witness statement from a family member attesting to how the letters dated 16 September 2021 from the Dr and the Church were obtained. Further evidence of remittances from the sponsor were provided and evidence in support of the guardian's health problems and evidence concerning the property occupied by the appellant. In addition Ms Wass had prepared a written response to those submitted by Mr Bates. Reference was made to the evidence provided (both oral and documentary) and that the sponsor had provide evidence from those best placed to provide evidence about who had continuing control and direction of his life from the sponsor, his present guardian , the appellant's doctor and headteacher. The submissions made did not identify any inconsistencies in the sponsor's evidence.

48. The FtTJ had accepted that the sponsor had chosen the school that the appellant was to attend, and the evidence also demonstrated that he paid his school fees and that the sponsor calls the school at the end of each term for an update on the appellant's academic progress (see letter 26/11/19). The letter from the church confirmed that the appellant attended church as a result of the sponsor and frequently (every month) the sponsor would be in touch about his son and his faith and the spiritual progress of his son. As to the appellant's health needs, the letter from the doctor (P19) confirmed that he had previous contact with the sponsor and that he would contact the sponsor when the appellant was ill and also would update the sponsor (and see appellant's oral evidence consistent with this).

49. At the resumed hearing, the respondent was represented by Ms Z. Young, Senior Presenting Officer. Whilst she had not been present at the earlier hearing, she had been provided with the notes of the proceedings taken by Mr Bates and had been provided with the further documentation that had been filed on behalf of the appellant.

50. Ms Young informed the Tribunal that having had the opportunity to consider the documents produced and in the light of the record of the evidence given previously that she did not rely on the written submissions provided earlier but conceded that on the evidence considered in its totality that it had been demonstrated that the sponsor had sole responsibility for the appellant.

51. In the light of that concession Ms Young invited me to allow the appeal. Ms Wass on behalf of the appellant agreed with the stance taken by the respondent and invited the Tribunal to set out in its decision the concession made and that the appeal should be allowed.

52. There is no dispute that the only statutory ground available to the appellant is that the decision of the ECO was unlawful under Section 6 of the HRA 1998. In reaching that assessment the advocates agreed that the appellant's ability to meet Paragraph 297 is a relevant consideration in the balance of proportionality.

53. The relevant paragraphs of paragraph 297 reads as follows:-

"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:

… …

(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 …”.

54. In the light of the concession made on behalf of the respondent that the evidence taken together does demonstrate that the appellant’s sponsor and father has had sole responsibility for the appellant, paragraph 297 (i) (f) is satisfied. It is therefore not necessary to consider the alternative paragraph 297 (i) (f). It is accepted that the appellant is under the age of 18 and not leading an independent life. No other issues have been raised on behalf of the respondent as regards accommodation, or maintenance.

55. In summary there is no dispute between the parties that the appellant meets the requirements of paragraph 297 which has now been resolved as set out above.

56. It has not been in dispute that on the factual circumstances that Article 8 (1) is engaged. I therefore allow the appeal on human rights grounds under Article 8 as where a person satisfies the requirements of the Immigration Rules, this will be positively determinative of that person’s Article 8 appeal, provide their case engages Article 8)1) (applying TZ (Pakistan) and PG(India) [2018] EWCA Civ 1109 at [34]).

57. The appeal is remade as follows; the appeal is allowed on Article 8 grounds.

Notice of decision:

58. The decision of the First-tier Tribunal involved the making of an error on a point of law and therefore the decision of the FtT shall be set aside.

The appeal is remade as follows: the appeal is allowed

I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of a minor. Unless and until a Tribunal or court directs otherwise the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Upper Tribunal Judge Reeds

Dated 16/2/ 2022.

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.