Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: EA/00280/2020**
EA/00284/2020

THE IMMIGRATION ACTS

Heard at Bradford IAC	**Decision & Reasons Promulgated**
On the 9 February 2022 and 30 March 2022	**On the 19 April 2022**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

GS
VS
(ANONYMITY DIRECTION MADE)
Appellants

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation:
For the Appellant: Ms S. Aziz, Counsel instructed on behalf of the appellants
For the Respondent: Ms Z. Young, Senior Presenting Officer

DECISION AND REASONS

Anonymity :

Rule 14: The Tribunal Procedure(Upper Tribunal) Rules 2008:

Anonymity is granted because the facts of the appeal involve a claim brought by a minor. Unless and until a tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them. This direction applies both to the

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appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Introduction:

1. The appellants appeal with permission against the decision of the First-tier Tribunal Judge who dismissed their appeals against the decisions made to refuse their applications for a family permit as a family member (first appellant) and as a dependent direct family members(second appellant) of an EEA national in a decision promulgated on 11 May 2021.

2. The background is set out in the decision of the FtTJ and the evidence in the bundle. The appellants are nationals of Ghana. They applied on 1 November 2019 for an EEA family permit residence cards as the direct family member (first appellant) and direct dependant family member (second appellant) of the sponsor, whom it is said is their father, an Italian national, resident in the United Kingdom.

3. The applications were refused in two decisions taken on 5 December 2019. In relation both the appellants GS and VS it was stated that to evidence that the sponsor their father they submitted Ghanaian birth certificate produced on 28 June 2018 (for GS) and 4 May 2018 (for VS). It was noted that the birth certificates were not produced at the time of their births and having considered the reports available online including the US Department of State website which states that "registrations not made within one year of an individual's birth are not reliable evidence of relationship, since registration, including late registration, may often be accomplished upon demand, with little or no supporting documentation required." It was stated that in the absence of any other document that supported their parentage, the ECO was not satisfied that they had provided sufficient evidence that their relationships with the sponsor were as stated . In respect of GS the application was refused as she failed to meet the requirements of regulation 7 of the Immigration (EEA) regulations 2016. In relation to the appellant VS, her application was refused for the same reason and additionally the ECO considered the issue of dependency. It was stated that as evidence of dependency she had provided money transfer remittance receipts from the sponsor naming her as the beneficiary. It was noted that the corresponding collection receipts or a bank statement in the appellant's name had not been submitted to verify any of the funds were received by her. As a result the ECO was unable to confirm the receipt of any funds and the limited amount of evidence in isolation did not prove that the appellant and her family are financially dependent on the sponsor or that any funds sent by him to the appellant we used to meet her essential needs. The ECO also stated that he would expect to see evidence which fully detailed her and her family circumstances, income, expenditure and evidence of the financial position which would prove that without the financial

support of the sponsor the essential living needs could not be met. Thus in relation to GS, the ECO was not satisfied that she was related to the sponsor or dependent on him.

4. The appellants appealed and the appeal came before the FtT on the 15 April 2021. In a decision promulgated on 11 May 2021 the FtTJ dismissed their appeals, having found that the appellants had not demonstrated on the balance of probabilities that they were direct family members of the sponsor. In the light of that primary finding the FtTJ did not go on to make any factual assessment of whether the second appellant was dependent on the sponsor.

5. Permission to appeal was issued and on 1 July 2019 permission was granted by FtTJ Nightingale .

6. Subsequently, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties.

7. The hearing took place on 9 February 2022 as a face to face hearing where I heard submissions from each of the advocates. Whilst the advocates were able to make their full submissions on their respective cases, one issue remained outstanding which related to ground 2 and the witness statement that had been recently been filed by the legal representative and as a result no directions had been given and the respondent had little opportunity to address it. It was therefore agreed by the advocates that the appeal would resume on this issue only by way of a short remote hearing to be listed upon compliance with the directions issued following the hearing on 9 February. This took place on the 30 March 2022.

<u>The submissions:</u>

8. I first heard from Ms Aziz who relied upon the grounds which she amplified in her oral submissions.

9. Dealing with ground 1, Ms Aziz submitted that this related to the DNA evidence and that the judge erred in law in his treatment of the sponsor's oral evidence as to why he did not obtain a DNA report to prove that he was the biological father of the appellants. This related to paragraph [34] of his decision. Ms Aziz submitted that the judge erred in law by failing to take into account the respondent's policy (DNA policy guidance version 4.0, 16 March 2020) which had been before the judge (see page20- 23 of the bundle). She submitted that this was a voluntary piece of information and that no negative inferences can be drawn from any failure to provide DNA evidence (see policy page 23).

10. Ms Aziz referred the tribunal to page 24 of the policy document and that where insufficient evidence of a biological relationship had been provided, the ECO should write the applicants to give them an opportunity within a reasonable specified timeframe to volunteer further supporting evidence. She submitted that the ECO could have

invited the sponsor to provide further evidence including DNA evidence after providing a reasonable opportunity. At page 25 of the policy document, it again stated that where DNA evidence has not been volunteered, officials must not draw negative inferences and that officials must weigh up all the evidence provided including evidence obtained from other sources, identifying that which supports the relationship and any discrepancies before deciding whether they are satisfied that the relationship is as claimed. Ms Aziz submitted that the judge should have looked at the other documents and sources of evidence within the bundle to determine whether the satisfied the relationship between the sponsor and the children. That had not been considered by the FtTJ and there is no reference to any kind of information that had been considered. In this respect there was an affidavit and statutory declaration a statement from the appellant VS (supplementary bundle) , a further statement at page 30 and page 3 of the supplementary bundle of statutory declaration. In addition the sponsor's statement and the sponsor's wife statement which explained the relationship and where she talked about her stepchildren. Ms Aziz submitted that in all of those documents had been given anxious scrutiny in terms of the relationship and reliance had been placed on the fact that DNA evidence had not been provided and also a letter that the sponsor had written.

11. Ms Aziz submitted that even if the judge sought to depart from the policy, no explanation been given as to why he had departed from the policy and what had caused him to draw the negative inference when the policy clearly stated that no negative inference should be drawn from the failure to produce a DNA.

12. As to the genuineness of the birth certificates, she submitted that the genuineness of those documents were not put in question in the decision letter and there was an explanation as to why the birth certificates were submitted due to the electronic registration 2016. The explanation being given orally and in writing. She submitted that no reasons were given by the judge to question the credibility of the sponsor due to the letter he had written. She submitted that this had been a procedural irregularity.

13. The written grounds make the additional point that the reason given by the sponsor for not obtaining a DNA test at [15] cannot constitute "significant evidence of a complete lack of parental relationship" [34]. It is submitted at paragraph 8 that the sponsor's answer was compatible with the existence of a biological paternal relationship, given the obviously foreseeable impact on the appellants were the assumed parentage disputed especially considering that the appellant's mother is deceased. Thus it was not open to the judge, without more, to deduce from the sponsor's answers the conclusions that he did.

14. Dealing with ground 2, it was argued that the FtTJ erred in law by making a mistake of fact at [24] stating that the sponsor's wife did not attend to give evidence.

15. The FtTJ recorded the earlier directions of Judge Jones at a hearing on 2 February 2021 where it was stated that the sponsor and his wife would be called to give oral testimony. Ms Aziz stated that the witness had taken a day off work so that she could attend to give evidence and that it was crucial to the appeal concerning the issue of parentage and the sponsor's wife had a relationship with the appellants (her stepchildren) that she wanted to put forward.

16. Ms Aziz referred to the documents provided in support of ground 2 which consisted of a witness statement of the representative at the hearing (dated 4/2/2022; served on 8 February 2022) which attached to it handwritten notes taken from the hearing. At paragraph 10, the legal representative set out that on the hearing day both before and after the hearing he met with the appellant's witnesses and that he confirmed the appellant sponsor's wife (stepmother to the appellants) was present and had been waiting outside the room where the sponsor was sat in order to be called into the room by the tribunal at the appropriate time. He records at paragraph 11 that the witness thought the reason for her taking off time for work on that day was to answer questions at the appeal hearing by the respondent, but felt disappointed that this did not happen. At paragraph 12, the witness confirmed that on the day of the hearing when it was time to call the appellant's stepmother to give evidence, the judge asked if the sponsor's wife was ready to give evidence and it was indicated that she was outside the room. The judge asked the HO representative if he had any questions for the appellant sponsor's wife who then stated that he had no questions. The judge therefore said that "I take note that appellant sponsor's wife is submitted a written statement and I take this as evidence in chief". It is said that he asked if the representatives are happy for him to take the sponsor's wife's witness statement as her "evidence in chief" and that he would look at her statement before making any decision. He indicated he did not have any questions for her. The representative stated that the judge checked with him and whether he had any objection and that the representative stated that he had no objection as long as the judge would "carefully consider the appellant's stepmother's witness statement before reaching any decision". It was further stated that he indicated that she was present at court to answer any questions that the tribunal or the HOPO may have for her in relation to the appeal. It is stated that the judge indicated he had no questions for her but would however take a statement into account before reaching a decision.

17. Ms Aziz submitted that at [14] the FtTJ stated "it was also indicated to Judge Jones at the sponsor and his current wife will be called to give oral testimony. I note here that the sponsor's wife did not attend to

give evidence and no DNA evidence was submitted before me." She submitted that this was a mistake of fact and that the appellant's wife was at the hearing ready and waiting to give evidence. She submitted that in a decision of Waf v SSHD [2016] (no citation given or decision provided) at paragraph 17 there was a discussion about oral advocacy and the importance of giving oral evidence. Furthermore in the decision of Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) dealing with fairness, any deprivation of the right to a fair hearing would amount to an error of law (paragraph 7). She submitted that fairness is important, and it was not fair for the FtTJ to state that the sponsor was not present when she was present at court and was able and willing to give evidence.

18. Ms Aziz referred to a decision FS(Somalia) UKIAT (no citation given or decision made available) and that failure to consider material evidence is a procedural irregularity and that it was essential for the evidence to be taken into account. She submitted that there was nowhere in the decision to say that he had taken her witness statement into account. If the sponsor's wife's evidence was not taken into account this was a procedural irregularity. The written grounds also state that it was a failure to take account of material evidence.

19. Ms Aziz submitted that there were other documents before the FtTJ which he had not taken into account or had not mentioned them in reaching his decision. In this respect she referred to amounts of transfer receipts going back to 2015 (p 161) and money transfer receipts from 2015 – 2019 (pages 191 – 170. There were lists at page 161-162 showing money transferred and at page 196 2015 in relation to VS. Ms Aziz pointed to a witness statement from the appellant VS which reflect the sponsor's evidence about the money given to her and how it was received however none of those documents had been referred to in reaching the overall decision and the only reference has been made to the letter sent by the sponsor dated 10/9/19 and the absence of DNA evidence.

20. Ms Aziz also referred to pages 253 – 256 which related copies of travel tickets for the sponsor to visit the children which was not taken into account nor with the photographs at page 257. There was also at page 265 – 331 telephone logs in numbers called, and also a statutory declaration with the number given. Ms Aziz submitted there was evidence before the judge on the face of the statutory declaration with the phone number to demonstrate the relationship.

21. As to the statutory declaration that was before the judge also that that had not been referred to. In conclusion she submitted the evidence had not been given sufficient scrutiny.

22. Dealing with ground 3, it is submitted that the judge failed to take into account material evidence. Reference is made to the decision at paragraph [30] where it is stated the judge drew an adverse inference

about the sponsor's claim stating that the sponsor "has offered no explanation why he waited for over 9 years after the death of their mother to seek to bring them (the appellant) to live with him in the U.K.'s dependents." However Ms Aziz submitted an explanation had been given in the sponsor's evidence which had been summarised at paragraph [11] which related to the appellant's aunt who had been looking after them who was now too ill to do so and that the sponsor had been concerned about the type of friends they might make and wanted them to join in the UK with his wife and children. Ms Aziz submitted that this had been set out in a statutory declaration and also was supported in the witness statement of the appellant's wife at paragraph 7. This statement corroborated the appellant's claim as evidence in chief which the respondent's representative has said he did not wish to challenge. Therefore she submitted the FtTJ was in error by stating that there was no explanation given by the sponsor in his decision at [30].

23. The written grounds at paragraph 17 set out the other evidence material to the assessment of whether the appellants were the direct descendants of the sponsor including a witness statement of the appellant VS (supplementary bundle page 1-2), the statutory declaration of the maternal aunt with whom the appellant had been living in Ghana (appellants supplementary bundle page 3) and the statutory declaration of the traditional elder of the community where the appellants were born (page 150 – 151).

24. Ms Aziz sought to make a further submission which she acknowledged was not part of the grounds but was "Robinson obvious" and that the judge had failed to take into account the best interests of the child under EU law and that their view should have been taken into consideration as should their circumstances. She submitted that this was relevant under section 55 and was an article 8 issue. She submitted that in relation to EC matters there is a statutory duty on officials to take into account EU article 24 of the Charter relating to family reunification and the best interests of the child should be taken into account. As the sponsor was the only surviving parent, this was not a matter that had been discussed in the findings of the FtTJ and therefore demonstrated another error of law.

25. Ms Young on behalf of the respondent relied upon the Rule 24 response dated 8 October 2021 and expanded on those matters set out. In that document it was argued that the FtTJ had given adequate reasons for not being satisfied regarding the birth certificates and the burden lay on the applicant to establish that the replacement documents were issued as stated.

26. Dealing with ground 1 and the DNA evidence, she referred to the rule 24 response where was noted that there was a policy which indicated that the absence of DNA is not fatal to an appellant's claim, but this did not materially affect the outcome of the appeal as the FtTJ would be required to assess the remaining evidence. She submitted that the

judge was not bound by the respondent's policy as it was guidance only and that it was the appellant to prove their case they were related as claimed. She submitted the judge did ask questions as to why he did not obtain DNA evidence and was entitled to ask this and assess the answers given and made findings at paragraph [34] when read together with paragraph [15]. Those findings were open to him to make. She submitted that whilst Ms Aziz has submitted that the respondent could have written to the appellant's, there was no obligation to do that and in any event it did not mean that the judge could not comment about the DNA evidence or lack of it.

27. As to ground 3 Ms Young submitted that the FtTJ stated at paragraph [7] that the appellant's joint bundle contained witness statements from sponsor and his wife and therefore the judge did refer to the witness statement of the sponsor's wife and was aware that it was in the bundle. Also at paragraph [5] reference was made to the documents in the appeal.

28. When asked if she accepted the witness statement and the notes attached to it, Ms Young stated that she had nothing to counter what was said as she had no record or file note available to her. She thought that it might be on the paper file but was not included in the request she had made to her unit.

29. When looking at the witness statement, she submitted that at paragraph 12 the representative set out that he had no objection so long as the witness statement had been carefully considered. She submitted that as the appellant's representative raised no objection to not calling the sponsor's wife to formally adopt that evidence it cannot be argued now that that was a material error of law. The legal representative did not object to the way the sponsor's wife evidence was dealt with and it would have been open to him to have said that he wanted the sponsor's wife to adopt the evidence formally.

30. Ms Young in her submissions accepted that the judge was in error when she said that the sponsor's wife was not present when she was. However it was not material because the judge had stated at paragraph 5 that he considered the witness statement. She further submitted that the sponsor was best placed to give evidence about the relationship and as a sponsor's wife witness statement was before the FtTJ and taken into account there was no error of law.

31. In relation to ground 3, Miss Young referred to paragraph of the rule 24 response where it was argued that the judge was entitled to find that the sponsor had not adequately explained why had left the children in Ghana if he had always been responsible for them. Whilst there may be someone to look after the children did not explain why he chose not to have them with him as this had been his intention. The judge gave adequate reasons for his findings in the assessment of the sponsor's letter to the appellants and identified the concerns.

32. In her oral submissions Ms Young submitted that the evidence at paragraph 11 did not set out why the sponsor did not make the application and it did not address why he did not want the appellants to come to the UK for 9 years. She submitted that the judge did not have to reference every document in the appellant's bundle and was not a material ever of law.

33. In respect of counsel's reference to the telephone numbers on the statutory declaration Ms Young submitted that even if there was a record it was not easy to read and it was not for the judge to make submissions on the case but for the sponsor and or the appellant's.

34. By way of reply Ms Aziz submitted that in relation to ground 1 and the submissions made by Ms Young, the FtTJ was entitled to look at the policy and to give reasons that if he did not accept what was in the guidance to give reasons why not. The policy was in the appellant's bundle and was therefore relevant to the issues and necessary to consider. She submitted that it was important the judge to look at the policy and reiterated the point that been made earlier in the section of notes referring to DNA evidence.

35. As to ground 2 it went to the sponsor's wife's evidence and that whilst it was stated he would take that into account that had not taken place. The respondent accepts that there was a mistake and was therefore a material error.

36. As to ground 3 she submitted that all the documents should have been been taken into account and that was not just relevant to the issue of dependency but was also relevant to the issue of the relationship.

37. At the conclusion of the submissions I sought assistance from the advocates as to the material relevant to ground 2 which had only been served on the tribunal and the respondent on or about 8 February 2022 (the witness statement dated 4 February 2022). The grant of permission made on 1 July 2021 at paragraph 3 set out that it would be expected that the notes of the representative would be produced along with a statement from the representative. There had been a delay in providing that material from the grant of permission until shortly before the hearing. As a result this did not give an opportunity for the respondent to provide a response nor for the tribunal to give any further directions. Ms Aziz submitted that it was likely that due to the pandemic the office had been closed for some time and that this was the likely explanation for the delay.

38. Ms Aziz accepted that it would be fair to give the respondent the opportunity to respond and see if there was any correspondence and also for the judge's notes to be provided. It was also noted by the advocates that the handwritten notes were difficult to read and that it could be typed up.

39. As a result, it was agreed with the advocates that before the hearing could be concluded the respondent should have the opportunity to check whether there had been a record of file note completed by the presenting officer which could be filed and served on the tribunal and the other party. The appellants solicitors would then be able to provide any response to any issues raised by the respondent relevant to ground 2 only. A typed version of the handwritten notes could also be provided. Directions were therefore made in those terms. It was further agreed with the parties that rather than deal with the outstanding issue by written submissions that a short hearing should take place remotely rather than a face-to-face hearing. The advocates were to provide their availability to the Tribunal listing office.

40. Following the hearing Ms Young, on behalf of the respondent confirmed in writing that having had the opportunity to make enquiries there was no file note or record available to the respondent. As a result, the administration was asked to contact the FtTJ for the record of proceedings. Upon contact by the tribunal, reference was made to the First-tier Tribunal guidance note dated 2/12/21 relating to record of proceedings and that any note made by the judge was to assist in preparing the decision and was a personal note. In essence the tribunal keeps a record of proceedings via the audio recording.

41. The hearing resumed on 30 March 2022 as a remote hearing with both Ms Aziz and Ms Young attending. Ms Young confirmed the contents of the email sent to the tribunal and further confirmed that it would not be necessary to request for a typed record of the audio recording as the tribunal had the statement from the legal representative and it was accepted that the sponsor’s wife had attended to give evidence. She further stated that she had already made her submissions at the earlier hearing in relation to the witness statement and therefore no further evidence or submissions were necessary to decide the issue of error of law.

42. Ms Aziz confirmed that the legal representative had now submitted typed notes to all the parties as required and acknowledged that the respondent accepted that the sponsor’s wife had been a court waiting outside to give evidence. She further indicated that she had given substantial submissions on every point at the earlier hearing and that it was not necessary to make any further submissions. As to ground 2, she stated that the representatives note should be taken into account as there was no other note or transcript and as he was an officer of the court; the handwritten note in typed notes explained what had happened. Thus she submitted there was sufficient information to consider ground 2.

43. In terms of error of law, she submitted that if there was sufficient information the court could remake the decision allowing the appeal or in the alternative to remit the appeal.

44. At the conclusion of the hearing I reserved my decision which I now give. I am grateful to both advocates for the assistance they have given to the Tribunal.

Decision on error of law:

45. The Immigration (European Economic Area) Regulations 2016 have now been revoked by The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 Schedule 1(1) paragraph 2(2) (December 31, 2020. Revocation, however, has effect subject to savings specified in The Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020, Regulation 2 and Schedule 1 and The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 Regulations ("The Transitional Provisions").

46. Schedule 3 paragraph 5 of the Transitional Provisions deals with existing appeal rights and appeals and as this appeal was extant prior to commencement day, and it is not argued by either party that the tribunal does not have jurisdiction to consider the appeal.

47. There are 3 grounds of challenge advanced on behalf of the appellants. I shall refer briefly to a further ground advanced on behalf of the appellants by Ms Aziz. This concerned the submission that the judge failed to address the best interests of the children by applying the EU Convention and taking into account their wishes. This did not form part of the grounds of appeal nor was there any application to amend the grounds either before the hearing or at the hearing. If this was a “Robinson obvious” point, it is reasonable to assume that it would have been part of the original grounds of challenge. Furthermore, it has not been demonstrated that any such argument was ventilated before the First-tier Tribunal. The guidance given in the case of Talpada v SSHD [2018] EWCA Civ 841 at [69] and repeated in Latayan v SSHD [2020]EWCA Civ 191, sets out that “courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded and where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potential to the wider public interest, which is an important facet of public law litigation”. In any event, the FtTJ would not have considered the “best interests” question as on his factual findings he was not satisfied that they were the direct descendants of the sponsor. I therefore will consider the grounds that have formed the basis of the grant of permission before considering this ground further.

48. I begin by considering ground 1 which has some overlap with ground 3. The argument advanced on behalf of the appellants is that the FtTJ erred in relation to his assessment of the evidence given by the sponsor regarding the absence of DNA evidence. It is plain from

reading the decision and its conclusion at paragraph [34] that alongside the contents of the letter dated 10/10/19 sent by the sponsor to the appellants, the FtTJ's view was that the sponsor's evidence as to why he did not obtain DNA was "significant evidence of a complete lack of parental relationship between the sponsor and the appellant". The absence of DNA or more accurately the evidence as to why he did not obtain DNA evidence was therefore significant in the FtTJ's analysis. Both parties accept that there was a copy of the respondent's policy and guidance in the bundle (page 20 onwards). In that policy document, reference is made to the issue of DNA evidence and that DNA is not required and that an applicant can choose to volunteer it. It expressly states where applicants choose not to volunteer DNA evidence no negative inferences can be drawn from this. The policy also notes that there are circumstances where applicants must satisfy an official they are related his claim to a particular person and this can usually be achieved by providing many different forms of evidence, which may include DNA evidence. There is no obligation to provide it. There are a number of references in the policy that where a person does not provide it that no negative inferences can be drawn from it (see pages 23, 24, 25). The policy further states at page 25 that where DNA is not volunteered, officials must not draw negative inferences and any explanations offered must not form part of the decision on the application. It said officials must weigh up all the evidence obtained from other sources, including from the Home Office.

49. Thus the policy highlights that in the absence of DNA evidence negative inferences should not be drawn from this. Ms Young on behalf of the respondent accepted that this was in the policy but submitted that it was guidance for officials and thus was not binding. I have considered that submission. However even if the guidance was designed to provide assistance to the respondent in the decision making process, it provides some basis for being careful in drawing negative inferences by the tribunal also. Such evidence is by its nature sensitive and is unclear why the sponsor's evidence concerning the lack of provision of DNA was significant evidence of a lack of parental relationship in the light of the policy guidance.

50. Furthermore, it would have been open to the FtTJ to depart from the policy guidance and state why he drew adverse inferences but to do so reasons would be required to justify drawing the adverse inference even though the respondent's position in the guidance was different.

51. This leads to ground 3 which overlaps with ground 1 and the issue of whether the appellants were related his claim to the sponsor and therefore were "direct descendants". The policy document refers to weighing up all the evidence from different sources, and this context it is submitted by Ms Aziz that there was evidence before the FtT relevant to this assessment which had not been taken into account. This related to the witness statement of the appellant VS, the

statutory declaration for the appellant's aunt and Guardian (dated March 2021), the statutory declaration from the elder of the community (page 150- 151) and the evidence of the sponsor's wife (which separately is referred to in ground 2 to which I will return).

52. The evidence from VS sets out confirmation of her history, who she lived with, contact with the sponsor who she stated was her father (paragraph 7 and 8) reference was made to the visit undertaken by the sponsor and his wife in 2016 and also issues relating to the birth certificate (paragraph 10). The statutory declaration of the elder of the community sets out that he was the elder of the community where GS was born and attended her naming ceremony. The sponsor's wife's statement sets out the circumstances of the appellants, who they lived with, arrangements put in place including change of circumstances in relation to the relative with whom they resided and at paragraph 11 sets out evidence in support of the sponsor's account concerning the introduction of the automated system for the registry in Ghana and also that she accepted the children as her own children.

53. Ms Young submitted that the FtTJ made reference to the documents and pointed to paragraph 5. The rule 24 reply does not deal with this issue. Whilst it is correct as Ms Young submitted that the judge stated at [5] that he had read and taken into account all the documents, a generalised reference to having taken into them into account does not demonstrate that an assessment has been made of that evidence. Whilst a judge is not required to set out each and every piece of evidence, the evidence relevant to the core issue, in this case whether the appellants were direct descendants of the sponsor, was contained in those documents. The judge addressed other documents such as the sponsor's letter to the appellants (at paragraph 31 – 33) which he plainly considered as adverse to the appellant's case and also that the birth certificates were issued on different dates (paragraph 27) but the other sources of evidence identified in the grounds does not appear to have been taken into account in that overall analysis. It would have been open to the judge to place the weight he thought appropriate on those documents provided reasons were given for doing so. However in the absence of considering those documents there was evidence relevant to the core issue which had not been taken into account.

54. Ms Aziz also challenged the adverse inference made by the FtTJ at paragraph [30] concerning the delay in making the application for the appellants to join him in the UK. At [30] the judge stated that the appellants' sponsor offered no explanation as to why he did not have the appellants with him after their mother passed away or why he had waited for 9 years. The point made in the grounds is at the sponsor had given an explanation and that the appellant's Guardian (the aunt) was no longer well enough to care for them and that he was also concerned about their care. This is recorded at paragraph 11. It was

also referred to in the evidence of the sponsor's wife in a witness statement (paragraph 7) which was evidence before the tribunal. Therefore before rejecting the sponsor's evidence, the explanation provided should have been considered. It is not a crucial point but nonetheless was relevant to the sponsor's credibility.

55. This brings me to ground 2 which concerns the evidence given, or not given by the sponsor's wife. The presenting officer's notes were not available and were not in the file/papers obtainable by Ms Young and both advocates agreed that it would not be necessary for the tribunal to obtain a transcript of the proceedings. Ms Young on behalf of the respondent accepts that the judge was in error at paragraph [14] where it was stated that the appellant's wife did not attend to give evidence. It is accepted as the witness statement given by the legal representative concerned sets out, that the sponsor's wife had previously indicated that she would give evidence and had attended on that day to give oral evidence. However when the presenting officer was asked if he had any questions of the witness, the presenting officer said he did not have any and it appears to be the position that the judge indicated that in the absence of any cross examination, he would take into account that evidence in the witness statement in his decision.

56. In strict terms the FtTJ was correct, the sponsor's wife did not attend to give evidence, that is, to attend to give evidence formally in court. However there is no dispute she did attend court to give evidence but was not required to as it was indicated that the presenting officer did not have questions for cross-examination. I do not consider that to be an unusual occurrence during a tribunal hearing and that when evidence is to be given it is permissible for a judge to ask whether the other party has any questions for that witness. I do not consider this to be a procedural irregularity that gave rise to unfairness as has been submitted. As Ms Young argued it would have been open to the legal representative to call the sponsor's wife to formally adopt a witness statement and ask any additional questions (if there were any). That said, I can well understand that a witness attending court and having given up their time to do so, and being unfamiliar with the court process may feel disappointed that they were not asked to give oral evidence. However, as I stated she could have been called to give evidence by the legal representative to formally adopt her statement notwithstanding the presenting officer stating that he had no questions. This is particularly the case if the appellant sponsor's wife was unhappy at not being able to express in her evidence any points she wished to make. However in a case where witnesses have not been required to give oral evidence the evidence contained in its written format still forms part of the appellant's case and is thus required to be subject to the same analysis as it remains evidence relevant in the appeal. The error asserted is therefore not a procedural irregularity but as the written grounds set out, material

evidence was not considered. I therefore have to consider whether that evidence was taken into account.

57. The sponsor's wife's witness statement sets out evidence which referred to a number of issues which has been summarised earlier in this decision. It included the change of circumstances in relation to the relative who was looking after the appellants, the appellants circumstances, the communication between them and at paragraph 11 supported the sponsor's evidence concerning the circumstances of the registry and the automated system. She also stated that she accepted the appellants as her own children and had visited Ghana in 2016. Beyond the reference made paragraph 5 as having read the documents, which would have included this witness statement, there was no analysis of the sponsor's wife's evidence as contained in her witness statement. The finding at paragraph [32] that the sponsor did not refer to his current wife as the appellant's stepmother might have been factually correct in respect of the letter that he was referring to, but the evidence contained in the sponsor's wife's witness statement gave arguably a different picture of the relationship. Whether the judge would have accepted this evidence is not known however the evidence was still arguably material to the overall issues under consideration.

58. For the reasons set out above, I am therefore satisfied that the grounds are made out. In summary as Ms Young submitted there were adverse findings made by the judge however when reaching the overall assessment I am satisfied that there was evidence material to the core issue that had not been the subject of any analysis and in the absence of such consideration I cannot state that it was not material to the outcome.

59. It is not necessary for me to consider the additional ground of challenge which arose from the oral submissions of Ms Aziz in the light of the reasons set out above upon grounds 1 – 3 as to why am satisfied that the decision of the FtTJ involved the making of an error on a point of law.

60. For those reasons given above, I am satisfied that it has been demonstrated that the decision of the FtTJ did involve the making of an error on a point of law and the decision is therefore set aside with no findings preserved.

61. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

> [7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that

party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

62. In light of the grounds which expressly challenged the assessment of the evidence and proceeded on the basis that there had been a failure to consider material evidence when reaching factual findings, there are no factual findings which can be preserved. The FtTJ dismissed their appeals, having found that the appellants had not demonstrated on the balance of probabilities that they were direct family members of the sponsor. In the light of that primary finding the FtTJ did not go on to make any factual assessment of whether the second appellant was dependent on the sponsor. That is also an issue which will require assessment. Therefore I am satisfied the appeal falls within both (a) and (b) of the practice direction above and having considered the overriding objective and the nature and extent of fact-finding that is necessary, in applying my discretion I have reached the conclusion that it is appropriate to remit the case to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal did involve the making of an error on a point of law and I therefore set aside the decision. It is remitted to the First-tier Tribunal for a hearing.

Signed Upper Tribunal Judge Reeds

Dated: 12 April 2022