IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Appeal No: UI-2024-000112

First-tier Tribunal No: HU/54508/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 4th of June 2024

Before
MR JUSTICE RITCHIE
UPPER TRIBUNAL JUDGE RIMINGTON

Between

BB
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. A Jafar instructed by Norton Folgate Solicitors.
For the Respondent: Mr. J Ojo and Ms A Ahmed of the Government Legal Department.

Heard at Field House on 23 April 2024

DECISION AND REASONS

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

Parties

1. The Appellant is an Iranian national. Her daughter, Sara, (dob 30.11.2016) is a minor and is a British Citizen. They are living in Tehran, Iran and have done so since November 2019.

The Application

2. The Appellant (d.o.b 28.5.1991) applied to the Respondent for a Visa to enter the UK and filled in a form on 13.1.2022 asking for a Visa under Appendix FM of the *Immigration Rules* on the basis of the 'parent route' (EC-PT). She was assisted and represented by Norton Folgate solicitors at the time. She set out her information in the form.

3. The Respondent (R), through her entry clearance officer, considered the application and made a decision on 22.6.2022. R considered the *Immigration Rules* (the IR), the *European Convention on Human Rights* (ECHR) and S.55 of the *Borders, Citizenship and Immigration Act 2009* (BA 2009). R specifically considered Appendix FM and paragraphs EC-PT.1.1 (and following) but decided the Appellant did not qualify under the parent route. The reasons given were that eligibility was not fulfilled specifically in relation to:
   3.1 the relationship requirements in E-ECPT 2.2. R found that Sara was not living in the UK at the time of the application.
   3.2 The Appellant did not submit evidence that she was legally separated from Sara's father or that the Applicant had sole parental responsibility for Sara.

   R also decided that the Appellant did not meet the financial requirement under E-ECPT paras. 3.1 and 3.2.

4. R went on to consider the exceptional circumstances route under para. GEN.3.2 of the IR and the best interests of the child under GEN.3.3. R concluded that the Applicant had provided no or no sufficient information or evidence to establish exceptional circumstances.

The Immigration Rules

5. In Appendix FM, paras. EC-PT state this:

> "**Section EC-PT: Entry clearance as a parent of a child in the UK**
> EC-PT.1.1. The requirements to be met for entry clearance as a parent are that-
> (a) the applicant must be outside the UK;

(b) the applicant must have made a valid application for entry clearance as a parent;

(c) the applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability–entry clearance; and

(d) the applicant must meet all of the requirements of Section E-ECPT: Eligibility for entry clearance as a parent.

Section E-ECPT: Eligibility for entry clearance as a parent

E-ECPT.1.1. To meet the eligibility requirements for entry clearance as a parent all of the requirements in paragraphs E-ECPT.A1.1. to 4.2. must be met.

E-ECPT.A1.1. The applicant must provide a passport or other document which satisfactorily establishes their identity and nationality.

Relationship requirements

E-ECPT.2.1. The applicant must be aged 18 years or over.

E-ECPT.2.2. The child of the applicant must be-

(a) under the age of 18 years at the date of application;

(b) living in the UK; and

(c) a British Citizen, settled in the UK, or in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d).

E-ECPT.2.3. Either -

(a) ***the applicant must have sole parental responsibility for the child***; or

(b) the parent or carer with whom the child normally lives must be-

(i) a British Citizen in the UK, settled in the UK, or in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d);

(ii) not the partner of the applicant; and

(iii) the applicant must not be eligible to apply for entry clearance as a partner under this Appendix.

E -ECPT.2.4.

(***a) The applicant must provide evidence that they have either-***

(i) sole parental responsibility for the child; or

(ii) direct access (in person) to the child, as agreed with the parent or carer with whom the child normally lives or as ordered by a court in the UK; and

(b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.

Financial requirements

E-ECPT.3.1. The applicant must provide evidence that they will be able to adequately maintain and accommodate themselves and any dependants in the UK without recourse to public funds

> ***E-ECPT.3.2. The applicant must provide evidence that there will be adequate accommodation in the UK, without recourse to public funds***, for the family, including other family members who are not included in the application but who live in the same household, which the family own or occupy exclusively: accommodation will not be regarded as adequate if-
>
> (a) it is, or will be, overcrowded; or
>
> (b) it contravenes public health regulations."
>
> (Emphasis: bold plus italics added by this tribunal)

6. The exceptional circumstances route is set out in GEN.3.2 thus:

> "GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.
> (2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.
> (3) Where the exceptional circumstances referred to in sub-paragraph (2) above apply, the applicant will be granted entry clearance or leave to enter or remain under, as appropriate, paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1., D-LTRC.1.1., D-ECPT.1.2. or D-LTRPT.1.2.
>
> GEN.3.3. (1) In considering an application for entry clearance or leave to enter or remain where paragraph GEN.3.1. or GEN.3.2. applies, the decision-maker must take into account, as a primary consideration, the best interests of any relevant child.
> (2) In paragraphs GEN.3.1. and GEN.3.2., and this paragraph, "relevant child" means a person who:
>
> (a) is under the age of 18 years at the date of the application; and
>
> (b) it is evident from the information provided by the applicant would be affected by a decision to refuse the application."

The FTT Appeal

7. The Appellant appealed from outside the jurisdiction to the First Tier Tribunal (FTT) by a notice dated 13.7.2022 under S.82 of the *Nationality, Immigration and Asylum Act 2002*. She asserted that R's decision was wrong "in law and fact" (para. 16). Her Grounds relied

upon the ECHR, *MF v Nigeria* [2012] UKUT 393; *Izuazu UKUT* [2013] 45; *Nagre* [2013] EWHC 720; the IR at Appendix FM the exceptional route; para. 276 ADE clause (vi) and Reg 36 of the *Immigration EEA Regulations 2016.* She asserted that she had evidenced "separation" from her husband by evidence of starting divorce proceedings in Iran; that only she cared for Sara and she accepted that Sara's passport had expired and raised her previous spousal Visa. The Appellant asserted she had evidenced the financial eligibility requirements by providing a tenancy agreement from her sponsor (N Rafiq) and bank statements showing savings of around £10,000. The Applicant relied on S.55 of the BA 2009 and asserted exceptional circumstances based on unjustifiably harsh consequences for herself and Sara staying in Iran. The Appellant relied on case law in *T (Jamaica)* [2011] UKUT 483; and [2012] Imm. AR 346; *SSHD v AM (Jamaica)* [2019] UKUT 72; *SR (Pakistan)* [2018] UKUT 334; *Maslov v Australia* (no citation given); *ZH (Tanzania) v SSHD* [2011] UKSC 4.

8. The appeal was heard by FTT Judge Bart-Stewart (the Judge) on 24th February 2023. The appeal was dismissed and the reasons were given on 30.3.2023. The Judge had before her a "stitched bundle" uploaded electronically, the Appellant's skeleton argument dated 5.10.2022 and a further skeleton argument dated 23.2.2023 (the day before the hearing). There was no authorities bundle. New evidence was put in just before the hearing. In the supplementary skeleton the Appellant submitted that she had been the victim of Transnational Matrimonial Abandonment (TMA) and this was relevant to the exceptional circumstances decision as affecting her Art. 8 rights and that this also proved disproportionality. The Judge recited evidence from the visa application form (VAF) as follows:

> "3…. She and her child live with the Appellant's parents in Iran. The application, completed by legal representatives, states that the Appellant was granted leave to enter the UK as a spouse. Her second 30 months visa was issued while she was in Iran but she remained there to take care of her mother. She is now separated and plans to divorce. She had lived in Iran for many months without her husband. He provides no support. She wished to return to the UK so that her daughter could continue with her education and be brought up with the rights, freedoms and values of the UK. She stayed in the UK from March 2014 to March 2019. She does not want her husband to know about the application as it would be detrimental to her and her daughter. She wants to start a new life without his involvement. If he were to learn that she intended to return the UK, he could stop them from exiting Iran."

9. The Judge summarised the relevant sections of the IR and R's decision on the criteria which R had found were not evidenced or fulfilled. The Judge summarised matters thus:

> "6. The Appellant's daughter needs to be living in the UK at the time of the application and the Appellant had also failed to submit evidence that

> she is legally separated from her daughter's father or that she has sole parental responsibility for her child. She had only submitted photographs, birth certificate, NHS letters, UK health records and nursery receipts for the child. She also failed to show that she meets the eligibility financial requirement as there is no evidence there would be adequate maintenance for herself and any dependent without further recourse to public funds. In the application she said that she cannot work because she looks after her daughter. Her family mainly supports her financially. She had personal savings of 100 million IRR. She had sold her car. The net income after accommodation costs are deducted is less than the level a family of that size would be entitled to as Income Support. She submitted evidence of cash savings that show for six months prior to the date of application, a minimum balance of £31.34. She also said that she relied on third party support from family members. Under Appendix FM the respondent is unable to take into account offers of financial assistance from third parties. The income support equivalent is £142.97.
>
> 7. Consideration was given to whether there were any exceptional circumstances in her case under paragraphs GEN.3.1 and GEN.3.2 and the bests interests of any relevant children, GEN.3.3, which would render refusal a breach of Article 8 of the ECHR as it would result in unjustifiably harsh consequences for the Appellant or relevant family member. It was noted that the Appellant had not submitted any evidence to suggest she has any exceptional circumstances therefore she did not qualify for grant of entry clearance outside the rules."

10. The evidence given before the FTT was on paper only, save, we were told, for one witness. The Judge noted the Appellant was in Iran. We were informed at the hearing before us that it was illegal in Iran to make video calls to give evidence to a foreign Tribunal without permission and that was not in dispute between the parties.

11. The documentation before the FTT included the VAF (January 2022), the first skeleton argument (October 2022) and the supplementary skeleton (23.2.2023) and various unsigned documents emanating from the Appellant standing as her evidence.

12. In paras. 8-11 the Judge identified how the Appellant's case had been put in the initial skeleton argument and how the last-minute supplementary skeleton argument subsequently raised *R (AM) v SSHD* [2022] EWHC 2591 *(Admin).* In the first skeleton the Appellant, through her counsel, set out how the Appellant had married Mr. Soleimani (F), a PhD student from Iran, in the UK and they had set up home and had a daughter. The Appellant submitted that F had "sent A and his daughter back to Iran" and "since 2019 the A has not had contact with him." It was submitted that F had abandoned his legal responsibility as a father to support his daughter; prevented her having a relationship with him; deprived the Appellant of her beneficial interest in the matrimonial home and deprived Sara of the right to hold him accountable. The Judge summarised at para. 10 that R, in submissions, relied

on the entry officer's and, having considered the Appellant's evidence submitted that, although the Appellant asserted she had started divorce proceedings in Iran in August 2021, there was no documentation corroborating that the divorce had been progressed. R had also taken into account that, despite the Appellant stating that since August 2021 her F 'has left Iran and has not returned to see his daughter (AB page 2)', in the translated documentation provided (AB page 54) A submitted that her husband has recently returned to Iran and has requested that he is banned from leaving due to not paying alimony. Further, despite stating that she is unable to register her daughter in pre-school without the presence of the child's father or a custody letter from the court, which A's husband refuses (AB page 2), A had provided a translated letter from her daughter's pre-school confirming her attendance. R was not satisfied that F had no involvement in Sara's life nor that the Appellant had demonstrated that she had sole responsibility for Sara and the Judge reaffirmed R's decision that the relationship requirement had not been met.

13. The Judge, at para. 11, considered the supplementary skeleton argument which,, on the eve of the hearing,, raised the TMA issue and which relied on *R (AM) v SSHD* [2022] EWHC 2591 (Admin) handed down on 14.10.2022. The Appellant asserted that she had been the victim of TMA by F. The Judge noted the evidence summarised and accepted by Lieven J. in *AM* from an NGO (Southall Black Sisters) about the details of recorded TMA as a form of domestic abuse of women and set out some details thereof.

14. The Judge held that the Appellant's case had dramatically shifted from the VAF made to R at the start in which there was no reference to TMA or domestic violence.

15. The Judge found at para. 14 that:

> "The visa application shows that she has travelled extensively. She said the reason that she remained in Iran was to take care of her mother. She could not return to the UK because her visa had expired. She and her husband were now separated and she was looking for a divorce. She wished to start a new life without her husband's involvement. There is a handwritten completed Appendix attached to the application. She refers to him being away most of the time and not taking responsibility for the child. There is no suggestion that the Appellant's husband sent or brought her to Iran and abandoned her."

16. The Judge further noted at para. 14, that the Appellant's VAF stated that the Appellant had travelled extensively. The VAF stated she had been into the UK 9 times in the last 10 years. She gave 3 examples: arrival May 2017, stayed 4 months (so leaving in September); arrival February 2018, stayed 9 months (so leaving in November); arrival March 2019, stayed 8 months (so leaving in November). She had holidayed in Saudi Arabia in 2012, Iraq in 2013, Turkey twice in 2014, Holland in 2015, Georgia and Armenia in 2017, France in 2018 and South Korea in 2021 for 2 months. The Appellant wrote:

> "I am travelling to the UK with my daughter, who is a British citizen. I have been to the UK a number of times, usually with my husband/her father. I applied for and was granted Leave to Enter the UK as the spouse of my husband. The second visa was issued when I was in Iran but the first visa had already expired. I was granted another 2.5 years visa ***but again remained in Iran to take care of my mother. However, we are now separated and I am looking for a divorce.*** We have lived in Iran for many months without my husband. He has provided no support for us during this time. We wish to return to the UK so that my daughter can continue with her education and be brought up with the rights, freedoms and values of the UK. In total I have travelled to the UK on 9 occasions, from March 2014 till March 2019. In total I have stayed in the UK with my daughter for a period of 5 years. In addition, I have travelled to Italy for holidays on 4th September 2013 until 9th September 2013 (unable to input this on the application form). I do not want my husband to know any of this, including this application, as it will be detrimental to both myself and my daughter. We are looking to start a new life for myself and my daughter without any involvement of my husband. If my husband discovers my intentions of returning to the UK he could block me & my daughter from exiting Iranian borders."
> (the bold plus italics are our emphasis)

17. The Judge went on to note the handwritten appendix to the VAF. This contained the following statements from the Appellant:

> "… my daughter has lived with me since she was born in the UK. But as my UK visa expired, we were not able to come back to the UK. Her father is away most of the time and refuses to take responsibility for our child. ***We are separating,*** but I want to come back to the UK with my daughter so she can continue her education and brought up with proper human rights.... we lived together in the UK until she was nearly four years old. I'm her only parent as her father has been away most of the time and is not keen on taking responsibility of his child. I am to put all I have to raise my child as a single parent and prepare a bright future for her. I have given my full attention in the past 5 years to my daughter. I've not been able to work as I had to fully take care of her. I've been with her for all her birthdays, first day of nursery and main milestones. …"
> "I don't work at the moment because I'm taking care of my daughter and since I'm separating, my mother and father have been fully supporting me. Since I look after my daughter alone I cannot work at the moment so my family mainly supports us financially but I also have a personal saving around 100,000,000 IR, I attached my bank letter. We (my daughter and I) are fully financially supported by my parents."
> "As mentioned in my application form, my husband and I are separating, and since then my family have had full support of me and my daughter."

(The italics and bold emphasis are ours).

18. The Judge then considered the Appellant's statement dated 20.1.2023. She recited the following from that:

> "15. …The Appellant said that she was engaged to her husband in June 2013 in Iran, obtained entry clearance as a partner in March 2014 and joined him in the UK. There were two further visas of 30 months, the last expiring in November 2020. She said that they lived together in the UK until November 2019. They moved to Aberdeen, bought a house together and the marriage started to breakdown after the birth of their child. They visited Iran every year. In 2018 while she and her daughter were in Iran the husband changed his job and moved the family to London. She and the child went there to live. She complains that her husband did not take responsibility or help to look after their daughter and was often out. She said that when they went to Iran in September 2019 she thought it was temporary but by November 2019 realised he planned to leave them there. She said that she also learned that he was in another relationship. She claimed that he said he would visit them between business trips but kept delaying the date. He also made excuses for not applying for a new visa."

19. It is clear from the Judge's findings that she considered the marriage was breaking down or under considerable strain long before the Appellant went to Iran in November 2019. The Judge then compared what the Appellant asserted about the restrictions of life in Iran with her own documents and found that the documentary evidence showed that Sara was registered in pre-school, the Appellant had a bank account and had started two sorts of legal proceedings against F. The Judge was unimpressed by the evidence from Zahra Emadi, the live witness called by the Appellant. The Judge accepted as a fact that the Appellant's relationship had broken down however did not make a finding on the evidence about when that had had occurred or that the Appellant was coerced into going to Iran and abandoned there. The Judge found as facts that the Appellant went to Iran voluntarily and she voluntarily stayed there to look after her mother and separated from her husband there. No date for separation was found. Thus, the Judge considered that the Appellant did not fit within the scope of a proper TMA categorisation.

20. The Judge then considered R's decision and ruled that the decision that the application did not meet the IR requirements for the parental route was justified. The Judge then considered the exceptional circumstances route, the ECHR Art 8, S.55 of BA 2009 and the best interests of Sara. She found that there was no objective evidence to support the Appellant's claim that she will not be able to make official decisions or interact with the authorities on behalf of her child without F's consent after they become divorced. The Judge considered the Appellant's evidence to be inconsistent and pointed out various of the inconsistencies. The Judge noted that, contrary to what the Appellant stated in her evidence, Sara was at school in Iran and had received medical care. The Judge pointed out the contradiction

between the doctor's July 2022 assertion that F had abused Sara and the Appellant's assertion that Sara had not seen F since November 2019. The Judge did not accept that there was sufficient evidence to make a finding that Sara was not well cared for and properly safeguarded in Iran. The Judge took into account that Sara was living with her mother and grandparents in Tehran and had been for half of her life and was in school there. The Judge took into account Sara's best interests in the context of the ruling in *ZH (Tanzania) v SSHD* [2011] UKSC 4. The Judge found that the whereabouts of F were "unknown". The Judge compared what would occur in the UK, were the Appellant and Sara to be granted a Visa, with her life in Iran. The Appellant would have no work, or secure accommodation in the UK and little savings. It was not clear how she would support herself without public funding. The Appellant's and Sara's links with the UK, in the absence of F, were very limited. The Judge ruled that: "I find there are no exceptional circumstances. Refusal of entry clearance is not a disproportionate violation of Article 8."

The Grounds of Appeal from the FTT

21. The Appellant appealed to the Upper Tribunal (UT). FTT Judge Dixon refused permission to appeal on 14.12.2023. The renewed Grounds for permission were dated 11.1.2024. Permission was granted by UTJ Stephen Smith on 2.2.2024 on the TMA ground and, less clearly, on ECHR grounds. Thus, there was no permitted appeal against the decision that the application did not come within the IR, Appendix FM, the parental route. The Grounds were threefold. Ground 1: an asserted a failure by the Judge properly to apply *AM v SSHD* and the Family Division Practice Direction 12J on TMA. Thus, it was asserted, in failing to apply *AM,* the Judge failed to find that the Appellant was a victim of TMA and counsel submitted:

> "7. There is no dispute that the family went together to Iran in September 2019 and that since then the relationship has broken down, that the Appellant is stranded in Iran and she receives no support from her husband either to re-enter or in terms of finance. A simple application of the law to the uncontroversial facts means that the Appellant satisfies the definition of TMA."

22. In Ground 2, the Appellant asserted that the Judge made errors of law because she took into account irrelevant matters, firstly, by imposing a high threshold on the definition of TMA which the Appellant described as "impossible to meet". Secondly, the Appellant asserted that it was unfair to find that the Appellant had dramatically changed her case. Thirdly, the Appellant asserted that she did not need to assert abandonment in the Visa application when she did not know about TMA at the time she applied. Fourthly, the Appellant sought to assert that her voluntary decision to stay in Iran until after her Visa expired could co-exist with her asserted abandonment.

23. In Ground 3, the Appellant set out a range of assertions that the Judge failed to consider relevant matters, such as the contents of the VAF which showed abandonment, the

evidence filed the day before the hearing in the form of an email from the Appellant and the information set out in counsel's skeleton argument dated October 2022, which was an extract from a Government website publication and an article from a journal entitled 'Iran Nameth' dated May 1998. It was asserted that the Judge's findings of fact on the lack of proof of TMA were irrational relying by on some of the paragraphs set out in her VAF. In addition, the Appellant's counsel wrote this at para. 14:

> "… the Judge clearly wishes to refuse the case **which gives the appearance of bias** especially when one considers how the inaccuracies and errors in the Judges legal tests and descriptions all wrongly contribute to her adverse reconstruction of the case)." (Our emboldening).

Appeals to the UT

24. The right to appeal from the FTT to the UT is provided in the *Tribunals and Courts Act 2007* at S.11, as follows:

> "11. **Right to appeal to Upper Tribunal**
>
> (1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.
>
> (2) Any party to a case has a right of appeal, subject to subsection (8).
>
> (3) That right may be exercised only with permission (or, in Northern Ireland, leave).
>
> (4) Permission (or leave) may be given by—
>
> (a) the First-tier Tribunal, or
>
> (b) the Upper Tribunal,
>
> on an application by the party".

If an error of law is found then S.12 sets out the powers of the UT thus:

> "12. **Proceedings on appeal to Upper Tribunal**
>
> (1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal—
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
>
> (b) if it does, must either—
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision.
>
> (3) In acting under subsection (2)(b)(i), the Upper Tribunal may also—

(a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;

(b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.

(4) In acting under subsection (2)(b)(ii), the Upper Tribunal—

(a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and

(b) may make such findings of fact as it considers appropriate."

25. The definition of "error on a point of law" is not set out in the Act. It was provided by the Court of Appeal in *R (Iran) v SSHD* [2005] EWCA Civ. 982 thus, per Brooke LJ:

> "**Part 2 Recent authoritative guidance: the power of the IAT to correct errors of fact …**
>
> 7. The judgments of this court in *Indrakumar v SSHD* [2003] EWCA Civ. 1677; [2004] Imm. AR 76 and *Subesh v SSHD* [2004] EWCA Civ. 56; [2004] Imm. AR 112 provided general advice to the IAT which related to the days when appeal lay to the IAT against the findings of fact by an adjudicator. So far as findings of fact were concerned, the burden lay on an Appellant to persuade the IAT not merely that a different version of the facts was reasonable and possible, but that there were objective grounds upon which the IAT ought to conclude that this different version was the right one.
>
> 8. In reviewing the findings of fact made by an adjudicator, Laws LJ made it clear in *Subesh* that the IAT were to follow these guidelines:
>
> i) It would only very rarely be able to overturn a finding of fact based on oral evidence and the assessment of credibility;
>
> ii) It could more readily overturn a finding of fact based on documentary evidence specific to the individual case (because the IAT was in just as good a position to assess such evidence), but great caution would be required in those cases where there might be an important relationship between the assessment of the person involved and the assessment of those documents;
>
> iii) The IAT would be at least as well placed as the adjudicator to assess findings as to the general conditions, or the backdrop, in the country concerned which would be based on the objective country evidence; the more so if the adjudicator had departed without solid justification from a relevant IAT country guidance decision;
>
> iv) The IAT would be entitled to draw its own inferences as to the application of those general country conditions to the facts of the particular case.

Part 3 The jurisdiction to correct errors of law: examples of errors of law commonly encountered

9. When the court gave this guidance in *Subesh*, it was aware that it would not be of any relevance to an appellate regime in which appeals were restricted to points of law. It may be convenient to give a brief summary of the points of law that will most frequently be encountered in practice:

> i) Making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");
>
> ii) Failing to give reasons or any adequate reasons for findings on material matters;
>
> iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
>
> iv) Giving weight to immaterial matters;
>
> v) Making a material misdirection of law on any material matter;
>
> vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
>
> ***vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the Appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made.***

10. Each of these grounds for detecting an error of law contain the word "material" (or "immaterial"). Errors of law of which it can be said that they would have made no difference to the outcome do not matter. This need to identify an error of law which would have made a material difference to the outcome was at the relevant time underscored by Rule 17(3) of the *Immigration and Asylum Appeals (Procedure) Rules 2003*, which provided that:

"(3) The grounds of appeal must –

(a) identify the alleged errors of law in the adjudicator's determination; and

(b) explain why such errors made a material difference to the outcome."

…

"**Part 6 Error of law: unfairness resulting from a mistake of fact**

28. The next matter we must address relates to the circumstances in which an appellate body like the IAT, whose primary role during the relevant period was restricted to identifying and correcting errors of law, could entertain an argument to the effect that the outcome in the lower court was unfair as a result of a mistake of fact, and that this constituted an error of law which entitled it to interfere.

29. In *E and R v Home Secretary* [2004] EWCA Civ 49; [2004] QB 1044 this court was concerned to provide a principled explanation of the reasons why a court whose jurisdiction is limited to the correction of errors of law

is occasionally able to intervene, when fairness demands it, when a minister or an inferior body or tribunal has taken a decision on the basis of a foundation of fact which was demonstrably wrong. Carnwath LJ gave at least eight examples in his review of the case law. Contrary to the basis on which the original decision was reached: ...

30. At para 64 Carnwath LJ said that there was a common feature of all these cases, even where the procedure was adversarial, in that the Secretary of State or the particular statutory authority had a shared interest with both the particular Appellant and with any tribunal or other decision-maker that might be involved in the case in ensuring that decisions were taken on the best information and on the correct factual basis. At para 66 he identified asylum law as representing a statutory context in which the parties shared an interest in co-operating to achieve a correct result. He went on to suggest that the ordinary requirements for a finding of unfairness which amounted to an error of law were that:

> (i) there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter;
>
> (ii) it must be possible to categorise the relevant fact or evidence as "established" in the sense that it was uncontentious and objectively verifiable;
>
> (iii) the Appellant (or his advisers) must not have been responsible for the mistake;
>
> (iv) the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning.

He made it clear that he was not seeking to lay down a precise code.

31. Needless to say, such a mistake could not be identified by the supervising or appellate court unless it was willing to admit new evidence in order to identify it. Paragraphs 68 to 89 of the judgment in *E and R* contain an analysis of relevant case law on the power to admit new evidence. It concluded with the observation that the case of *Khan v SSHD* [2003] EWCA Civ 530 that gave rise to the problem summarised in (viii) above was a good example of the need for a residual ground of review for unfairness arising from a simple mistake of fact and that it illustrated the intrinsic difficulty in many asylum cases of obtaining reliable evidence of the facts that gave rise to the fear of persecution and the need for some flexibility in the application of *Ladd v Marshall* principles.

32. The reference to *the Ladd v Marshall* principles is a reference to that part of the judgment of Denning LJ *in Ladd v Marshall* [1954] 1 WLR 1489 when he said at p 1491 that where there had been a trial or hearing on the merits, the decision of the Judge could only be overturned by the use of further evidence if it could be shown that:

> (1) the new evidence could not with reasonable diligence have been obtained for use at the trial (or hearing);

(2) the new evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive);

(3) the new evidence was apparently credible although it need not be incontrovertible.

33. By way of a final summary of the position, Carnwath LJ said in *E and R* at para 91 that an appeal on a question of law might now be made on the basis of unfairness resulting from "misunderstanding or ignorance of an established and relevant fact" and that the admission of new evidence on such an appeal was subject to *Ladd v Marshall* principles, which might be departed from in exceptional circumstances where the interests of justice required."

…

"90. It may now be convenient to draw together the main threads of this long judgment in this way. During the period before its demise when the IAT's powers were restricted to appeals on points of law:

1. Before the IAT could set aside a decision of an adjudicator on the grounds of error of law, it had to be satisfied that the correction of the error would have made a material difference to the outcome, or to the fairness of the proceedings. This principle applied equally to decisions of adjudicators on proportionality in connection with human rights issues;
2. A finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the Wednesbury sense, or one that was wholly unsupported by the evidence.
3. A decision should not be set aside for inadequacy of reasons unless the adjudicator failed to identify and record the matters that were critical to his decision on material issues, in such a way that the IAT was unable to understand why he reached that decision.
4. A failure without good reason to apply a relevant country guidance decision might constitute an error of law.
5. At the hearing of an appeal the IAT had to identify an error of law in relation to one or more of the issues raised on the notice of appeal before it could lawfully exercise any of its powers set out in s102(1) of the 2002 Act (other than affirming the adjudicator's decision).
6. Once it had identified an error of law, such that the adjudicator's decision could not stand, the IAT might, if it saw fit, exercise its power to admit up-to-date evidence or it might remit the appeal to the adjudicator with such directions as it thought fit.
7. If the IAT failed to consider an obvious point of Convention jurisprudence which would have availed an applicant, the Court of Appeal might intervene to set aside the IAT's decision on the grounds of error of law even though the point was not raised in the grounds of appeal to the IAT.

> 91. Although we have phrased this guidance in relation to the appellate regime that came to an end in April 2005, with the demise of the IAT and the birth of the AIT many of the principles we have set out in this judgment will be equally applicable when issues arise as to the identity of an error of law under the new statutory regime." (The highlighting in bold together with italics is ours).

26. The most frequently encountered errors of law may be categorised in 7 gateways, as follows:
    (1) Making perverse or irrational findings on a matter or matters that were material to the outcome;
    (2) Failing to give reasons or any adequate reasons for findings on material matters
    (3) Failing to take account material matters or failing to resolve conflicts of fact or opinion on material matters;
    (4) Givin weight to immaterial matters;
    (5) Making a material misdirection of law;
    (6) Committing a procedural or other irregularity capable of making a material difference to the outcome or fairness of the proceedings;
    (7) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, resulting in unfairness, when the Appellant and his advisors are not responsible for the mistake.

The Law on TMA

27. The Family Court *Practice Direction 12J, Child Arrangement and Contact Order; Domestic Abuse and Harm* states:

> "**Summary**
> 1. This Practice Direction applies to any family proceedings in the Family Court or the High Court under the relevant parts of the Children Act 1989 or the relevant parts of the Adoption and Children Act 2002 in which an application is made for a child arrangements order, or in which any question arises about where a child should live, or about contact between a child and a parent or other family member, where the court considers that an order should be made."…
> 3. For the purpose of this Practice Direction –"
> "domestic abuse" includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment;

> **"abandonment" refers to the practice whereby a husband, in England and Wales, deliberately abandons or "strands" his foreign national wife abroad, usually without financial resources, in order to prevent her from asserting matrimonial and/or residence rights in England and Wales. It may involve children who are either abandoned with, or separated from, their mother;**
> "coercive behaviour" means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim;
> "controlling behaviour" means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour;
> "development" means physical, intellectual, emotional, social or behavioural development"
> (Our emboldening).

28. In *AM v SSHD* [2022] EWHC 2591, Lieven J. was dealing with a judicial review of Appendix FM to the IR dealing with domestic violence leave to remain. C was a national of Pakistan who married a British man came to the UK on a spousal visa and gave birth to a daughter. She was subjected to severe financial, physical, emotional and sexual domestic abuse. The High Court made findings of very serious domestic abuse against the father which resulted in severe and long-lasting physical harm. The husband effectively forced C to travel to Pakistan, ostensibly on a holiday to resolve their marital difficulties. He reassured social services that the family would return to the UK. The family travelled to Pakistan. He went to stay with his family, while C and her daughter stayed with C's parents. He took their daughter back to the UK without C. C was stranded in Pakistan. She sought a visa which was refused. She applied on domestic abuse grounds. She sought urgency so she could attend her family court hearings. No decision was taken so she applied for urgent judicial review. The defendant was ordered to make a decision. Soon after she was granted leave short term leave. She challenged that and the application was settled but the principles involved in TMA and the lawfulness of the domestic violence paragraphs in Appendix FM were challenged and were determined by Lieven J. at the hearing. The issues arose because the indefinite visa provisions only applied to those applying from the UK not from abroad opening up TMA as a way for spouses to abandon their spouses abroad and stop them returning with leave. On TMA Lieven J. summarised the evidence before her and inter alia stated thus:

> **"30. SBS states that that the two key identifying features of TMA are the deception by which the woman is deceived into leaving the UK and the deliberate infraction of the woman's rights. TMA always occurs in the context of other forms of gender related harm and abuse, and the abandonment is often the final act of control by the perpetrator.**

> …
> 33. The Claimant's witnesses refer to a number of individual cases of TMA. Although the specific facts necessarily vary, **the core characteristics arise in all or virtually all the cases. The victims of the abandonment are women who have been the victims of domestic abuse, and the abandonment comes as the culmination of that abuse. In a very large proportion of cases the women are mothers of the perpetrator's child or children, who are either separated from their mother and brought back to the UK, or who are also abandoned. In the latter situation the child cannot return to the UK unless s/he is separated from her/his mother. In all cases, the women have had significant difficulties being able to re-enter the UK, although the scale of that difficulty and the length of time involved varies considerably**.

Lieven J. held that the IR were not unlawful in relation to that route of entry for failing to provide for applications from abroad and leaving them to apply outside the IR. She went on to find that Art. 8 was engaged, being abroad was a "relevant status" and there being no policy arguments raised against the IR covering such applicants, Lieven J. found that it was disproportionate to interfere with the victim of TMA's family life by failing to provide a similar right to non UK based applicants for their applications in the IR as was provided to UK applicants.

29. It is apparent to us from the Family Court Practice Direction and the judgment in *AM* that the definition of TMA, whilst influenced by the Practice Direction, is not defined by it. Indeed, it has been acknowledged that the family and immigration/asylum jurisdictions are very different with different legal tests and thresholds and driven by different policy considerations, *Secretary of State for the Home Department v Suffolk County Council and others* [2020] EWCA Civ. 731 [36-37].

30. There is no statutory definition. TMA is by its nature a fact specific and a flexible category. As Lieven J. noted, it exists under the umbrella of domestic abuse. There are some components involved which may be relatively clear. Firstly, because TMA is transnational, it involves the victim being abroad. Secondly, because it is based on abuse, the foreign abandonment involves the perpetrator getting the victim abroad and keeping the victim or leaving the victim abroad for the purpose of his or her own advantage. This may be by achieved by violence, threats, deceit, coercion or other nefarious methods. Thirdly, it involves a lack of informed volition by the victim, for if the travel and stay abroad by the victim are voluntary and informed, then abuse is not the cause of the travel away or the inability to get back to the UK. Fourthly, lack of finance may be involved as at least one of the barriers to the victim being able to return. Fifthly, Visa difficulties owing to the lack of assistance from the perpetrator (whether legal, practical or procedural) are likely to be another of the barriers to the victim being able to return to the UK because he/she is a foreign national. Sixthly, intention on the part of the perpetrator to abuse to victim by depriving the victim of his or her rights in the UK is a part of TMA. Seventhly, there should

probably be a position of some control on the part of the perpetrator over the victim, for if there is no such control then wherein lies the abuse? We do not seek to set out an exhaustive list and the multitude of human behaviours will no doubt throw up new situations and each case is fact specific. In her supplementary skeleton before the Judge the Appellant submitted that at para. 80 that two key identifiers of TMA are deception of the spouse into leaving the UK and deliberate infraction of her UK rights.

Submissions

31. In his oral submissions, Mr. Jafar submitted that the only requirement that the applicant in *AM* did not meet as a victim of domestic abuse was that she was not in the UK and that the Respondent did not deny serious domestic abuse to TMA victims exists. Nor did the Respondent assert that there was a public interest in refusing entry to such women and children.

32. Mr. Jafar submitted that, from the witness statement of the Appellant dated 15th November 2022, from her knowledge, F had Indefinite Leave to Remain and was in the UK so there was sufficient information to presume that he is in the UK and no evidence that this had changed. Mr. Jafar advanced that the Judge had wrongly referred to the need to show coercion or force. The Appellant's Visa had expired in November 2020 and she had no income or job and she was left without support. He added that the Judge, at para. 14, had misunderstood the evidence. Mr. Jafar submitted that the Appellant was led to believe the last time she went to Iran it was to be a short trip, although we pointed out that the Judge had noted in her VAF that she had stated that she stayed to care for her mother and the Judge had found that it was separation rather than abandonment. Mr. Jafar submitted that the Judge was mistaken over the Appellant staying to care for her mother. Mr. Jafar accepted that the Appellant could not succeed under the Immigration Rules (the parent route) but submitted the Rules had now changed and it was possible to make an application from abroad on the basis of TMA. The Judge had entirely failed to consider relevant matters such as the witness statements of 2022 and had only considered the one 2023 statement. The Judge had not considered that F needed to give permission for his wife and child to leave Iran (although the Judge, we note, had identified that the Appellant had travelled abroad from Iran since November 2019).

33. Mr. Ojo (a trainee) stated that the Appellant was not cross examined and the Judge was invited to proceed on the basis of written statements. This was not a domestic violence case. The Judge had summarised the important aspects of *AM* and made relevant findings. Credibility was an important factor and in the VAF the Appellant had written that she remained in Iran to care for her mother but in the three statements the Appellant had made there was no reference to caring for the mother (likewise in her mother's statement). This was not a rehearing. The Judge did not accept that the Appellant satisfied the definition of a victim of TMA. The Grounds failed to acknowledge that the Judge took a holistic view of the evidence. There was no indication the Judge had failed to consider the evidence. The Judge found the Appellant's evidence was not consistent. Paras.15 and 16 showed that Sara was in school and the Appellant had a bank account and had travelled to Korea in 2021.

Ground 3 was merely a dispute about the Judge's conclusion of a dramatic shift in the case. The Appellant needed to be a credible victim of TMA and the Judge simply found she was not.

34. Whilst Ritchie J. was in discussion with Mr. Ojo about the definition of TMA, 15 minutes into his submissions, Mr. Jafar objected, submitting that the hearing was unfair and was quickly supported by Ms. Jegarajah, who submitted that Mr. Jafar had been stopped from speaking on behalf of his client.

35. Ms. Ahmed, Mr. Ojo's mentor and a senior Home Office presenting officer, pointed out that Mr. Jafar had taken over two hours to make his submissions and had interrupted Mr. Ojo twice in 15 minutes. Mr. Jafar could not point to how he had had an unfair hearing. Indeed, the proceedings were adversarial by nature.

36. Mr. Jafar then asserted that new points had been taken, uncontentious issues had been raised and new points raised in an attempt to raise barriers. He asserted he had not had the opportunity to make his submissions and was "thrown off course". He asserted bias and that the panel should recuse itself. We will deal with that application at the end of this decision.

37. Ms Ahmed, with Mr. Jafar's assent, took over the representation from Mr. Ojo, following the objections raised by Mr. Jafar. She submitted this was not a domestic violence case and the Appellant had never claimed to be a victim of domestic violence. The Practice Direction was for the Family Court, not the IAC, and *AM* was a judicial review challenge to the IR. That was not the case here. There was a significant credibility issue in relation to the presentation of the case and *AM* did not bite because of the credibility issue. As the Judge found, the Appellant did not meet the definition of TMA. If the Appellant had been capable of returning on her visa, how could she be described as "stranded"? Further, as the Judge found, she was not without financial resources. The VAF pointed out that she was separated. TMA may be a form of domestic violence but each case was fact specific. The Judge found it was the Appellant who caused the loss of her rights, because she went to Iran voluntarily and stayed there voluntarily. The Judge had noted the evidence but found, at para. 19, that there was no objective evidence that it was not possible for Sara to register for school. The evidence on Iranian law referred to was in fact in the skeleton argument of Mr. Jafar and was merely general. On procedure, Ms Ahmed objected to Ms Jegarajah's intervention and submitted that there had been no unfairness.

38. Mr. Jafar replied that under the current IR, which had been changed in April 2024 (Appendix VDA), whereby victims of TMA can apply for entry clearance, all that was needed was a spousal Visa and for an abandonment overseas, for example by a husband who no longer supported the wife. The Appellant was completely under the control of her husband and that was abuse. The Appellant had applied for different schools but could not register Sara. The Judge had not taken into account R's own evidence/advice. It was absurd of the Judge to state there had been a dramatic shift in the case. R had not objected. The

Judge had made findings in complete contradiction of the evidence. The whole point was that victims did not know their rights. The Judge also misapplied the best interests of the child test. There was no requirement to show where the husband was. Initially Mr. Jafar submitted that the Appellant could not have entered the UK on her spousal Visa, between November 2019 and September/November 2020, although he then accepted that he had no clear instructions on the date when they had separated.

Applying the law to the Grounds of Appeal

39. **Ground 1. TMA and exceptional circumstances.** It is clear from the Judge's reasons that she did carefully consider TMA and the decision in *AM*. So, the Appellants' submission that the Judge failed to direct herself to apply *AM* is not made out. As to the Family Court's Practice Direction and the correct definition of TMA, the text can be split into five parts: (1) a husband in England; (2) deliberately; (3) abandons or strands his foreign national wife abroad; (4) usually without financial resources; (5) in order to prevent her from asserting her UK rights. Looking firstly at (1), the Judge found that there was inadequate evidence for her to be able to determine where F was. The Appellant has failed to raise a satisfactory case on the appeal before us that any such evidence was before the Judge. Her own evidence showed that she had tried to ban him from leaving Iran long after 2019. No address for F was provided. There was no evidence that he still worked in the UK. As the Judge recorded at para. 23, 'Her father's [the husband's] whereabouts are unknown'. As to (2) and (3) and F's intention on abandonment, the Judge did not find that there was sufficient evidence for the Appellant to discharge the burden of proof that she was intentionally abandoned by F in Iran in the TMA sense.

40. It was not correct for Mr. Jafar to assert that there was no dispute that the Applicant went to Iran in September 2019. The Appellant herself asserted that she went in November 2019 and the Judge so found. Nor was it correct to assert in the Grounds that there was no dispute that the Appellant was stranded there *by her husband*. That was not accepted by R nor found by the Judge, on sound reasoning. Even if it were not clear where F was, the Judge had found that the Appellant chose voluntarily to go to and to stay in Iran to care for her mother and did so between November 2019 and the date her Visa ran out in September/ November 2020. These submissions on material factual matters are important to get right in appeal grounds.

41. The Judge found that the Appellant travelled to Iran regularly (we note she did so annually around November) and did so again in 2019. She cared for her mother in Iran. The Judge found that the Appellant voluntarily chose to stay in Iran through 2020, before and until long past the date when her spousal Visa expired. Long before November 2019 her marriage was disintegrating and by 2021 she issued divorce proceedings. It was open to the Judge to make the findings of fact that she did on the evidence before her, which were to the effect that this was a relationship breakdown case, not a TMA case. When asked by the Tribunal during submissions what the Appellant's case was on when the Appellant was sure the relationship was over, counsel had no instructions. This undermined counsel's previous verbal submission that: the Appellant could not have entered the UK between November

2019 and September/November 2020 (so before her Visa expired) because she would have had to be honest and tell the authorities that her marriage had broken up. As to (4), whilst there was evidence that F provided no finance to the Appellant, the Judge found the Appellant had financial resources in Iran, had savings and had spent two months on vacation in Korea in 2021 and was therefore able to buy her flights back to the UK, so the financial, TMA style, abandonment criterion was not satisfied. As to (5), the Judge did not find that F had abandoned the Appellant with the intention of frustrating her UK rights in the TMA sense.

42. As to the Judge's legal self-direction on the need for the Appellant to prove coercion or deception to find TMA, we consider that there was no material error of law in the ruling. What the Judge did was to find that the Appellant's marriage was breaking down before and after November 2019 and the Appellant voluntarily went to Iran, to live with her parents and voluntarily stated that she cared for her mother and this was before her Visa expired. At para. 14 the Judge specifically found 'there was no evidence at that stage [the application] of the Appellant having been sent to Iran and abandoned' and the Judge added 'there is no suggestion that the Appellant's Husband sent or brought her to Iran and abandoned her'. Those findings on the evidence were open to the Judge.

43. Importantly, the Judge clearly did not find the Appellant's evidence credible and ruled upon this inconsistency (see for instance para. 19). Considering each of the Judge's findings of fact which is challenged, the Appellant has failed to show that the Judge made a mistake as to a material fact which could be established by objective and uncontentious evidence, resulting in unfairness and which the Appellant and her advisors were not responsible for.

44. In this appeal the Appellant has failed bring herself within category 7 of the errors of law gateways relating to established facts, as summarised above and so this Ground fails on that basis. In addition, taking the considerations in each of the 5 Practice Direction criteria outlined above into account, we find no irrationality or unlawfulness in the Judge's findings on TMA and no errors of law (properly defined) in relation to the factual findings.

45. Now that all of the challenges to the Judge's findings of fact and asserted errors of law on TMA are disposed of, we must consider whether the Judge's approach on the application outside the IR was an error of law. We consider that the Judge balanced the Appellant and Sara's non TMA circumstances in Iran, all relevant circumstances and the child's best interests in the proportionality assessment as required and without material error of law.

46. Lastly, Mr. Jafar submitted that the IR have changed since the Judge's decision and the only requirement now is that the wife was abandoned abroad. There is no requirement to show the whereabouts of the husband and even if previously required, would only need to have been shown as at the date of the application. The new Rule, was introduced in April 2024, subsequent to the decision of the Judge, even so, on the sustainable findings of the Judge the requirement of abandonment had not been fulfilled in our judgment.

47. In our judgment no error of law is made out in this appeal on Ground 1.

48. **Ground 2: Took into account irrelevant matters.** It was submitted that the Judge relied on various allegedly irrelevant matters. We have already dealt with the definition of TMA and the Judge's rulings thereon above. In relation to the assertion of the use of an "impossibly high" threshold on TMA, we do not see that the word 'impossible' used in the Grounds is logical. The twin criteria which the Judge applied were coercion and abandonment. Both are perfectly possible to prove in cases where the facts so justify. The identified allegedly wrong findings were about: (1) being sent or brought to Iran; and (2) being deceived and abandoned. We do not consider that the Judge wrongly changed the law or made an error of law. As to the allegation that the Appellant's case dramatically shifted from a parental route to a TMA claim, the VAF and the contents of it, upon the Judge relied, speak for themselves.

49. Mr. Jafar asserted that the Appellant did not need to assert abandonment in the Visa application when she did not know about TMA at the time she applied. The Judge however made specific reference to the fact that the VAF was completed by lawyers, who are immigration law specialists. We find no error in the Judge's approach. The Appellant also sought to assert that her voluntary decision to stay in Iran until after her Visa expired could co-exist with her asserted abandonment, as follows in the skeleton:

> "12. Another matter which is irrelevant to whether the husband abandoned his wife is that the Judge seems to consider that that is mutually exclusive to the Appellant "voluntarily extended her stay in Iran to look after her mother" [17]. The Appellant faced with the fact that her husband is not involved in her and her daughters life and no longer supports them will continue to look after her family in Iran, that has nothing to do with the fact of abandonment by the husband or his intentions to do so."

In this Ground the Appellant therefore appears to accept the decision to stay was voluntary. A voluntary decision to remain however does not square with abandonment and we reject that premise as advanced.

50. What the Judge did permit the Appellant to do was to put in a supplementary skeleton and seek to set out her TMA claim under the exceptional circumstances route. However, the Judge's findings on the evidence and on the Appellant's, credibility did not sufficiently make out the Appellant's TMA case. As the Judge cogently found and recorded at para. 14, the Appellant was not abandoned. As for the Appellant's assertion that R has done nothing to facilitate TMA victims entering the UK, this assertion does not need to be dealt with by this Tribunal because TMA was not found. As for para. 12 of the Grounds, we consider that if one of the constituent elements of TMA is not made out, because the Appellant voluntarily goes abroad on an informed basis and stays abroad on an informed basis and lets her Visa expire, that will not assist her in proving TMA.

51. **Ground 3: Failing to consider relevant matters.** The Appellant again seeks in this Ground to disagree with the Judge's findings of fact in relation to TMA and the shifting case point.

52. Mr. Jafar made the very serious allegation of judicial bias in his skeleton argument without objectively justifiable evidence on which to do so. Asserting that to refuse an appeal gives an appearance of bias is no such justification. Asserting that the Judge's ruling that the Appellant's case has dramatically shifted justifies such a criticism, is equally unimpressive and unsustainable.

53. We were not persuaded by the submission that the Judge only considered the witness statement from January 2023 and ignored the other witness statements from the Appellant including that from the day before the hearing. The Supreme Court in *Zoumbas v SSHD* [2013] UKSC 74, and the Court of Appeal in *Volpi v Volpi* [2022] EWCA Civ. 464, both confirm that not every piece of information needs to be referred to, the decision and reasons should be read as a whole. It was the last witness statement (save for the email referenced below) that the Judge specifically addressed and that does not indicate that the previous statements were not considered. The Judge specifically, at para. 2, referred to the documentation uploaded including the skeleton argument. It was also submitted by Mr. Jafar that some of the Appellant's statements were made prior to *AM*, but that does not undermine the Judge's point concerning the evidence given in the VAF, the inconsistency in the evidence and the overall 'shift' in the application.

54. Further, the Appellant asserted that the Judge failed to take into account evidence filed the day before the hearing from the Appellant in an undated, unsigned email with no statement of truth and no address or writer's name on it, received by her lawyers from the Appellant. That email asserted: (1) there is no NHS in Iran; (2) that her parents' connections obtained medical care for Sara; (3) that her parents paid for Sara to go to nursery school, but Sara will not be able to access any healthcare or schooling going forwards.

55. The Appellant asserts that there was evidence of serious disadvantage and harshness for Sara in Iran in relation to medical care, schooling and opening a bank account, based on her own evidence. The Judge made factual findings on the relevant matters and did not accept the Appellant's assertions in her late served email. The Judge did so on the express basis that the Appellant's own documents undermined her evidence. What the Appellant did not do is put in evidence from an expert Iranian lawyer on any of those matters. In law, the mere assertion by an appellant that there is some conflicting evidence on the findings does not constitute an error of law within gateway 7.

56. Further, the Appellant challenged the Judge's finding that the Appellant had not proven she would be unable to make official decisions for Sara after her divorce in Iran. The Appellant relied before the Judge on allegedly expert evidence on Iranian law set out in counsel's own skeleton argument dated October 2022. This was an extract from a Government website publication on child abduction in Iran. The link no longer works so we could not access the

document or determine its provenance. The document itself was not in the appeal bundle before the Judge. This evidence was not expressly accepted or rejected by the Judge. In any event, in relation to post divorce power, the guidance was expressly related to a "typical" situation and was non-specific to the Appellant's circumstances. Guardianship was stated as typically with the father and mothers were stated typically to be granted custody. The extract does not deal with a neglectful and generally absent father, who pays nothing, takes little or no part and may live abroad. It also suggests that, at puberty, the girl can choose whom she lives with. We consider that there is no material error on the part of the Judge in relation to this evidence.

57. Further, the Appellant relied on an extract which the Appellant put into her late served witness statement, from an article written by a "political scientist", from a journal entitled "Iran Nameth" published in May 1998 in Maryland USA, as an accurate summary of Iranian law at the date of her application in January 2022. We note that the article was not in the appeal bundle before the Judge. The expertise of the author is unknown but he/she was not asserted to be a fully trained Iranian family law lawyer or a lawyer at all. We note that 24 years had passed between the article and the date of the application. Expert evidence on Iranian law could have been provided from an Anglo-Iranian lawyer in England or an Iranian lawyer in Tehran. No such evidence was put before R. That is so despite that fact that the Appellant had instructed Iranian lawyers in 2021 to commence divorce proceedings and to force F to pay alimony and ban him from exciting Iran.

58. In our judgment neither of these pieces of evidence are anywhere near sufficient to make out a material error of law by the Judge in relation to the findings of fact as to Iranian law.

59. We note that the Appellant made no effective challenge to the Judge's approach to the Appellant's financial position other than to complain about the finding. We consider that the Judge's conclusions in relation to the Appellant's financial support were not unlawful, irrational or in any way errors of law.

60. Overall, the Judge made reasoned findings, including at para. 17, that the Appellant's relationship had broken down but did not accept that she was abandoned in Iran by her husband in the TMA sense and that she had voluntarily extended her stay in Iran to look after her mother and that she was separating from her husband. The Judge also reasoned, from paras. 17 – 25, as to the best interests of the child, that there was no objective evidence to support the claim that the Appellant could not make official decisions. The Judge found inconsistency in the evidence in relation to the 'health letter' on Sara which was not explained. Overall, the welfare needs of Sara were met and we consider that the Judge addressed the relevant factors.

61. Having failed to meet the IR parental route, under which the Appellant had applied, at para. 25 the Judge considered, on a basis which was open to her, that there were no exceptional circumstances. We remind ourselves of the Court of Appeal guidance, albeit dealing with

the test for a finding being "wrong", not just "wrong in law", in *Volpi v Volpi* [2022] EWCA Civ. 464, at para. 2(i) that:

> 'An appeal court should not interfere with the trial Judge's conclusions on primary facts unless it is satisfied that he was plainly wrong'.

Conclusions

62. We dismiss each of the Appellant's Grounds of appeal for the reasons set out above. We do not consider that the Judge made the asserted or any errors of law.

Procedural matters

63. The Appellant's appeal bundle did not include various of the documents upon which the Appellant relied in submissions. The index was not hyperlinked. There were no bookmarks to assist navigation by the Tribunal. The pagination was handwritten. At 9.30 am on the morning of the hearing before us, a second digital bundle was provided to us. It had been efiled the afternoon before. The Tribunal had written to the Appellant's solicitors four times, requesting compliance with filing procedure prior to the hearing. Emails were sent on 6th February 2024, 7th March 2024 (hearing notice served), 10th April 2024 and 15th April 2024. The deadline for compliance 10 days before the hearing. On 15th April 2024 the representatives were advised that 'This hearing is taking place on 23 April and the Judges require adequate time to prepare for the hearing.'

64. On 15th April, at 1604 hours, the Appellant's representatives wrote to the Tribunal inter alia stating this:

> 'We apologise for the delayed response. The delay in submitting the updated bundle is due to our instructed counsel being out of the country, and we were awaiting the submission regarding the ECHR Article 8, which was drafted by the counsel. We apologise for any inconvenience caused. Please see attached the updated bundle as per your request.

65. The Mandation Guidance issued by the Upper Tribunal (UT) President in September 2023 is a supplement to the CE-File Practice Direction issued by the Senior President on Tribunals on 31 August 2023 and is clear about the Appellant's responsibilities in relation to appeal bundles. It states:

> "A bundle which does not comply with the guidance is likely to be rejected by the Tribunal. The Tribunal might also consider using its powers under rule 10." …
>
> **"Pagination**
>
> 9. All pages of the bundle (including index pages) must be numbered in ascending order, preferably by computer generation or at least in typed form and not numbered by hand. Pagination must not mask relevant detail on the original document. The Tribunal will expect references to be made to the

bundle page numbers, not the original (or internal) page numbers on the documents.

10. The digital PDF page number must correspond to the paginated page number. Where, for example, the contents pages of a bundle are not included in the pagination, such pages should be assigned a different page range (e.g. pages (i) to (x) for the contents, substantive pagination beginning at 1, etc.). A system of numbering which comprises a letter and a number (eg A1, A2 etc) should never be used.

11. Where it is necessary to split a bundle, the pagination of each part should follow on from the preceding section, with appropriate digital page ranges assigned. For example, if the first part features pages 1 to 300, the digital and actual pagination of the second part must start at page 301.

Indexing, Hyperlinking and Bookmarking

12. A digital index or table of contents of the documents must be prepared. The index must be hyperlinked to the pages or document it refers to.

13. All significant documents and all sections in bundles must be bookmarked for ease of navigation. Bookmarks must be labelled indicating what documents they are referring to (it is best to have the same name or title as the actual document) and also display the relevant page numbers.

Format

14. Bundles should be provided in a PDF format which is suitable for use with Adobe Acrobat Reader, PDF Expert and PDF XChange Editor.

15. The default display view size of all pages must be 100%.

16. All documents must appear in portrait orientation. If an original document is in landscape orientation, it must be inserted so that it can be read with a 90 degree rotation clockwise. Documents must not appear upside down.

17. All bundles must be text based, not a scan of a hard copy bundle. If documents within a bundle have been scanned, optical character recognition ("OCR") must be undertaken so that the text is word searchable and comments and highlights can be imposed.

18. The resolution of the document must be reduced to between 200-300 DPI to minimise size and to prevent delays whilst scrolling from one page to another. File optimisation should be undertaken in order to reduce size further.

19. Any draft order or directions must also be provided separately as a Microsoft Word file, so as to assist the Judge or lawyer in reviewing, editing and approving them.

Naming

20. The file name of the PDF containing the bundle must include the UI or JR file reference and, where necessary, an indication of the number of the bundle"

66. The Mandation Guidance requires the one appeal bundle to be bookmarked, sequentially paginated in typescript and OCR readable, so cut/pastable. These are not a whimsical requests but are axiomatic to Rule 2 of *The Tribunal Procedure (Upper Tribunal) Rules 2008* at Rule 13 states:

> '13.— Sending and delivery of documents
> (1) Subject to paragraph (1A), any document to be provided to the Upper Tribunal under these Rules, a practice direction or a direction must be—
> (a) sent by pre-paid post or [by document exchange, or delivered by hand,]2 to the address specified for the proceedings;
> (b) sent by fax to the number specified for the proceedings;
> (ba) uploaded to the Upper Tribunal's secure portal; or
> (c) sent or delivered by such other method as the Upper Tribunal may permit or direct.
> (1A) A practice direction may specify for any document subject to paragraph (1)—
> (a) the requirements that must be fulfilled for it to be uploaded to the Upper Tribunal's secure portal; and
> (b) for any specified category of party in any specified category of case, that it must be so uploaded to the Upper Tribunal's secure portal.'

67. The late bundle was not delivered in accordance with the UT's appeal directions and was non-compliant.

68. Instead of excluding the late bundle and/or the original appeal bundle, we decided to allow the Appellant to proceed, relying on both. The effect of the late bundle containing many documents on which the Appellant relied in submissions, was that the Tribunal asked from time to time during the Appellant's submissions to be taken to documents in the new bundle to evidence submissions on the grounds pleaded that the Judge had failed to take into account relevant material documentation. At the hearing Mr. Jafar relied on three statements by the Appellant dated 22nd September 2022, 15th November 2022 and 20th January 2023, but they were not all located in the final uploaded bundle. The 15th November 2022 statement was in the 'updated bundle' filed on 16th April but the 'complete' bundle relied on and filed at the last minute, on the day of the hearing, contained the statement from 22nd September 2022. All statements were in the Core Case Data (CCD), the electronic filing system of the FTT, which is not linked to the UT Court Electronic (CE) filing system. During the hearing we had to access both systems to ensure we had the correct documentation. Bearing in mind the specific submission that the Judge 'misunderstood the evidence' and 'only looked at the statement of 20th January 2023' (which as we pointed out was not in the bundle, but clearly relevant) the accessibility of the documentation was vital but hampered by the presentation of the documentation.

69. In addition, because no authorities bundle was provided, the Tribunal searched for some of the cases relied upon by the Appellant online during the submissions and on some points asked for the Appellant to provide the principle of law relied on and the paragraph in the case law supporting the principle. The Appellant's counsel assisted us to navigate the various bundles during his submissions and completed his submissions in 2 hours and 15 minutes.

The unfair hearing submissions

70. As mentioned above, fifteen minutes into the Respondent's submissions, whilst the Tribunal was in discussion with the Respondent's representative about the Family Division Practice Direction on TMA, Mr. Jafar interjected and when reminded that the Respondent was responding to his submissions, alleged that the hearing was unfair and the Tribunal was biased. The Tribunal asked him to wait and provide his submissions in reply, not during the Respondent's submissions. This request triggered a barrister named Ms S. Jegarajah (who was appearing in one of the two other cases listed before us later in the day) to stand up and assert that she also considered that the Tribunal was being unfair. Ms. Jegarajah was allowed to provide her views. She asserted that as a senior member of the bar it was her duty to interject if she considered the hearing to be unfair; the hearing appeared to be treated as a substantive hearing, not an error of law appeal; the Tribunal was testing the evidence; the Respondent had very little to say; the Appellant was being tested and she was surprised that the Tribunal had stopped allowing Mr Jafar to make is representations about unfairness during the Respondent's submissions.

71. The Respondent's senior representative, Ms Ahmed, (who was mentoring Mr. Ojo) then took over with permission (and with the assent of Mr. Jafar) and submitted as follows: the Appellant had taken over two hours to make his submissions; the Respondent had been making submissions for only 15 minutes and then Mr. Jafar interrupted; the Appellant's counsel had failed to raise any real point of unfairness; the Tribunal had only asked Mr. Jafar during his submissions to justify the factual points he was raising by reference to the evidence in the bundles.

72. The Tribunal withdrew and took a few minutes to consider the timing of the interruptions then returned and invited Mr. Jafar to make all of his submissions on unfairness. We summarise them below. Mr. Jafar asserted that we had: made the hearing adversarial; made it a fact finding hearing; raised issues for which he had no notice; adopted new points against the Appellant; challenged uncontested facts (spousal visa); acted outside the scope of an independent judiciary; broken the Family Law Practice Direction into 5 parts and identified two elements which the Appellant needed to address; acted unfairly; been dismissive; been biased; made interjections; unreasonably expected counsel to be able to deal with hundreds of pages of documents; expected counsel to look at the facts instead of just the Grounds of Appeal. Mr. Jafar asserted that he had been "thrown off balance". Mr. Jafar then asked us to recuse ourselves on the grounds of inherent bias which was apparent to an objective observer (Ms. Jegarajah).

The decision on unfairness

73. The application to recuse was based on two discernible grounds: (1) the asserted apparent bias and (2) the asserted unfair interjections. We rejected the application and stated we would give our reasons in the reserved judgment. In short the application was rejected because: (1) exploring a ground of appeal and the underlying assertions is not predetermining any fact or issue, and (2) the interjections we made were requests for the Appellant's counsel to take us to the evidence supporting some of his factual assertions (mainly because a large new bundle had been filed late and Mandation not complied with) and to take us to the case law supporting some of his legal assertions. The appeal was based on three Grounds, one of which specifically identified as a: "*failure to consider the most important and elementary aspects of the evidence concerning this very disturbing case. It is submitted that the Judge's determination when read as a whole together with the evidence before her show she has not carried out the basic functions of an impartial Judge, that her decision has the appearance of bias and that the Appellant has not had a fair hearing before an impartial decision maker on relevant matters*."

74. Discussion took place about the legal definition of TMA during both the Appellant's and the Respondent's submissions to elicit the parties' clearest submissions upon that. We consider that on an appeal in which errors of law (as defined above) are raised, where there is an assertion that many findings of fact were sufficiently wrong to make them errors of law, it is important for the Tribunal to gain a clear understanding of the Appellant's case, the evidence relied upon and to clarify any lack of clarity on factual submissions or legal ones. This also provided Appellant's counsel with the fairest opportunity to address the matters which were or might be relevant. If no such issues are raised by Tribunals, then after judgment or reasons are handed down, a party may rightly say: "this was never raised for us to deal with at the hearing".

75. Guidance was given on unfair hearings in *SSHD v Elais* [2022] UKUT 00300. UTJs Rimington and Stephen Smith were concerned with an assertion of procedural irregularity through the holding of an allegedly unfair hearing in the FTT due to judicial comments. Providing a succinct summary of the law on three issues (interventions during evidence, apparent bias through pre-determining matters and unfairness) the following paragraphs are helpful:

> "**THE LAW**
>
> **The appearance of bias and preliminary judicial indications**
>
> 25. The grounds of appeal allege bias and unfairness. As the Supreme Court held in *Serafin v Malkiewicz* [2020] UKSC 23 at [38], it is important to distinguish the two; although they overlap, they are distinct. A hearing may be unfair for any number of reasons, including as a result of the conduct of the Judge, without there being any suggestion of actual or apparent bias. If there is the appearance of, or actual, bias that will have rendered the hearing unfair, but the primary error of law will be the actual or apparent bias.

26. The test for establishing unfairness differs from determining the presence of the appearance of bias. Whether a hearing was fair is an objective judicial question; either the hearing was fair, or it was not. By contrast, the question of whether there is the appearance of bias is determined by asking whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*: Porter v*
Magill [2001] UKHL 67 at [103] per Lord Hope.

27. The working definition of bias accepted by the Supreme Court in *Serafin* was taken from *Bubbles and Wine Ltd v Lusha* [2018] EWCA Civ. 468, in which Leggatt LJ said, at [17]:

> "Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case."

Bias and preliminary judicial indications

28. As to the propriety of a judicial preliminary indication and its relationship to the appearance of bias, in *Arab Monetary Fund v Hashim* (1993) 6 Admin LR 348, Sir Thomas Bingham MR held:

> "…the English tradition sanctions and even encourages a measure of disclosure by the Judge of his current thinking. It certainly does not sanction the premature expression of factual conclusions or anything which may prematurely indicate a closed mind. But a Judge does not act amiss if, in relation to some feature of a party's case which strikes him as inherently improbable, he indicates the need for unusually compelling evidence to persuade him of the fact. An expression of scepticism is not suggestive of bias unless the Judge conveys an unwillingness to be persuaded of a factual proposition whatever the evidence may be."

29. In *Harada Ltd v Turner* [2001] EWCA Civ 599 at [31], Pitt LJ identified the importance of preliminary judicial indications in directing the parties to the focus on the issues of greatest concern to the Judge:

> "Provided a closed mind is not shown, a Judge may put to counsel that, in the view of the Judge, the counsel will have difficulty in making good a certain point. Indeed, such comments from the Bench are at the very heart of the adversarial procedure by way of oral hearing which is so important to the jurisprudence of England and Wales. It enables the party to focus on the point and to make such submissions as he properly can."

30. The headnote to *Sivapatham (Appearance of Bias)* [2017] UKUT 293 (IAC) summarises the relevant principles in these terms:

> "(i) Indications of a closed judicial mind, a pre-determined outcome, engage the appearance of bias principle and are likely to render a hearing unfair.
>
> (ii) Provisional or preliminary judicial views are permissible, provided that an open mind is maintained."

31. In summary, the common law tradition of the courts and tribunals in England and Wales (and, indeed, the United Kingdom as a whole) values dialogue between the parties and the Bench. The purpose of preliminary indications is not for the Judge to indicate a closed judicial mind, or a predetermined outcome. Rather it is to enable the parties to focus on the issues of greatest concern to the Judge. Preliminary indications may enable the parties to make submissions on the essential issues that, in the Judge's preliminary view, lie at the heart of the case, and which may present the greatest obstacles to a party's case. Provided a Judge maintains an open mind to the conduct of the hearing and the determination of the issues, there can be no objection to the Judge giving an indication of the tribunal's preliminary or provisional judicial view.

The fairness of a trial

32. In *Serafin*, the Supreme Court held that the leading authority on inquiry into the unfairness of a trial remains the judgment of the Court of Appeal in *Jones v National Coal Board* [1957] 2 QB 55. Mrs Jones' husband had been killed in a mining accident. She brought proceedings against the National Coal Board. Her claim was dismissed at first instance. She appealed on the basis that the Judge, Hallett J, had adopted an overly interventionist approach to cross examination. He prevented questions from being put on behalf of Mrs Jones to the defendant's witnesses and took over large parts of the examination himself. The Coal Board made similar complaints to the Court of Appeal. Denning LJ said, at page 65, that:

> "…such interventions should be as infrequent as possible when the witness is under cross-examination. It is only by cross-examination that a witness's evidence can be properly tested, and it loses much of its effectiveness in counsel's hands if the witness is given time to think out the answer to awkward questions; the very gist of cross examination lies in the unbroken sequence of question and answer. Further than this, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he has given in chief."

33. It is often said that a Judge must not "descend into the arena". The phrase is said to find its origins in this context in *Yuill v Yuill* [1945] P. 15, 20 per Lord Greene MR. Denning LJ said in Jones, at page 65:

> "If a Judge, said Lord Greene, should himself conduct the examination of witnesses, he, so to speak, descends into the arena and 'is liable to have his vision clouded by the dust of conflict'." (emphasis added)

34. The phenomenon of judicial vision being "clouded by the dust of conflict" was illustrated in *London Borough of Southwark v Kofi-Adu* [2006] EWCA Civ 281. In contrast to Jones, the focus of the court was less on whether the Judge's conduct prevented the parties fully from participating in the proceedings (although the court was highly critical of the trial Judge's

attitude towards one of the barristers), but rather concerned the Judge's descent into the arena through extensive participation in cross-examination, which impaired his ability to perform his role properly. The court found that certain of the Judge's findings were irrational. He failed to take into account the oral evidence that had been given, despite his own extensive participation in cross-examination, and had based his findings almost entirely on the written evidence, with minimal if any regard for what had happened during the trial. At [146], Jonathan Parker LJ identified the consequences from a Judge falling into such error in these terms:

> "It is, we think, important to appreciate that the risk identified by Lord Greene MR in *Yuill v. Yuill* does not depend on appearances, or on what an objective observer of the process might think of it. Rather, the risk is that the Judge's descent into the arena (to adopt Lord Greene MR's description) may so hamper his ability properly to evaluate and weigh the evidence before him as to impair his judgment, and may for that reason render the trial unfair…" (emphasis supplied)

35. In *Serafin,* the Judge's extensive interventions aimed at the Claimant litigant in person were characterised by the Supreme Court as a "barrage of hostility", which had been "fired by the Judge in immoderate, ill-tempered and at times offensive language". In turn, that meant that the Judge did not allow the claim to be properly presented, and that he could not fairly appraise it, thereby rendering the trial unfair: [48].

36. One facet of a fair trial is the exercise of judicial restraint during the taking of evidence. In *WA (Role and duties of Judge) Egypt* [2020] UKUT 127 (IAC), the first paragraph to the headnote states:

> "During the taking of evidence a Judge's role is merely supervisory."

At [6], the Presidential Panel gave further practical guidance as to the conduct of the Judge during evidence being taken:

> "…while evidence is being taken, [a Judge] should limit himself to making sure that the evidence is given as well as may be. He should be alert to the witness's welfare; he should check that there are no obvious problems with interpretation. He will ensure that there are no undue interventions from the other side, reminding representatives, if necessary, that they will have an opportunity in due course to ask their questions. When both sides have finished their examination, he may ask questions of his own by way of clarification; if he does, he should give both sides an opportunity to ask any further questions arising from his."

37. In summary, interventions that stray beyond the merely supervisory role of a Judge during the taking of evidence risk a Judge descending into the arena and so clouding their vision by the dust of conflict."

76. The application before us did not relate to the management of live evidence, but the guidance thereon is helpful. Asking counsel to identify the evidence he relied upon in relation to assertions of factual errors, does not stray into the category of descending into

the arena. Asking counsel for his propositions of law and the authority supporting the proposition is not descending into the arena. Interruptions are not right if they are unnecessary, irrelevant, unfair, or obstruct counsel unfairly in performing his or her professional duties, but in relation to late filed evidence which the Tribunal has not been given an opportunity to read before a hearing, where the lower Tribunal's findings of fact are challenged, in our judgment, it is right and proper to ask the advocate to identify the evidence relied upon where the Tribunal needs help on the matter.

77. On this error of law appeal, the facts in the judgment below were appealed. If the Appellant was to establish material errors of law in relation to the facts, for instance to make out gateway 7 set out at para. 25 above, the Appellant needed to show, inter alia, that the Judge had made a mistake or mistakes as to a material fact which could be established by objective and uncontentious evidence, resulting in unfairness and for which the Appellant and her advisors were not responsible. In this case the Appellant's Grounds and skeleton did not address that threshold or even mention it. We considered it only right to ensure that Appellant's counsel understood the threshold and was given an opportunity to address us on the facts challenged and evidential foundations for those facts.

78. For those reasons we rejected the application to recuse ourselves. As a result of the interjection by Ms. Jegarajah and Mr. Jafar's application, considerable additional time was added to the hearing of this appeal and the two cases listed to be heard on the day, after this appeal, had to be adjourned.

Notice of Decision

We find no material errors of law in the decision of the First-tier Tribunal which will stand and the Appellant's appeal is dismissed.

The Honourable Mr Justice Ritchie

Helen Rimington
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 7th May 2024