



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: OA/17723/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 5 January 2015**

**Decision & Reasons Promulgated  
On 3 February 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**ENTRY CLEARANCE OFFICER - ACCRA  
(Anonymity Direction not made)**

Appellant

**and**

**MISS ZUNON KATTY PRUDENCE BAROAN**

Respondent

**Representation:**

For the Appellant: Mr P Nath, Home Office Presenting Officer

For the Respondent: Mr A Bajwa, instructed by Bajwa & Co Solicitors

**DECISION AND REASONS**

**The Appellant**

1. The appellant is the Entry Clearance Officer for Accra but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal, that is the Entry Clearance Officer as the respondent and Miss Zunon Katty Prudence Baroan as the appellant.
2. The appellant was born on 4 May 1996 and is a citizen of the Ivory Coast and appeals against the decision to refuse her entry clearance to join her father, Mr Zunon Sosthene Baroan, who was a citizen of the Ivory Coast.

He arrived in the UK on 28 December 2002 and applied for political asylum two days later. He was not granted refugee status or humanitarian protection but was granted discretionary leave to remain. This leave expires on 10 April 2015 when he will be eligible to apply for its extension and subsequently for indefinite leave to remain.

3. The appellant made an application under paragraph 297 of the Immigration Rules on the basis that her father had sole responsibility for her upbringing. She submitted her application on 18<sup>th</sup> May 2013 and her application was refused further to paragraph 319R (family reunion) on the basis that the father and sponsor had discretionary leave to remain in the United Kingdom and the Entry Clearance Officer was not satisfied that she was the child of a parent who had been granted leave to remain as a refugee or beneficiary of humanitarian protection under the Immigration Rules 319R(i).
4. The matter came before Designated Judge of the First-tier Tribunal J M Lewis who applied **CP (Section 86(3) and (5); wrong immigration rule) [2006] UKAIT 40** which held that where an application has been refused under the wrong Immigration Rules the Tribunal ought to determine the appeal under the right Rule unless there was not enough evidence to do so. He found that the Entry Clearance Officer had applied the wrong Rule and it was acknowledged by Mr Dasgupta (accompanied by Ms Butt) that the decision should have been made under paragraph 297 of the Immigration Rules which relates to a child wishing to join a parent in the UK.
5. Judge Lewis found that on the facts the sponsor had sole responsibility [28]. An application for permission to appeal was made on the basis that the judge had misunderstood the meaning of “present and settled in the UK” further to paragraph 6 of the Immigration Rules. As the appellant’s father and sponsor had discretionary leave to remain in the UK until 10 April 2015 he had limited leave to remain in the UK and there was no guarantee that he would be successful in any future application leading to settlement.
6. Permission to appeal was granted by First-tier Tribunal Judge Fisher. He noted that paragraph 6 of the Immigration Rules states that “settled in the UK” is to find that the judge noted as “free from any restriction on the period for which he may remain”.
7. At the hearing Mr Nath confirmed that the issue was that set out in the grounds of appeal but he had had the opportunity of discussing the matter with Mr Bajwa who had confirmed he conceded that there was an error of law.
8. Clearly paragraph 6 of the Immigration Rules which refers to “settled in the UK” is defined and as being “free from any restriction on the period for which he may remain”. There was no doubt that the sponsor’s current leave would expire on 10 April 2015 and thus he was clearly not free from

any restriction on the period for which he may remain as defined in Rule 6. I therefore find there is an error of law in relation to paragraph 9 of the decision.

9. It was agreed by both representatives that Rule 316 was not applicable but that Appendix FM (ECC) should have been considered. There were no findings in respect of the correct rule in the first instance.
10. Bearing in mind the very different provisions which would apply I set aside the decision of Judge Lewis and refer the matter to the First-tier Tribunal for consideration under the appropriate Rule and in line with **CP (Section 86(3) and (5) ; wrong Immigration Rule) [2006] Dominica UKAIT 40.**

*“Where the Secretary of State (or Entry Clearance Officer) applies the wrong immigration rule, the resulting immigration decision is technically unlawful. However, subject to the requirements of fairness, an Immigration Judge should apply the correct rule when deciding an appeal. If the appellant satisfies the requirements of the correct rule, the appeal will be allowed in full under s 86(3) of the 2002 Act. If any (or all) of the requirements are not satisfied, the appeal will be dismissed in substance under s 86(5). However, the appeal will be allowed in part under s 86(3) to the limited (and inconsequential) extent that the decision was ‘not in accordance with the law’. See also RM (Kwok On Tong: HC395 para 320) India [2006] UKAIT 00039.”*

#### **Notice of Decision**

11. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings (a different rule applies) to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement

#### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 31<sup>st</sup> January 2015

Deputy Upper Tribunal Judge Rimington

