



IAC-AH-KRL-V1

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

Appeal Numbers: OA/09868/2014  
OA/09869/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 7<sup>th</sup> March 2016**

**Decision & Reasons Promulgated  
On 25<sup>th</sup> April 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**MR SG  
MISS HG  
(ANONYMITY DIRECTION MADE)**

**Appellants**

**And**

**ENTRY CLEARANCE OFFICER - New Delhi**

**Respondent**

**Representation:**

For the Appellants: Mr B Hawkin, instructed by Fisher Meredith  
For the Respondent: Mr S Walker, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants appeal, with permission from Upper Tribunal Judge Kopieczek, against a decision of First-tier Tribunal dismissing their appeal against the refusal by the Entry Clearance Officer on 6<sup>th</sup> August 2014 to allow them entry clearance to the

United Kingdom. The appellants are citizens of Nepal born on [ ] 1995 and [ ] 2000 and on 28<sup>th</sup> November 2013 they made an application for entry clearance to join their parents, one of whom is present and settled in the UK and one of whom has limited leave to remain. At the date of the applications in 2013 it was stated in the applications that the father was British.

2. First-tier Tribunal Judge Adio dismissed the appeals making his findings further to Appendix FM, stating that the appellants were not exempt from the financial requirements as defined under paragraph E-ECP.3.3.1. Judge Adio appeared to accept that the respondent “noted that the sponsor needs a gross income of at least £18,600 per annum or if applying with one child £22,400 and an additional £2,400 for each additional child”.
3. Permission to appeal was filed, stating that the issue of discretion in relation to the relevant specified documents that the entry clearance should have considered was not exercised by the Entry Clearance Officer and further the matter should have been considered under paragraph 297 of the Immigration Rules and it was not. Further Article 8 was not considered.
4. It was apparent from the hearing that both the children remained in Nepal whilst both parents are in the UK. Mr Hawkin and Mr Walker agreed that the relevant Rule was paragraph 297 of the Immigration Rules and not Appendix FM which was applied by both the Entry Clearance Officer and Judge Adio. The relevant Rule would be Appendix 297(i)(f).
5. Both of the decisions in relation to these children, one of whom was 15 years old and one of whom was 13 years at the date of the application, revealed that the Entry Clearance Officer had applied the requirements further to EC-P.1.1(d) – Section E-ECP: “eligibility for entry clearance as a partner”. That was the incorrect Rule applied in both cases and I find that the judge adopted this error in his decision. Paragraph 297 was not considered. I therefore find an error of law and the matter should be returned as agreed by both representatives before me at the hearing to the Entry Clearance Officer for decision under the appropriate Rule. It would appear that the wrong factual matrix has been applied. I note that further to **CP (Section 86(3) and (5); wrong immigration rule) Dominica** [2006] UKAIT 00040 it can be that the Immigration Judge should apply the correct rule but also that ‘The issue of fairness will most likely arise where the substance of the correct rule differs from that applied by the decision-maker’ [18]. The rule to be applied here is not substantially the same rule.
6. The appeal is allowed to that extent set out. It is open to the appellant to submit further documentation in support of the application if the appellant so wishes. That said it is clear that the fact that both parents of the appellants are in the UK and they are effectively without their parents would suggest compelling reasons for considering them under paragraph 297(i)(f). The necessary details of the sponsor’s income and housing costs will be relevant further to **KA and Others (Adequacy of maintenance) Pakistan** [2006] UKIAT 0065 which made it clear that the yardstick to

be used was an objective comparison with the funds received by the family on income support and the level of income. The sponsor now maintains that he is employed by New Claire Wine Limited and produced evidence to that effect in the form of P60s from his employer. No challenge was made to the P60s. The sponsor had been employed by New Claire Wine on a full-time permanent basis since 1<sup>st</sup> December 2013 with an annual salary of £19,000 and also worked for Wincanton from 2<sup>nd</sup> January 2014 with an annual income of £16,445. His wife also has an annual salary of £14,144. The documentation would suggest that the sponsors have in excess of at least £30,000 per annum. No issue was taken in relation to the rented accommodation and I have no doubt that information regarding the council tax and rent would need to be submitted but it would be surprising if the sponsor could not meet the objective requirements set out in relation to income support. Clearly the relevant information would need to be submitted but the children applied in 2013. I note the father and sponsor has a British passport dating from at least 1<sup>st</sup> August 2011.

7. 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) and remake the decision under section 12(2) (b) (ii) of the TCE 2007.

#### **Order**

8. The appeal is allowed to the extent set out above in that it should be returned to the Entry Clearance Officer for a lawful decision.

#### **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. The decision involves minors.

Signed

Date 20<sup>th</sup> April 2016

Deputy Upper Tribunal Judge Rimington

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because the appeal is only allowed in that it awaits a lawful decision.

Signed

Date 20<sup>th</sup> April 2016

Deputy Upper Tribunal Judge Rimington