**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: OA/13473/2012

**THE IMMIGRATION ACTS**

| **Heard at Manchester** | **Determination Promulgated** |
|---|---|
| **on 7th November 2013** | **on 11th November 2013** |

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**ENTRY CLEARANCE OFFICER - NAIROBI**

Appellant

**and**

**KAMWANYA BENDICTE ILUNGA**
**(Anonymity order not made)**

Respondent

**Representation:**

For the Appellant: Mr Mc Veety – Senior Home Office Presenting Officer.
For the Respondent: Mr M Syed – Legal Representative.

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge Mensah promulgated on 4th June 2013 in which she allowed the appeal against the refusal of an Entry Clearance Officer (ECO) dated 6th June 2012.

2. The Appellant, a national of the DRC born on 15th August 1994, made a settlement application. The ECO was not satisfied she met the requirements of paragraph 297 of the Rules and so dismissed the appeal.

3. Before Judge Mensah it was accepted that the requirements of paragraph 297 could not be met. One of the sponsor's is a British citizen although the Appellants mother has only been granted discretionary leave and therefore could not fill the settled status category required under this rule. It was agreed that the rule which should have been considered was paragraph 301. The Judge therefore proceeded to determine the appeal by reference to this rule.

4. The Judge, from paragraph 26 onwards of her determination, makes specific findings relating to the criteria to be found in paragraph 301. In paragraph 26 the Judge finds:

> 26. Whilst it is clear documents from the DRC can be unreliable I do not feel it is appropriate to go so far as to find all documents are unreliable and taken together with the rest of the evidence I have before me I accept the appellant is the daughter as claimed and her date of birth is as claimed. I accept therefore the appellant has demonstrated on balance she is the child of a person settled and a person with limited leave to remain in the UK.

5. This paragraph encapsulates the Judge's findings regarding the ability of the appellant to satisfy the requirements of 301 (i) (a) and (ii).

6. There is no challenge to the finding under subparagraph (ii) but the finding under (i) is disputed.

**Discussion**

7. The grounds of appeal refer to the need for the Judge to have considered the issue of sole responsibility but they are poorly drafted and before the Tribunal Mr McVeety set out the true nature of the ECO's challenge. Paragraph 301 sets out the requirements for limited leave to enter or remain in the United Kingdom with a view to settlement as the child of the parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement. Paragraph 301 (i) provides:

> 301 The requirements to be met by a person seeking limited leave to enter or remain in the United Kingdom with a view to settlement as the child of the parent or parents given limited leave to enter or remain in United Kingdom with a view to settlement are that he:
>
> (i) is seeking leave to enter or accompany or join or remain with the parent or parents in one of the following circumstances:
>
> (a) one parent is present and settled in the United Kingdom or being admitted on the same occasion to settlement and the other parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement; or

(b) one parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement and has had sole responsibility for the child's upbringing; or

(c) one parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and

(ii) ……..

8. Paragraph 301 provides for a number of scenarios depending upon the status of the parents. In this appeal the child's father is in the United Kingdom and is a British citizen. The child's mother is also in the United Kingdom as she entered in 2007 and claimed asylum which was refused, although she was granted discretionary leave outside the Rules on 11th May 2011. The Judge appears to have allowed the appeal, as she was satisfied the requirements of 301 (i) (a) had been proved to be met, on the basis the Appellant is a child of a person present and settled and a person with limited leave to remain in the UK [26]. The difficulty with this finding is that the Rule contains a further requirement that the grant of limited leave to enter or remain must have been with a view to settlement. The Judge fails to address this specific requirement and in doing so has fallen into legal error.

9. Mr Syed argued that the fact the Appellant's mother has been granted leave outside the Rules, which would inevitably lead to settlement, meant the requirement was satisfied. I do not accept this argument. The points-based system is a highly prescriptive system setting out in detail individual requirements that must be satisfied before an individual is able to be awarded the points they seek. The phrase 'with a view to settlement' has a very specific meaning within the Rules.

10. When I asked the advocates to indicate whether there were any provisions of the Rules that would allow an individual to satisfy this requirement my attention was drawn to paragraph 281 which contains the requirements for leave to enter the United Kingdom with a view to settlement as the spouse [or civil partner] of a person present and settled in the United Kingdom or being admitted on the same occasion for settlement. Although it may be possible to secure settlement based upon passage of time following grants of discretionary leave, I do not find this is sufficient to satisfy the requirements of paragraph 301 as it is not specifically leave granted 'with a view to settlement'.

11. The difficulty recognised by Mr McVeety is that in the circumstances of the parents of this appellant, and any other, in which one parent is settled and the other has only been granted discretionary leave outside the Rules it is

impossible for the Appellant to succeed as the Rules make no provision for relief on these facts.

12. That the provisions of 301 (i) could not be met on the facts is correct and as such the Judge made a legal error in allowing the appeal on this basis.

13. It was also submitted the Judge had failed to deal with Article 8 ECHR but a reading of the determination shows this was dealt with by her, albeit briefly, in paragraph 34 in which the Judge finds:

> 34. In those circumstances I find the refusal to grant entry would breach the appellant's family life under Article 8 as a lawful and/or in disproportionate in those circumstances.

14. The Judge allowed the appeal under both the Immigration Rules and Article 8 but I have found legal error in relation to the Rules and find a proper Article 8 assessment as per the Razgar criteria was not undertaken, especially in light of the appeal being allowed under the Rules which appears to have been determinative of the Article 8 decision.

15. I set the determination aside and proceed to remake the appeal by allowing it under Article 8 ECHR for the following reasons.

16. When considering Article 8 issues it is necessary to consider the questions set out by Lord Bingham in paragraph 17 of the judgement in the case of Razgar [2004] UKHL 27 which are:
(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
(3) If so, is such interference in accordance with the law?
(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well- being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

17. In the situation where it is accepted parentage is as claimed, of a minor child, in relation to an application for family reunion, in which all other requirements of paragraph 301 can be met are met, the weight given to the fact that the appellant cannot satisfy the Immigration Rules must be substantially reduced; especially if the Rules make no provision for her personal circumstances.

18. I am satisfied the Appellants parents have maintained a material input into her life and provide input and support as demonstrated by the evidence. It was not

disputed before me that family life recognised by Article 8 exists and I note the positive obligation upon States to enable the development of genuine family relationships. Although it is accepted that the Secretary of State has a margin of appreciation under Article 8 and a valid legitimate aim in controlling immigration in relation to the United Kingdom, it has not been proved to be necessary in all the circumstances of this case to exclude the Appellant.

19. It was accepted the issue is one of proportionality and I am not satisfied the Secretary of State has discharged the burden of proof upon her to the required standard to show that the decision is proportionate. I allow the appeal under Article 8 ECHR.

**Decision**

20. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed under Article 8 ECHR only.**

Anonymity.

21. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order.

Signed…….
Upper Tribunal Judge Hanson

Dated the 8th November 2013