



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

Appeal Number: IA/22855/2013

THE IMMIGRATION ACTS

**Heard at Newport
On 28 April 2014**

**Determination
Promulgated
On 9 May 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ARD
(ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr J Al-Khayat instructed by Duncan Lewis & Co Solicitors

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind

the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. The Secretary of State appeals against the decision of the First-tier Tribunal (Judge A E Walker) which allowed ARD's appeal against a refusal to grant her leave as the dependant of a Tier 1 (General) Migrant under para 319H of the Immigration Rules (HC 395 as amended). The Judge allowed the appeal under Article 8 of the ECHR but dismissed the appeal under the Immigration Rules.
3. For convenience, I will refer to the parties hereafter as they appeared before the First-tier Tribunal.
4. The appellant is a citizen of Mauritius who was born on 24 January 2010. Her father has leave to remain as a Tier 1 (General) Migrant until 20 August 2014. The appellant's mother had leave as a dependant also until 20 August 2014.
5. The background to the appeal is as follows. The appellant's mother and father came to the UK on 3 October 2005, her father as a student and her mother as his dependant. The appellant was born in the UK on 24 January 2010 in Swindon. The appellant's father and mother had a second child who was born in the UK on 4 October 2011.
6. On 28 January 2011 the appellant was granted leave to remain in the UK as a Tier 1 (General) Dependant Child of her father until 2 June 2012. The appellant's leave expired on that date.
7. In October 2012, the appellant and her father visited her dying grandmother in Mauritius where they were joined subsequently by the appellant's mother. Whilst in Mauritius, her father went to the British Embassy because he realised that her leave had expired. He was told that the Embassy was closed for making applications and that all such applications were being met by the Embassy in South Africa. In any event, on re-entry to the UK, an immigration officer granted the appellant leave as a visitor for a period of six months and told her father that he needed to make an in-country application for the appellant to remain as his dependant. That application was made on 19 March 2013 but was refused in the respondent's decision of 30 May 2013 on the basis that the appellant, as she had last been granted leave to enter as a visitor, could not establish under paragraph 319H(h) of the Immigration Rules that she had or had last been granted leave to enter or remain in the UK as the child of a Points Based System migrant or as the child of a parent who had leave under another category of the Immigration Rules.
8. The appellant appealed to the First-tier Tribunal. It appears to have been accepted before Judge Walker that the appellant could not succeed under the Immigration Rules on the basis that she was not permitted to "switch" from being a visitor to a dependant of a Tier 1 (General) Migrant. However, Judge Walker allowed the appellant's appeal under Article 8

perhaps not surprisingly given that the appellant was three years of age and that her parents and sibling were lawfully in the UK on the basis that the appellant's father was a Tier 1 (General) Student and having regard to the fact that the Immigration Officer had led the appellant's father to believe that an in-country application to switch was open to the appellant.

9. The Secretary of State sought permission to appeal on the grounds, put in a nutshell, that Judge Walker had failed to take into account that the appellant's parents had entered the UK on the basis that her father was a student and that there was no expectation that her parents could therefore remain in the UK and that the effect of the decision would be to separate the appellant from her parents.
10. On 14 January 2014, the First-tier Tribunal (DJ Appleyard) granted the appellant permission to appeal.
11. Thus the appeal came before me.
12. At the outset of the hearing, I drew to the representatives' attention the wording of para 319H(h) which was the provision relied upon by the respondent to refuse the appellant's application under the Rules. At the date of decision, the requirement in para 319H(h) was as follows:

"An applicant who is applying for leave to remain must have, or have been granted leave as the child of, or have been born in the United Kingdom to, a parent who had leave under any category under these Rules." (My emphasis).
13. On behalf of the Secretary of State, Mr Richards conceded that the appellant met this requirement in that she had been "born in the United Kingdom" on 24 January 2010. Mr Richards accepted that the respondent's decision was, therefore, not in accordance with the Immigration Rules. In addition, Mr Richards did not seek to advance any grounds to challenge Judge Walker's decision allowing the appellant's appeal under Article 8 of the ECHR.
14. Mr Al-Khayat, who represented the appellant invited me to allow the appellant's appeal under the Immigration Rules and to dismiss the Secretary of State's appeal against Judge Walker's decision to allow the appeal also under Article 8 of the ECHR.
15. For whatever reason, the appeal before Judge Walker wrongly proceeded on the basis that the appellant could not succeed under paragraph 319H. It was accepted before Judge Walker that the appellant met all the requirements of paragraph 319H except for the requirement in para 319H(h). In fact, the appellant clearly did meet the requirement in para 319H(h). She was entitled to succeed in her appeal before the First-tier Tribunal under the Immigration Rules. In the light of the submissions made to me, I am satisfied that Judge Walker's decision in relation to the Immigration Rules involved the making of an error of law, in the proper application of the Immigration Rules, and cannot stand. I set that decision

aside and remake the decision allowing the appellant's appeal under the Immigration Rules, namely para 319H.

16. In addition, in the light of Mr Richards not seeking to challenge Judge Walker's decision to allow the appeal under Article 8, that decision shall also stand.
17. Consequently, the appellant's appeal is allowed under the Immigration Rules and under Article 8 of the ECHR.

Signed

A Grubb
Judge of the Upper Tribunal

Date: