IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22919/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 20 January 2015	**On 17 April 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

JABIR GULAM IBRAHIM AKKU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A B Faryl, instructed by M A Consultants (Blackburn)
For the Respondent: Mr McVeety, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Jabir Gulam Ibrahim Akku, was born on 8 April 1979 and is a male citizen of India. By a decision dated 10 May 2014, the respondent refused the appellant's application for further discretionary leave to remain in the United Kingdom on the basis of his relationship with his children (J and Z). A decision was also made to remove the appellant by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The appellant had entered the United Kingdom in

November 2000 with leave to remain as a visitor. He had remained in the United Kingdom for eight years beyond the expiry of that visit visa without making any attempt to regularise his immigration status. He left the United Kingdom in April 2008 but returned again in October 2008 with leave to remain (until 26 December 2010) as the spouse of a British citizen. On 5 February 2011, the appellant was granted discretionary leave to remain until 4 February 2014 as the parent of British children subject to conditions in respect of employment and recourse to public funds. Whilst that leave was extant, the appellant applied for further leave to remain on the basis of his parental relationship. It is that application which is the subject of this appeal.

2. The refusal letter of 10 May 2014 records that "the Home Office Policy" (more specifically IDI: Transitional Provisions (Chapter 8 – paragraph 3.3)) provides that;

> "… applicants who were granted leave under the Discretionary Leave Policy before 9 July 2012 will continue to be considered under the Discretionary Leave Policy through to settlement provided they continue to qualify for leave and their circumstances have not changed."

The letter went on to state:

> "… you were previously granted DL [Discretionary Leave] on the basis of your parental relationship with your children and that you had a contact order in place allowing you access rights to them. However, you have now provided a contact order dated 12 January 2012 stating that you are to have indirect contact only, by way of telephone calls and letters. You therefore no longer have direct access rights to your children, so the circumstances under which you were granted DL no longer subsist. Your application for an extension of Discretionary Leave is therefore refused."

The letter proceeded to consider Appendix FM. Paragraph R-LTRPT1.1 provides:

> R-LTRPT.1.1. The requirements to be met for limited or indefinite leave to remain as a parent or partner are-
>
> (a) the applicant and the child must be in the UK;
>
> (b) the applicant must have made a valid application for limited or indefinite leave to remain as a parent or partner; and either
>
> (c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
>
> (ii) the applicant meets all of the requirements of Section ELTRPT: Eligibility for leave to remain as a parent, or
>
> (d) (i) the applicant must not fall for refusal under S-LTR: Suitability leave to remain; and
>
> (ii) the applicant meets the requirements of paragraphs E-LTRPT.2.2-2.4. and E- LTRPT.3.1.; and
>
> (iii) paragraph EX.1. applies.
>
> E-LTRPT.2.4.
>
> (a) The applicant must provide evidence that they have either-

(i) sole parental responsibility for the child, or that the child normally lives with them; or
(ii) access rights to the child; 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.

The refusal letter asserted that the appellant had;

> "… not shown that you have access rights to your children only indirect contact. As a result of this you are unable to take an active role in their upbringing. Your telephone calls and letters can continue unchanged from overseas as can your child maintenance payments and any contact you have with the children's school. As such, you fail to meet the requirements of E-LTRPT 2.4."

3. The appellant appealed against the decision to the First-tier Tribunal (Judge McGinty) which, in a determination promulgated on 11 September 2014, dismissed the appeal. The arguments contained in the refusal letter found favour with Judge McGinty. He noted the contents of an order made in the Bolton County Court by District Judge Swindley dated 12 January 2012 which provided at [2]:

> "2. The mother do permit the children to have indirect contact with their father Jabir Gulam Ibrahim Akku
>
> (i) by telephone each Wednesday at 7.45pm;
>
> (ii) by occasional letters and gifts at the children's birthdays, religious festivals etc."

Judge McGinty considered that the contact referred to in the order was "indirect contact" and went on to state:

> "… contact may be maintained by means of gifts, letters and phone calls irrespective of where the appellant himself is located, whether this be in the United Kingdom or in India and it seems clear that the purpose behind the Rule in requiring access rights to the child or simply contact with the child as it is only in circumstances where the father has access rights to the child and is actually therefore physically seeing the children that his presence in the United Kingdom is thereby necessary and required in order for him to be able to physically have access to the children and to be able to enjoy his access rights. However, as the appellant does not have access rights to the children but only a right to indirect contact, he sadly does not meet the requirements of paragraph E-LTRPT2.4."

4. Mr McVeety, for the respondent, submitted that the judge's construction of the Rule was correct. Finally, Ms Faryl referred me to the provisions of the previous Rule, paragraph 248A which provided, *inter alia*, for a successful applicant to provide evidence that;

> "… he has access rights to the child in the form of a Residence Order or a contact order granted by a court in the United Kingdom or a certificate

issued by a District Judge confirming the applicant's intention to make contact with the child."

5. I reserved my decision.

6. Mr McVeety told me that, if the judge's treatment of "indirect" and "direct" contact and the construction of "access rights" in Appendix FM were to be found to be incorrect then, on the particular facts of this appeal, the appellant should be entitled to a grant of further leave to remain. He accepted that this appeal turned upon the proper construction of the words "access rights to the child"; if the latest "indirect" contact order was found to be sufficient proof of the appellant having "access rights" to his children then the respondent was prepared to accept that the appellant was "taking, and intend to continue to, take an active role in the child's upbringing." I am aware that Mr McVeety's observations were limited to the facts in the instant case and were not intended to be a concession of general application.

7. So far as the respondent's policy is concerned, I accept that the change in the nature of the appellant's contact with his child as evidenced in the latest court order arguably does represent a change in his circumstances thereby ending the appellant's entitlement to rely on the policy. I have proceeded on the basis that the appellant must satisfy the current provisions of Appendix FM if he is to succeed in this appeal.

8. In family law, prior to 1989, "access" referred to the right of a child to maintain a relationship with a parent or other relative with whom he or she did not live. The Children Act 1989 (Section 8) effected a change of nomenclature by introducing "contact orders", defined as "an order requiring the person with whom the child lives or is to live, to allow the child a visit or stay with the person named in the order or for that person of the child otherwise to have contact with each other." "Contact orders" have, in turn, now been replaced, since 22 April 2014, by the provisions of the Children and Families Act 2014. Section 12 of that Act provides for the making of a "child arrangements order" (CAO) defined as an order which "regulates arrangements relating to any of the following: (a) with whom a child is to live, spend time or otherwise have contact; and (b) where a child is to live, spend time or otherwise have contact with any person". The word "contact" is, therefore, now only used in reference to "indirect"(as opposed to face to face) communication between a parent and child; many family judges and practitioners have begun to refer to "live with" orders (formerly residence) and "spend time with" orders (that is, "direct" contact). The word "access" no longer appears in family legislation. However, because it appears in the current E-LTRPT.2.4, I shall from this point in my decision use "access" rather than "contact" or "spend time with or otherwise have contact with"

9. There is no reason why the Immigration Rules should necessarily adopt the same legal principles and terminology used in family law although it is apparent that the Rules have, albeit belatedly, attempted to reflect

changes in family legislation (e.g. the change from "access" to "contact" although, oddly, that change has been reversed in the most recent changes to the Immigration Rules.). In some instances, the Children Act provides the only source for interpreting the Rules; for example, neither Appendix FM nor paragraph 6 (Interpretation) of HC 395 provide a definition of the expression "parental responsibility" so it must follow that it has the meaning given to it by section 3 of the Children Act 1989 ("*parental responsibility" means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property*"). Moreover, the former paragraph 284 clearly sought to take account of section 1(5) of the Children Act 1989 which provides that:

> "Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all."

Where arrangements are made by agreement between parents, there will often be no court order so paragraph 284 made provision for an applicant for leave to remain to apply to a district judge for a certificate confirming an applicant's "intention to have contact with a child." The fact the Immigration Rules have sought to reflect and adopt changes in primary family legislation indicates that that legislation may assist in the construction of those Rules which deal with applications by those seeking leave to enter or remain on the basis of their relationship with children living in the United Kingdom.

10. In this appeal, Judge McGinty concluded that the Bolton County Court order did not constitute "evidence that [the appellant] has access rights to" his children. There is, however, nothing in the wording of the Rule to justify such a construction. As I have noted above, a "contact order" under the 1989 Act covered both visiting and "staying contact" but also circumstances where "the person and the child [might] otherwise have contact with each other". Likewise, Section 12 of the Children and Families Act 2014 refers to a child, "living, spending time or *otherwise having contact with any person*" [my emphasis]. No distinction is made between "direct" and "indirect" access in the primary family legislation nor is any plainly indicated in the expression "access rights." If it had been intended to make a qualitative distinction between face to face access and "indirect" access by telephone calls and letters, then such a distinction could have been included, expressed in unambiguous language, in the Rules. Furthermore, in the context of family law, it is often the case that an "indirect" access order may be intended as a preliminary to the development (often guided by the courts and CAFCASS) of more extensive access over time. "Indirect" access orders may be made when, for example, a young child has not seen a parent for a long time and needs to re-establish a relationship before moving on to spending time (and staying) with that parent. Such a process would be brought to an end if the parent is removed from the United Kingdom. On the other

hand, a court may deny a parent "direct" access because, for example, there has been a history of domestic abuse which has had a detrimental impact on the child's welfare. It is important, therefore, that, where the Family Court has ordered "indirect" access only, it may be necessary for the Tribunal (in order to determine whether an appellant can satisfy the "active role" provision) to examine the reasons why it has done so.

11. Mr McVeety submitted that it made no sense for an individual to be granted leave to remain in the United Kingdom solely in order to be able to send letters and cards to child, a form of access which might be continued from outside the United Kingdom. That may be so, but it does not justify imposing a construction on the Rule which its current wording cannot support. Accordingly, I hold that the expression "access rights" in E-LTRPT.2.4 is capable of referring to both "indirect" and "direct" access.

12. I accept that a parent who has "access rights" because he or she has a court order may not necessarily be taking "an active role in the child's upbringing" but whether or not that is the case will depend on the evidence. It is not uncommon for a parent with a "spend time with" order to lose touch with a child entirely whilst a parent with an "otherwise spend time with" (i.e. "indirect" access) order may use it to take an active role in the child's life; indeed, Immigration Tribunals have for years accepted the principle that a parent separated by thousands of miles from a child might yet exercise "sole responsibility" for the child's upbringing. In the present case, it was not correct for the respondent and the judge simply to conclude, by reference only to the nature of the access court order, that a parent who is not actually having face to face access with his child cannot, by definition, be taking an active role in a child's life.

13. Further support for the argument that "taking an active role in a child's upbringing" need not depend upon a parent and a child having regular fact to face access is provided by the Immigration Rules themselves. The provisions which I have set out above concern those seeking leave to remain in the United Kingdom; very similar provision is made at E-ECPT 2.4 for applicants seeking entry clearance from abroad as a parent. The fact that, in entry clearance cases, "direct" access is likely to be, at best, sporadic whilst parent and child live in different countries and "indirect" contact likely to be the norm does not in itself appear exclude the possibility of the absent parent taking "an active role in the child's upbringing"; if it did, then E-ECPT 2.4 would be a pointless provision.

14. Having said that, a person (including a parent with parental responsibility) who has only "indirect" access rights to a child and who is not involved in either the day to day care of the child or in making important decisions regarding the child's life may find it difficult to prove that he/she is "taking an active role in the child's upbringing.". I stress that the ability of the appellant in the present appeal to satisfy E-LTRPT.2.4 (a) (ii) was not disputed but that may not be the case in other appeals.

15. As I have noted above, the previous paragraph 284A provided for those parents who might find themselves without proof in the form of a court order of contact with a child on account of the operation of the "no order" principle of section 1(5) of the Children Act 1989. The new provision in the Immigration Rules (which refers only to "access rights") makes no such provision. It would be unfortunate if the respondent and Tribunals were to consider that a parent without a court order as having no "access rights." The word "rights" would suggest the ability to enforce access if it were to be denied, an ability which does not exist where there is no court order but only an informal arrangement. I consider that E-LTRPT.2.4 applies not only those parents who have obtained court orders for access but also to those parents whose "rights" to have access with their child are granted informally by, for example, agreement with the parent with whom the child lives.

16. I find that Judge McGinty was wrong in law to dismiss the appeal for the reasons he has given. The judge should have accepted that the contact order of Bolton County Court was evidence that the appellant had "access rights" to his children and that the appellant satisfied E-LTRPT.2.4 (a)(i). Given the respondent's concession on the particular facts of this appeal, I accept that the appellant is taking and intends to continue to take an active role in his children's upbringing. I therefore set aside the First-tier Tribunal's determination and remake the decision. The appeal against the respondent's decision dated 10 May 2014 is allowed.

Notice of Decision

The determination of the First-tier Tribunal which was promulgated on 11 September 2014 is set aside. I have remade the decision. The appellant's appeal against the decision of the respondent dated 10 May 2014 is allowed.

No anonymity direction is made.

Signed Date 2 February 2015

Upper Tribunal Judge Clive Lane