



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/03880/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 9<sup>th</sup> April 2018

Decision & Reasons Promulgated  
On 3<sup>rd</sup> May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MA  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Malik, Counsel  
For the Respondent: Mr C Avery, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge L K Gibbs dismissing her appeal against the Secretary of State's decision to refuse to grant leave to remain on the basis of her access to her child.
2. The decision of Judge Gibbs was promulgated on 6<sup>th</sup> June 2017. The Appellant was granted permission to appeal by Upper Tribunal Judge Storey. The grounds upon which permission was granted may be summarised as follows:

"The grounds disclose an arguable error of law in respect of the judge's refusal to consider that in order to satisfy the access rights requirements of the relevant Immigration Rules the Appellant had to show she had direct access to her child. The judge clearly had other concerns about the Family Court order and the

extent to which the Appellant was adhering to it (see paragraphs 13 to 14); but I cannot exclude that the arguable error regarding indirect access had a material impact on the judge's subsequent assessment."

3. I was provided with a Rule 24 response from the Respondent which all parties had the opportunity to consider before the hearing commenced.

### Error of Law

4. At the close of submissions I indicated I would reserve my decision which I shall now give. I do not find that there is an error of law such that the decision should be set aside. My reasons for so finding are as follows.
5. The grounds in essence argue that the judge's decision is wrong in relation to the interpretation of paragraph E-LTRPT.2.4(a) in relation to the access rights to a child in the UK. The appeal does not explicitly seek to challenge the judge's findings under Article 8 ECHR.
6. In relation to that paragraph of the rules, paragraph E-LTRPT.2.4.(a) and (b) read as follows:

*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) direct access (in person) to the child, as agreed with the parent or carer with whom the child normally lives or as ordered by a court in the UK; 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.*

7. As the Respondent's Rule 24 response correctly states, the relevant immigration rule specifies that there must be direct access **in person** to the child (my emphasis). Having discussed this matter with the parties it is plain that the Appellant's reliance upon the decision of *JA (meaning of "access rights")* [2015] UKUT 225 (IAC) promulgated on 17 April 2015, is not helpful to her appeal as following the promulgation of that decision of Upper Tribunal Judge Clive Lane, the Respondent amended her immigration rules by virtue of a Statement of Changes which were placed before parliament on 13<sup>th</sup> July 2015 (see Statement of Changes in the Immigration Rules HC 297). As reflected on page 21 of 25 of that Statement of Changes, against paragraph FM6, the following wording appears:

FM6. In Appendix FM in paragraph E-ECPT.2.4.(a)(ii) for "access rights to the child" substitute "direct access (in person) to the child, as agreed with the parent or carer with whom the child normally lives or as ordered by a court in the UK".

8. Thus it can be seen that the Immigration Rules were amended by the Secretary of State to incorporate a much more detailed definition of access rights to the child which were substituted with the terminology that included direct access to the child which should be in person explicitly.
9. The difficulty the Appellant faces is that the judge was plainly aware of the fact that the Appellant does not have direct access to her son as reflected at paragraph 10 of her decision. Thus, given that the Appellant does not have direct access to her son, either by way of an informal agreement with her son's biological father or stepmother, or as ordered by the Family Court, the rule cannot be met. It is clear from the rule (and also from the accompanying FM.1.0(a) guidance) that the definition of 'direct access' to the child does mean "in person" as opposed to "indirect access" as the rules *previously* stated when the decision of JA was promulgated.
10. The further difficulty that the Appellant has is that, notwithstanding the rule change, Appendix 3 and 4 annexed to JA indicate that whilst the previous Rule could have given rise to indirect access (by means of letters, telephone calls, etc.) and access via an informal agreement (between parents where there is no court order – see Section 151(5) of the Children Act 1989 (as amended)), as head note 4 of JA makes clear, it is likely to be unusual that a person having only indirect access rights will be able to satisfy the rule in its previous form, and that in some cases, Tribunals may need to examine the reasons why the Family Court has ordered indirect, rather than direct access.
11. In that regard the judge noted that the Appellant's child did not want contact with the Appellant which the judge said was important to her assessment of the best interests at paragraph 13 of her decision, but moreover at paragraph 14 of the decision, the judge stated that despite the court order which indicated that the Appellant and the stepmother were ordered to "promote the relationship" between the Appellant and her son, this had not happened. The judge correctly noted that the stepmother was in breach of the Family Court's order, but, notwithstanding minimal telephone contact and no direct contact in 2007 at all, the judge found that the Appellant had failed to make any application to return to the Family Court since 13 October 2015 to enforce the terms of the court order against the stepmother and to enforce the promotion of the relationship with her child (my emphases).
12. Thus, it was not only open to the judge to find that the interpretation of direct access had not been fulfilled in terms of the Immigration Rules, but also it was open her to find that, in any event, even if the old rules were to be an aid to interpreting access rights to a child (notwithstanding that the rules had also changed), indirect access in this event had been ordered because the child did not want contact with his mother and, notwithstanding that also, even though the Family Court had ordered the promotion of the relationship between the mother and child, the Appellant as the child's mother had not pursued enforcement of the Family Court's order which led the judge to find that family life also did not exist between the Appellant and her son. As stated by the First-tier Tribunal Judge, this is an extremely sad situation for

the Appellant but the judge's decision was correct based upon the evidence before her.

13. In this appeal as the First-tier Tribunal Judge did not find that family life existed between the Appellant and her son due to the lack of any contact between the Appellant and her son for some time, the appeal was also sadly going to fail under Article 8 as notwithstanding the Family Court's order that indirect access or contact should be promoted with a view to direct access or contact, the Appellant had not sought to enforce that order and for that reason there was no indirect access which could give rise to Article 8 being engaged.
14. In light of the above findings the decision and findings of the First-tier Tribunal is affirmed.
15. I would make a further *obiter* observation however in relation to access rights having considered this area with some care and given that there was no explanation for the statement of changes that could be discerned which effectively rendered the decision in *JA* out of date when considering a rules-based assessment alone. Notwithstanding that E-LTRPT.2.4(a) has been amended since July 2015 so that access rights to a child must be "direct" in order to secure leave *under the immigration rules*, that of course will not be the end of the matter (as the First-tier Tribunal Judge here also realised). In my view, in harmony with the view of UTJ Lane in *JA*, indirect access *can* still be of significance, as a matter to be considered *outside the rules* when applying a fair balance approach and performing a proportionality assessment, for example, if indirect access or contact is given with a view to securing direct access or contact with a child at some point in the future to facilitate the development of family life between a parent in child (in accordance with the European Court of Human Rights' decision in *Keegan v Ireland* [1994] ECHR 18; [1994] 18 EHRR 342 concerning the 'proper development of ties with a child' – which if not recognised would constitute a lack of respect for family life in breach of a positive obligation imposed by Article 8 – see [48] to [50] of that judgment). However, it is hard to see the utility in granting leave to a parent outside the rules or an appeal succeeding outside the rules if there is *no* direct contact *and* crucially if there is *no* prospect of contact developing at some point in the future also.

### **Notice of Decision**

16. The appeal to the Upper Tribunal is dismissed. The First-tier Tribunal's anonymity direction is maintained.

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

17. 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 02 May 2018

Deputy Upper Tribunal Judge Saini