



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

Appeal Number: IA/02959/2015

THE IMMIGRATION ACTS

**Heard at Newport
On 20 November 2015**

**Determination Promulgated
On 29 December 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

RLK

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Joseph Edwards, Counsel, instructed by Just Legal Group

For the Respondent: Mr Irwin Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.
2. The appellant appeals against the decision of the First-tier Tribunal dismissing the appellant's appeal against a decision taken on 14 January

2015 to refuse to grant further leave to remain and to remove the appellant from the UK.

Introduction

3. The appellant is a citizen of India born in 1982. She entered the UK legally on 23 October 2003 as the spouse of a UK citizen, KG. Their child, K, was born on 1 November 2004 and she is a UK citizen. The appellant left the family home in December 2004. She claims to be the victim of domestic violence and the parties were divorced on 4 August 2005. The appellant was granted indirect contact with K in 2008. The appellant claims that she has been torn between her desire to be with K and conceded to indirect contact to avoid K being put under stress. The appellant was granted discretionary leave to remain on 25 November 2011 but the respondent refused her application under the domestic violence concession. The appellant made an application in 2013 for direct contact with K. CAFCASS recommended that the indirect contact should continue. It was difficult to establish if direct contact was in the best interests of the child because she would be emotionally destabilised, at least in the short term. K said that she did not wish to meet the appellant. The appellant withdrew her application for direct contact on 10 December 2013 because she did not wish to upset K. Indirect contact was to continue no more than 6 times a year.
4. The appellant applied on 28 October 2014 for active review of discretionary leave to remain in the UK on the basis of her family and private life in the UK. The respondent decided that the previous grant of discretionary leave was to allow the appellant to pursue direct contact with K and was not satisfied that those grounds still persisted. The application for further discretionary leave was refused. The appellant did not meet the requirements of Appendix FM or paragraph 267ADE of the Immigration Rules.

The Appeal

5. The appellant appealed to the First-tier Tribunal and attended an oral hearing at Stoke on 21 April 2015. She was represented by Ms Dasani, Counsel. Ms Dasani conceded that the appellant could not meet the requirements of Appendix FM and that she had no family life in the UK. The First-tier Tribunal judge found that the appellant had no contact with K by virtue of a court order and that she had no intention of seeking any direct contact for another three years. The judge decided that removal of the appellant would not prejudice the best interests of K and that, following a full Article 8 assessment; it would not be disproportionate to remove the appellant to India. There was inadequate reliable evidence that the appellant could be maintained economically in the UK, her private life was established when her immigration status was precarious, the appellant had never had a legitimate expectation that she could make the UK her home, the appellant had a family and a house in India, she could continue relations with family and friends in the UK by telephone or

periodic visits, it was in the best interests of K that the appellant had no direct contact with her, removal would not prevent future applications and the appellant had not proved that she was the victim of domestic violence in the UK.

The Appeal to the Upper Tribunal

6. The appellant sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law. The judge erred in finding that there was no court order for contact as the appellant has an indirect contact order since 2007 and further consideration should have been given to the parent route under Appendix FM. The judge further erred in not considering indirect contact as a contact order within the Immigration Rules. The judge failed to consider whether the appellant was a victim of domestic violence which was never litigated as the appellant was not granted a right of appeal. There was no change of circumstances since the last grant of discretionary leave. Contact will be sought at some point when K is older; the CAF/CASS report was produced at a time when K was young and confused and influenced by the father not to allow the appellant to see K. The Article 8 assessment was inadequate.
7. Permission to appeal was granted by Upper Tribunal Judge Chalkley on 20 August 2015. The appellant's hopes should not be raised unduly but it was arguable that the judge may have erred for the reasons given in the grounds. Permission to appeal was granted on all grounds.
8. In a rule 24 response dated 25 August 2015, the respondent stated that there was a concession by the appellant's representative that the only issue to be considered was Article 8. The judge considered the factual matrix of the case, considered the best interests of the child, considered Article 8 and arrived at conclusions that were open to him. There was no material error of law in the decision.
9. Thus, the appeal came before me

Discussion

10. Mr Edwards submitted that there was an error of law at paragraph 29 of the decision. The appellant did have indirect contact and the judge failed to consider the second limb of E-LTRP.2.4; the appellant is pursuing an active parenting role through letters. That is grounds for a remittal. The Family Court and the First-tier Tribunal go through the same process for considering best interests and it is not correct to state at paragraph 42 of the decision that the appellant was prohibited by court order from having direct contact. The court simply declined to order that direct contact take place and the order permits any contact that the parties might agree. The judge did not properly consider best interests or weigh the best interests

in the Article 8 consideration. The appellant submitted the required evidence in relation to domestic violence and the judge did not address it because of the concession at paragraph 22 of the decision. The errors of law contaminate the Article 8 assessment at the very least.

11. Mr Richards submitted that the judge found at paragraph 67(xi) of the decision that the appellant had not proved that she was the victim of domestic violence. The judge was faced with an appellant who was represented by counsel who made concessions and the judge had to act on those concessions (paragraphs 22 and 54 of the decision). The judge was only left with Article 8 private life and dealt with it in an appropriate manner. It was not appropriate to argue the case on a different basis today. Paragraphs 37-44 of the decision conclude that removal would not prejudice the best interests of the child, K. Where did the judge go wrong if he did what counsel asked him to do? No material error of law arises and the appeal should be dismissed.
12. Mr Edwards submitted in reply that JA (Meaning of “access rights”) India [2015] UKUT 225 (IAC) was only promulgated on 2 February 2015 and the concessions were made in ignorance of that authority. The concessions on family life and Appendix FM should not have been made. The judge was wrong to accept the concessions. Paragraph 42 of the decision is an obvious and fundamental error which undermines the judge’s conclusions on best interests. The finding at paragraph 67(xi) is wholly unreasoned; domestic violence must have remained as a live issue and that paragraph is inadequate.
13. I have considered JA. From paragraph 10, 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 such a distinction then that 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 spend time with a parent. The expression “access rights” in E-LTRP.2.4 is capable of referring to both “indirect” and “direct” access. The remaining issue is whether the appellant is taking an active role in K’s upbringing and intends so to continue.
14. In this case, the judge found at paragraphs 42-43 of the decision that the appellant was prohibited by a court order from having direct contact with her child in the UK and had no intention of seeking any such contact for another 3 years. The CAFCASS report of 27 November 2012 indicated that it was not in the best interests of K to have direct contact with the appellant; the author of the report was concerned about the emotional impact of contact upon K and K was adamant that she did not wish to meet the appellant. The judge did not consider Appendix FM because

counsel conceded that the appellant could not succeed under the Rules. I am satisfied that concession was incorrectly made, for the reasons set out above. The judge cannot be criticised for approaching the appeal on the basis of Article 8 outside the Rules only given the concession and the fact that JA was not cited or available to the judge. However, the absence of any consideration of E-LTRP.2.4 is a material error of law which could result in a different outcome to this appeal.

15. I accept Mr Edward's submission that the wishes and feelings of K are not immutable. She did not wish to see the appellant as of November 2013 when she was aged 9. However, as she grows up, her attitude might change and to remove the appellant would potentially foreclose any prospect of a meaningful relationship between the appellant and K. The order of District Judge Nisa dated 10 December 2013 did not prohibit any form of contact. The application for direct contact was withdrawn upon the father agreeing to encourage K to engage in indirect contact taking into account her wishes and feelings and further agreeing to send K's annual school report to the appellant. The order goes on to state that, "There shall be such further or other contact as the parties may from time to time agree".
16. I also accept that the finding at paragraph 67(xi) that the appellant had not proved that she was the victim of domestic violence in the UK is not supported by an analysis of the evidence. Again, the judge cannot be criticised because the domestic violence issue was not the central feature of the oral submissions made on behalf of the appellant in the First-tier which appear to have focussed on Article 8 outside the Rules. However, the appellant was granted three years discretionary leave to remain on 25 November 2011 after her application for indefinite leave to remain as a victim of domestic violence was refused on the basis that there was insufficient detail in the submitted police report to "establish conclusively" that she had been a victim of domestic violence. I find that there are significant issues in relation to domestic violence and the previous grant of discretionary leave to remain which have not so far been addressed in this appeal.
17. Thus, the First-tier Tribunal's decision to dismiss the appellant's appeal under the Immigration Rules and the Human Rights Act involved the making of an error of law and its decision cannot stand.

Decision

18. Mr Edwards invited me to order a rehearing in the First-tier Tribunal if I set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. I find that the error of law infects the decision as a whole and therefore the re-hearing will be *de novo* with all issues to be considered again by the First-tier Tribunal.

19. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined *de novo* by a judge other than the previous First-tier judge.

Signed 

Date 14 December 2015

Deputy Judge of the Upper Tribunal
Judge Archer