Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/11242/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 2nd October 2015	**On 14th October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ISHRAT MEMOONA

Respondent

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Benjamin Hawkin (counsel) instructed by HRS Solicitors LLP

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. An anonymity direction was made previously in respect of this Appellant, but there is no indication that any risk is created to the appellant by participating in the appeal process. No application is made for an anonymity direction. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a

decision of First-tier Tribunal Judge Kimnell, promulgated on 15 May 2015 which allowed the Appellant's appeal.

Background

3. The Appellant was born on 14 March 1973 and is a national of Pakistan.

4. On 22 August 2014 the Secretary of State refused the Appellant's application for entry clearance as the parent of a child present and settled in the UK.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Kimnell ("the Judge") allowed the appeal against the Respondent's decision under the Immigration rules.

6. Grounds of appeal were lodged and on 20 July 2015 Judge Davies gave permission to appeal stating *inter alia*

> *"The Judge has not considered at all whether the Appellant currently does or will in the future take an active role in the child's upbringing"*

The Hearing

7. Ms Everett, for the respondent, adopted the terms of the grounds of appeal and argued that the decision contains a material error of law because the test set out in paragraph E-ECPT 2.4 is a two-part test. She argued that at [17] and [18] of the decision the judge failed to carry out the second part of the test; i.e. the judge ignored the requirement for evidence that the appellant is taking and intends to continue to take an active role in the child's upbringing. Ms Everett relied on the cases of JA (meaning of "access rights") India [2015] UKUT 225 (IAC), and TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 . She asked me to set aside the judge's decision and to remake the decision of new.

8. Mr Hawkin, counsel for the appellant, told me that the decision does not contain a material error of law, and that the judge correctly directed himself in [17] and [18] by specifically applying the test in TD Yemen, and considering the case of JA (meaning of "access rights") India. At [14] the judge sets out the two-part test required by paragraph E-ECPT 2.4, and thereafter applies that test. He took me through the judge's decision emphasising parts of [16], [17] & [18] where he argues that the judge expressly found that the appellant is taking, and intends to continue to take, an active role in the child's upbringing. He urged me to dismiss the appeal.

Analysis

9. In JA (meaning of "access rights") India [2015] UKUT 225 (IAC) it was held that (i) where the Immigration Rules are silent as to interpretation, it may be necessary to refer to the Children Act 1989 (as amended) and other family legislation in order to construe those parts of the Rules which provide a route to entry clearance or leave to remain as a parent; (ii) "*Access*" in the latest version of the Immigration Rules means the same as "*contact"* in the previous paragraph 284A. Neither term is now used in the Family Court where Child Arrangements Orders are made to regulate "(*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*."; (iii) The expression "*access rights*" in paragraph E-LTRPT.2.4 (a) (i) may refer equally to parents who have "*indirect*" access to a child by means of letters, telephone calls etc as well as to those who spend time with a child ("*direct*" access). A parent may also have "*access rights*" where there is no court order at all, for example, where parents agree access arrangements (the "*no order*" principle; section 1(5) of the Children Act 1989 (as amended)); (iv)Having satisfied the requirements of paragraph E-LTRPT.2.4 (a) (i), an appellant must still prove that he/she "*is taking and intend to continue to take an active role in the child's upbringing*"(paragraph E-LTRPT.2.4 (a) (ii)). Whether he/she will be able to do so will depend upon the evidence rather than the nature of the "*access rights*." However, it is likely to be unusual that a person having only "*indirect*" access rights will be able to satisfy this provision. In some cases, Tribunals may need to examine the reasons why the Family Court has ordered *"indirect"* rather than "*direct"* access.

10. In this case it is beyond dispute that the appellant has indirect access to her child. That is quite clearly because she lives in a separate country. At [14] the judge clearly sets out the two-part test in by paragraph E-ECPT 2.4. In [17] of the decision the judge repeats the two-part test, and specifically finds that the appellant has access rights. He then goes on to say that there is evidence of contact which will continue. It is implicit that the judge finds that evidence to be persuasive. He concludes [17] by saying "*if the appellant comes to the United Kingdom she will have a parental relationship with the child in question".*

11. At [18] of the decision the judge finds that "*the sponsor and parent in the UK will not stand in the way of his separated wife playing a parental role*". The judge does not use the language found in paragraph E-ECPT 2.4, but it is quite clear from a fair reading of the decision that the judge applied to part test required by paragraph E-ECPT 2.4, and found that there was sufficient evidence to satisfy those parts of the test. The conclusion reached by the judge after he correctly directed himself in law is a conclusion which was open to the judge to reach.

12. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the

requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue under argument. Disagreement with an Immigrations Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. I find that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

14. I therefore find that no errors of law have been established and that the Judge's determination should stand.

DECISION

15. The appeal is dismissed.

Signed

Deputy Upper Tribunal Judge Doyle