Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31904/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Decision & Reasons Promulgated**
On 20 April 2017	**On 11 May 2017**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR DOUGLAS WILLON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Norman, Counsel, instructed by RBM Solicitors
For the Respondent: Mrs H Aboni, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Malawi, has permission to challenge the decision of First-tier Tribunal Judge Juss sent on 9 September 2016 dismissing his appeal against the decision made by the respondent on 17 June 2015 refusing him leave to remain.

2. The appellant's grounds have two main limbs. First, issue is taken with the judge's statement at paragraph 14 that "there is no evidence of substantial and ongoing influence over their development" [that of the two

British citizen children born in July 2007 and March 2011 respectively.] The grounds continued that the appellant had shown clear evidence that he has direct contact with his children at their school and attends their sports days and parents' evenings. Reference was made to a letter the appellant provided from his daughter's school to that effect.

3. In oral submissions Ms Norman advanced a second point which was that the judge had also erred in the same paragraph in respect of the legal criteria he had to apply whether or not there would be disruption of the contact arrangements. (At paragraph 14 the judge wrote that "... the evidence is not such as to demonstrate that any disruption to the current arrangements between the appellant and the children is going to have a detrimental effect on the children's lives.").

I am grateful to both representatives for their concise submissions.

4. I should mention that Ms Norman informed the Tribunal at the start of the hearing that there was a Family Court order made on 13 December 2016 stopping direct contact between the appellant and the children and a further order dated 16 March 2017 directing a fact-finding hearing to consider allegations made by the appellant's ex-partner. I explained that I am tasked with deciding whether the FtT judge erred in law in the decision he made and in deciding that matter I cannot have regard to evidence that was not before the judge. Nevertheless I conclude it was right of Ms Norman to apprise the Tribunal of the latest position and such evidence would of course be relevant if I found a material error of law.

5. I am not persuaded however, that there was a material error of law. It will assist if I first of all set out what Judge Juss said in full in paragraphs 14 and 15:-

> "14. First, although there are emails between the Appellant and [YM] (see C1 to C3) and a parenting agreement (see C4 to C8) as well as various other e-mails (see C9 to C17), together with academic reports that the Appellant has produced (see D1 to D7), the evidence is not such as to demonstrate that any disruption to the current arrangements between the Appellant and the children is going to have a detrimental effect on the children's lives. I notice that there are photographs in the bundle showing the Appellant in close contact with his children. Nevertheless, there is no evidence of substantial and ongoing influence over their development. Although my attention has been drawn to the case law, and in particular to **JA (meaning of 'access rights') India [2015] UKUT 225**, and although that case stands as an authority for the principle that, '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), can come under the definition of 'access rights', the evidence before this Tribunal is not persuasive that the Appellant has got such indirect access to the children in the manner alleged. In his evidence before the Tribunal, the Appellant stated that he had not as yet initiated court proceedings to have formal access, although he was

minded to do so. However, it is clear that the evidence at present does not come up to the requisite level.

15. Second, as far as the Appellant's relationship with his current partner, Ms [N] is concerned, I note that she is a British citizen, and my attention has been drawn to the document at H14 in the form of a gas bill for the address where they live together, there is no reason why the Appellant cannot return back to his country and make a formal application for entry clearance to join Ms [N] in this country in the appropriate manner. The Appellant cannot succeed under the Immigration Rules for the reasons that have been set out in the refusal letter. However, he cannot succeed under freestanding Article 8 jurisprudence either."

6. From the above I am satisfied firstly that the judge took account of all the evidence that was placed before him including the school letters. Secondly, I am satisfied that when the judge referred to there being "no evidence" he meant only to denote evidence of substantial and ongoing influence over the children's development. He was plainly aware there was some contact and some degree of influence. Third, I consider this to be a finding of fact that was entirely open to him on the evidence. The appellant has not lived with the children for several years. He resides in Birmingham; his ex-partner and children reside in Worthing. In the case of the oldest child, he was not in the country for the first four years of her life. Since the appellant and his partner became estranged, he has had direct contact but the evidence before the judge did not demonstrate that such contact with the children was regular and frequent. The direct contact he was enjoying with them at the date of the hearing was limited to attendance at school events and did not extend to him seeing the children outside of school or the children going to stay with him. The last time he was allowed to take the children to his own accommodation was in February 2015.

7. It must be borne in mind that what the judge had to assess in the first instance was whether the appellant met the requirements of E-LTRP.2.4 of the Immigration Rules which require that:

(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) <u>access rights to the child; and</u>

<u>(b) the applicant must provide evidence that they are taking and intend to continue to take, an active role in the child's upbringing.</u>

8. In the appellant's case he had not provided evidence of access rights to the children. He had provided evidence of family mediation and Ms Norman is right to mention that family mediation is often a step prior to Family Court proceedings, but the fact remains that at the date of hearing

he did not have any access rights. Further and in any event, the evidence he had provided of contact was reasonably considered by the judge not to demonstrate that he was and would continue to take an active role in the children's upbringing. Ms Norman is quite correct to emphasise that the Upper Tribunal held in **JA (meaning of "access rights") India [2015] UKUT 225 (IAC)** that taking an active role does not necessarily require having regular face to face access, but the Tribunal in that decision went on to state in paragraph 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'."

9. Given that the appellant's direct contact in this case was limited to school events. I consider this paragraph deals properly with the evidence that the judge had to assess and that it confirms that there was no error in the judge's approach to the issue of "active role".

10. As regards the second limb of the grounds as developed by Ms Norman, (regarding legal criteria to be applied to disruption of contact arrangements) I find it lacks merit. For one thing the judge's statement in paragraph 14 was clearly intended to provide his response to the point made by the appellant's representative as recorded in paragraph 8 ("Mr Nyamayaro said that the appellant to leave the country would have a detrimental effect on his children given that he was having direct contact with them at present"). It was not intended as a statement regarding the legal test he had to apply under the Immigration Rules. For another thing, one of the requirements as set out in. E-LTRPT.2.4. is that an applicant must provide evidence of current active involvement in the children's upbringings as well as evidence of an intention to continue taking such a role. Hence the judge was fully entitled. to have regard to the current arrangements. In addition, insofar as the judge was required to consider prospective contact and active involvement, he clearly had future developments in mind when he noted at the end of paragraph 14 that the appellant had stated he had not yet initiated contact proceedings although he was minded to do so. The judge observed that "However, it is clear that the evidence at present does not come up to the present level". I am also satisfied that the judge was clearly entitled to take the view that there was no basis for considering that any steps taken by the appellant through the Family Court was not forseeably likely to result in any significantly greater degree of involvement by the appellant in his children's lives.

11. For the above reasons I conclude that the appellant's grounds fail to demonstrate a material error of law. Accordingly the decision of the FtT judge to dismiss the appellant's appeal must stand.

No anonymity direction is made.

Signed Date: 8 May 2017

Dr H H Storey
Judge of the Upper Tribunal