Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01955/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 17th July 2014	**On 04th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ESOSA EROMOSELE
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Lee of Salam & Co Solicitors
For the Respondent: Mr G Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. The Appellant appeals against a determination of Judge of the First-tier Tribunal Phull promulgated on 22nd April 2014.

2. The Appellant is a male Nigerian citizen born 10th April 1972 who on 30th September 2013 applied for a Permanent Residence Card as confirmation of a right to reside in the United Kingdom on the basis that he is the spouse of Mary Teresa Eromosele, an Irish national who had been exercising Treaty rights for a continuous period of five years in the United Kingdom in accordance with The Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations).

3. The application was refused on 11th November 2013 with reference to regulation 15(1)(b) of the 2006 Regulations. The Respondent did not accept that the Appellant had provided evidence to show how his EEA national spouse was exercising Treaty rights in the United Kingdom between 2008 and 2013.

4. The Appellant appealed to the First-tier Tribunal, requesting that his appeal be determined on the papers.

5. The appeal was considered by Judge Phull (the judge) on 28th March 2014. The judge found that insufficient evidence had been submitted to support the Appellant's claim that his spouse had been exercising Treaty rights as a worker. The judge also considered whether the Appellant's spouse was a self-sufficient person and exercising Treaty rights in that way, but this required evidence of health insurance and that there had been no claim on public funds, whereas the evidence submitted indicated that the Appellant's spouse had been receiving public funds.

6. The judge dismissed the appeal finding that insufficient evidence had been submitted to support the Appellant's claim that his spouse had been exercising Treaty rights as an EEA national for a continuous period of five years, from 2008 until 2013.

7. The Appellant then instructed solicitors who applied for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had erred in her consideration of the 2006 Regulations, and failed to consider the Appellant's rights, and those of his children under Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

8. Permission to appeal was granted by Judge of the First-tier Tribunal TRP Hollingworth who found the Article 8 ground to be arguable.

9. Directions were issued making provision for there to be a hearing before the Upper Tribunal to decide whether the First-tier Tribunal determination should be set aside.

The Appellant's Submissions

10. Ms Lee accepted that there had been insufficient evidence before the First-tier Tribunal to prove that the Appellant was entitled to permanent residence, and therefore she did not pursue the ground which had contended that the judge had erred in her consideration of the 2006 Regulations.

11. Ms Lee submitted that the judge had erred in not considering the Appellant's children and their best interests, and had made no findings in relation to Article 8. Ms Lee pointed out that the Appellant had referred to having three children in section 4 of his application form. Ms Lee submitted that the three children are British citizens, although it was conceded that this was not stated in the application form, neither did the application form refer to their dates of birth. However their dates of birth were contained in the Statutory Declaration prepared by the Appellant's spouse which was before the judge.

12. Ms Lee submitted that the Home Office should have considered the best interests of the children and it was an error of law for the judge not to have considered those best interests and Article 8. The Appellant was not legally represented when he submitted his appeal, and was not aware that he should have provided further evidence. If enquiries had been made of the Appellant, he could have confirmed that the children are British and given further details.

The Respondent's Submissions

13. Mr Harrison accepted that the judge had not considered any human rights issues, but this was because such issues were not raised before her. The judge dealt with the appeal on the evidence that had been placed before her.

14. I was asked to note that human rights had not been raised, and that the Appellant had not requested an oral hearing. Mr Harrison submitted that the judge had been presented with insufficient evidence, and the burden of proof was on the Appellant.

My Conclusions and Reasons

15. Ms Lee was correct to concede that the judge had not erred in dismissing the appeal against the refusal to issue a Permanent Residence Card. There was insufficient evidence provided by the Appellant to discharge the burden of proof.

16. I do not find that the judge erred in failing to consider Article 8 of the 1950 Convention. There was no indication in the Appellant's application that Article 8 was relied upon. It appears that the Appellant completed section 4 of the application form in error, as this section should only be completed if the applicant is divorced from an EEA national, or the EEA national is deceased or has left the United Kingdom. The Appellant did include in that section the information that he has three children, but did not indicate their nationality or dates of birth. I am not satisfied in any event, that this application form was before the judge. It was not in the Tribunal file that was placed before the Upper Tribunal, which is the same file that was before the First-tier Tribunal, and this application form was provided to the Upper Tribunal by Ms Lee.

17. There is no mention of children in the Respondent's reasons for refusal letter or Notice of Immigration Decision, the reason for this being, in my view, that the application was not pursued on any human rights grounds, but was made simply on the basis that the Appellant claimed to be entitled to permanent residence in the United Kingdom. This was based upon his spouse having exercised Treaty rights, and was not based upon the fact that he had children. The Appellant provided insufficient information to the Respondent, for any consideration to be given to his children. The application was not made on that basis.

18. I take into account that the Appellant did not have legal representation, but it was the Appellant's choice to request an appeal on the papers rather than an oral hearing. It is the responsibility of the Appellant to provide to the Tribunal sufficient evidence to prove his case.

19. The evidence submitted by the Appellant in relation to his appeal amounts to a Statutory Declaration sworn by his spouse on 24th December 2013 to which there is attached five exhibits. This was considered by the judge who refers to it in paragraph 3 of her determination.

20. The birth certificates of the Appellant and his spouse's three children are attached to the affidavit. No evidence was submitted to show that the children are British. There was evidence that the Appellant's spouse has another child from a previous relationship.

21. The Respondent had not made a removal decision. It is clear that Article 8 was not raised as a Ground of Appeal. If Article 8 had been raised as a Ground of Appeal, the judge would have erred in law in not determining that ground, even if there was no removal decision. This is because section 86(2)(a) of the Nationality, Immigration and Asylum Act 2002 requires that any matter raised as a Ground of Appeal must be determined. That however was not the case in this appeal.

22. Even though Article 8 was not raised, taking into account the Appellant was unrepresented, I have considered whether it was a "Robinson obvious" point that Article 8 needed to be considered. I do not find that to be the case. The judge was faced with an appeal against refusal of permanent residence with no removal decision. The Notice of Immigration Decision and the Respondent's reasons for refusal letter both indicate that the Appellant had the option to submit a further application for consideration if he believes that he has the right to reside in the United Kingdom as a matter of European law and is in a position to submit the necessary information to support his application.

23. The Notice of Immigration Decision also indicates that if the Appellant does not submit a further application and does not leave the United Kingdom, then a separate decision may be made at a later date to enforce his removal, which may be an appealable decision.

24. In my view the judge had insufficient information before her to properly consider Article 8 and the interests of the Appellant's children, which were not issues that had been specifically raised, and the judge would have been aware that it was open to the Appellant to make a further application and raise the issue of the best interests of his children if he thought appropriate.

25. I therefore, for the above reasons, conclude that the judge did not err in law.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision. The appeal is dismissed.

Anonymity

No order for anonymity was made by the First-tier Tribunal. There has been no request for anonymity and the Upper Tribunal makes no anonymity direction.

Signed Date 24th July 2014

Deputy Upper Tribunal Judge M A Hall

Fee Award

The appeal is dismissed. There is no fee award.

Signed Date 24th July 2014

Deputy Upper Tribunal Judge M A Hall