



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

Appeal Number: IA/46005/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 21 April 2015  
Dictated 21 April 2015**

**Decision & Reasons Promulgated  
On 28 April 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GIBB**

**Between**

**OLUGBADE OLAO THOMAS  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: None (The appellant attended the hearing in person)

For the Respondent: Ms A Everett, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant, a Nigerian citizen, came to the UK in 2007 with his French wife, and had a residence card as her husband for five years, until June 2013. An application for a further residence card, made in April 2013, was then refused, and the appellant's appeal against this refusal was dismissed by First-tier Tribunal Judge Davidson, following a hearing at Taylor House on 7 August 2014.

2. Permission to appeal was initially refused, but was subsequently granted by Upper Tribunal Judge Clive Lane, on 15 January 2015. In granting permission reference was made to the fact that Article 8 had been raised in the grounds of appeal before the First-tier, but the judge had not addressed this at all in his decision. If the judge had considered that Article 8 was not engaged, then arguably reasons should have been given.

### **Error of Law**

3. At the hearing the appellant confirmed that he was no longer legally represented. I explained the purpose of the hearing, and asked him a number of questions designed to clarify the nature of his challenge to the judge's decision.
4. The appellant said that his wife and son were currently living in Israel. They had been there since January 2015. His wife's mother in Israel is ill, and relies on her. The appellant then mentioned that he was now separated from his wife. The couple had been divorced in Nigeria in 2012. This had not been mentioned at the hearing in 2014. The appellant was particularly worried about losing contact with his son. The couple had met in Israel in 2001, and had married in 2004. The appellant was still hoping that they might be reunited.
5. Ms Everett, for the Secretary of State, referred to a case that had been heard on 31 March 2015, before a Presidential panel, in which a decision was awaited. Although she was not aware of the full details of the submissions made she knew that the Secretary of State had taken the position that Article 8 was not engaged in EEA appeals. She therefore had to resile from the position in the Rule 24 response, where it had been accepted that there was an error of law, although not a material one.
6. As I indicated at the hearing I have decided that there was an error of law, but that it was not material to the outcome.
7. The question of whether Article 8 is engaged in EEA appeals is a complex one, on which there may be guidance available soon. At present, however, it appears to me to be safe to say that the judge was obliged to consider Article 8, even if briefly, because it was a matter raised in the grounds of appeal. As indicated by the Upper Tribunal Judge who gave permission it would also have been necessary, if the judge had decided that Article 8 was not engaged, for some reasons to have been given, even if brief. It therefore appears to me to be the case that the judge can be said to have erred in law in not making any reference whatsoever to the Article 8 grounds raised before him.
8. My decision that this was not material, however, rests on a number of findings in the decision. Although the appellant's wife was present at the hearing the judge found, at paragraph 17, that the appellant's wife and child had been spending considerable periods, including a period from November 2011 to May 2013, living in Israel. Any assessment of Article 8

would therefore not have been on the basis that the appellant's wife and child, being resident in the UK, would have been separated from the appellant by his being removed, or required to leave. For these reasons I accept the point made in the Rule 24 response, that the appeal could not possibly have been allowed on Article 8 grounds, for these reasons, even if Article 8 had been considered.

9. The appellant mentioned significant new issues, but these were matters that were not raised before the judge. The most important of these was that the appellant said that he and his wife had in fact been divorced in 2012. This was an important piece of information that neither the appellant nor the appellant's wife disclosed at the hearing. If the appellant now has concerns about access to his child, then those have to be addressed in the light of the fact that his child is now living in Israel.
10. There was some discussion of the issue of a potential retained right of residence. This was not explored in any detail. Again, this was a matter that was not raised before the judge. If the appellant now wants to pursue an application on the basis that he had acquired a retained right of residence in the UK by the time of the divorce, and if he can establish the divorce itself, which he has said took place in Nigeria, then it is open to him to make an application to the respondent. He would need to show that she was exercising treaty rights at the time of the divorce; that they had lived together in the UK for at least a year (and been married for 3 years); and that he was and is working. He would also need to explain his decision to withhold the true picture in his application and at the appeal. None of this, however, appears to me to impact on the question of whether the judge's approach involved a material error of law.
11. No mention was made of any issues in relation to anonymity, or fee awards.

### **Notice of Decision**

12. The appeal to the Upper Tribunal is dismissed.
13. The error of law in not dealing with Article 8 was not, in this particular case, a material one, and the judge's decision dismissing the appeal stands.
14. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Gibb