Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/16320/2013

THE IMMIGRATION ACTS

Heard at Field House **Determination Promulgated**
On 19 November 2013 **On 24 January 2014**

Before

The Hon. Mr Justice McCloskey, President
Resident Senior Immigration Judge D E Taylor

Between

OLUMIDE OLUSEYI SAMMY FADEYI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Williams instructed by Williams Horter Solicitors
For the Respondent: Miss Kiss on behalf of the Secretary of State

DETERMINATION AND REASONS

1. We have completed the remaking of the decision under appeal. Prior to doing so we gave our reasons at an earlier stage today for setting aside the decision of the First-tier Tribunal and embarking upon the remaking exercise. As we said earlier

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we decided to set aside the decision of the First-tier Tribunal on the ground of procedural unfairness. In short, the Judge investigated and determined an issue of considerable importance in circumstances where the Appellant was not put on notice.

2. The issue in question, which was whether Appellant's spouse had ever exercised Treaty rights, was, for the Judge, one of decisive importance. It followed, therefore, in our judgement that the Appellant had been deprived of a fair hearing at first instance. To this we add that the Judge, having adopted that course, failed to engage with the Secretary of State's letter of decision. For the first of those reasons, fundamentally, we concluded that the Appellant had been deprived of a fair hearing and, accordingly, we set aside the decision of the First-tier Tribunal.

3. The appeal has proceeded on two grounds. The first is based on the Immigration European Economic Area Regulations 2006. We conclude that it fails on this ground for the reason that the Appellant's spouse does not fall within the definition of "EEA national" in the amended Regulation 2, it being common case that this amendment applied to the Appellant's application to the Secretary of State. We also agree with the Judge that the application under the Regulations had to fail on the independent ground that there was no evidence that the Appellant's spouse had been exercising Treaty rights. That, however, is secondary to the fundamental and incurable frailty in the application to which I have just adverted.

4. The second ground on which the appeal proceeds is that of Article 8 of the Convention. The procedural route here is noteworthy. While the original application to the Secretary of State had included Article 8, the decision maker declined to address this ground at all. The reasons for that are not entirely clear. In any event, that is how the decision was made. The Judge at first instance adopted a somewhat different course. First of all, she concluded that the Appellant had failed to establish an Article 8 case under the Rules. The Judge then proceeded to consider the Appellant's Article 8 case out with the Rules. Continuing, the Judge pronounced herself satisfied that the impugned decision interfered with the Appellant's family life in the United Kingdom. Proceeding to the next step, she further pronounced herself satisfied that the interference was in accordance with the law.

5. The Judge then identified the legitimate aim of the maintenance and promotion of effective immigration control. This brought the Judge to a further stage in the exercise. The Judge's conclusion was that there was a marked insufficiency of information. This impelled her to conclude that the Appellant's Article 8 case must fail. Notably, the Judge did not couch this conclusion in the language of proportionality or otherwise. The net result is that the reasons for rejecting the Article 8 case at first instance do not emerge with clarity from the Judgement.

6. This Tribunal, in remaking the decision, has been fully equipped with a broad spectrum of evidence bearing on the Article 8 claim. Both parties are agreed that

the central question is that of proportionality. In the proportionality equation there are some factors adverse to the Appellant personally. The first is his immigration history, which is very unsatisfactory. The second concerns his wife's knowledge of his illegal immigrant status in the United Kingdom. The third concerns the misrepresentations which he made to the Registrar of Births when the Certificates of Birth of the children of the partnership were being composed and registered. These misrepresentations concerned the Appellant's place of birth and his regular place of residence.

7. At this juncture, it is appropriate to highlight that the Judge at first instance did not consider the family life of anyone other than the Appellant. Ultimately, before this Tribunal, Miss Kiss (on behalf of the Secretary of State), whilst correctly highlighting some of the negative factors in the Article 8 equation, has conceded that the impugned decision is disproportionate. That concession is very properly made. It is based on the predictive reality that the impugned decision will have an enormous negative impact on the family life of the five members of the family unit concerned. Realistically, it will mean separation of the father from all the other members of the family, who include three children who are aged 9, 7 and 5½ respectively, in circumstances where they are EU citizens and British nationals and they with their mother will as a matter of strong probability continue their lives in the United Kingdom in their father's absence. There will be no real family life at all if this decision is maintained. We also highlight the duration of the mother/father relationship, its obvious sustainability and durability and the key role which the Appellant plays in the family life of all concerned. He has become a primary carer of the children and has a dominant role in their lives. Destruction of this family unit would not further the public interest.

8. There are other factors to which we could refer but which it is unnecessary to highlight in the circumstances. We repeat that the concession on behalf of the Secretary of State has been properly made. Accordingly, in the remaking of this decision we have no hesitation in allowing the appeal under Article 8 of the Human Rights Convention. Thus the appeal succeeds.

Bernard McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 24 January 2014