



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

Appeal Number: IA/32865/2013

THE IMMIGRATION ACTS

**Heard at Bradford
On 30 June 2014**

**Determination
Promulgated
On 31 July 2013**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

JOSEPH OSAJIE EHIMUAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ene, Immigration Consultancy and Training Bureau
For the Respondent: Mr Diwncyz, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Joseph Osajie Ehimuan, was born on 5 October 1977 and is a male citizen of Nigeria. The appellant appealed against the decision of the respondent dated 2 July 2013 refusing to grant him a Residence Card for Permanent Residence as a confirmation of his right to reside in the United Kingdom as a non-EEA national who has retained a right of

residence after the termination of his marriage to his former spouse, an EEA national. The First-tier Tribunal (Judge S Phillips QC) dismissed his appeal in a determination promulgated on 21 March 2014. The appellant now appeals, with permission, to the Upper Tribunal.

2. The appellant's appeal fell to be considered under Regulation 10(5)(d)(i) and Regulation 15(1)(f) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). The judge noted that the appellant had entered the United Kingdom in December 2001 and had, in July 2002, allegedly met Lucinda Lopes De Brito, a Portuguese national. He claims to have married Ms De Brito on 23 January 2003. A decree nisi in their divorce was made absolute on 16 January 2013. The appellant had applied in 2008 for Permanent Residence but had been unable to produce the documents required by the respondent and his application had been refused. He did not appeal that decision. A further application by the appellant for Permanent Residence was refused on 9 January 2012. The appellant did appeal against that decision and his appeal was dismissed because he failed to produce a valid passport. The application which is the subject of this appeal was made on 2 July 2013 and refused by the respondent on the basis that the appellant had not established that his (now former) wife had been exercising Treaty Rights for five years within the meaning of Regulation 15(1)(f) of the 2006 Regulations.
3. The appellant also claims that he has a new partner (Efosa Petra Amadin) and that they have a daughter together, A, who was born in February 2009 and that a second child is expected in April 2014. The appellant claims that he wishes to marry Ms Amadin who is a Nigerian citizen who, he claims, has settled status in the United Kingdom.
4. The grounds of appeal at [1] and again at [9] assert that the respondent had a duty to seek out and adduce evidence which would show that Ms Lopes had been exercising Treaty Rights at the date of her divorce from the appellant. I find the respondent had no such duty in law to assist the appellant in proving his case.
5. Further, at [2] it is asserted in the grounds that "it is an undisputed fact that the appellant is the biological father of the child A" Indeed, it was on the basis that it was "arguable that the judge should have ... included a consideration of the effect of the appellant's removal on his daughter [A] as it is not disputed that he is the father of the child" that Judge Cheales granted permission to appeal to the Upper Tribunal [3].
6. The assertion in the grounds is not supported by the findings of the First-tier Tribunal. In a detailed and thorough determination, Judge Phillips QC stated, more than once, that he did not accept the appellant as a credible witness. Detailed reasons are given for that finding (see [35-41]). The judge concluded:

I do not believe that [the appellant] has presented a truthful account regarding cohabitation during the marriage. I do not believe that he has

presented a truthful account regarding the exercise of Treaty Rights by his wife during the marriage. I go on to make my findings accordingly.

7. As regards Article 8 ECHR, the judge accepted that the appellant had established private life in the United Kingdom but he:

did not find credible the appellant's claim regarding his role in the life of his claimed partner's daughter ... my assessment is what the appellant states regarding their claimed relationship [with Ms Amadin] and their claimed child and what Ms Amadin states in her statement in these respects is not credible. [49].

Having found [53] that the respondent's decision would bring about an interference with the appellant's Article 8 rights, the judge went on to conclude:

The appellant in my view has given an incredible account in relation to his relationships with, firstly, his wife and, now, with his claimed current partner. Neither has given evidence, nor has any other witness testified in support of the appellant's claims regarding these relationships.

8. On the basis of that finding, the judge found that any interference with the appellant's Article 8 rights would be proportionate.
9. I leave aside for the moment the question as to whether or not the judge should have considered Article 8 ECHR at all given that the appeal related to the refusal of a Residence Card (in consequence of which it is unclear that the appellant would be removed from the United Kingdom). However, insofar as Article 8 ECHR may have been engaged in this appeal, I can find nothing wrong with the judge's reasoning. It is abundantly clear that the judge has not accepted any part of the appellant's evidence as truthful. In consequence, it is not "an undisputed fact" that the appellant is the biological father of the child A. That much appears to have been accepted in the grounds of appeal, notwithstanding the assertion that the appellant was the father of the child; at [4] it is asserted in the grounds that "whether or not A is [the appellant's] ... biological daughter] can be established by DNA evidence"; if it were an "undisputed fact" that the appellant and child were related as claimed, it is difficult to see why DNA evidence would be required. I observe again that it is not for the respondent to make the appellant's case for him and, if the appellant wished to adduce better evidence to show that he was the father of the child, it was open to him to obtain a DNA report prior to the Upper Tribunal hearing accordingly. The fact remains that the judge did not accept the appellant's evidence at all or that of his "claimed" partner. As noted above, the judge at [54] expressly found that the appellant's evidence regarding his claimed current partner and claimed child was simply not credible. In the light of that finding, what the grounds of appeal assert regarding Section 55 of the Borders, Citizenship and Immigration Act 2009 ("the best interests of the child") and the human rights of Ms Amadin and A are simply not sustainable. Likewise, the assertion in [8] that "it is factually inaccurate to imply that the appellant is not the biological father

of baby A” was nothing more than a disagreement with the finding of the Tribunal.

10. Mr Ene sought to rely on a direction to Home Office caseworkers which indicates that caseworkers may exercise a discretion to contact HM Revenue and Customs in cases such as this. However, he produced no evidence to show that the direction had not been followed in this instance and the direction is, in any event, discretionary and not mandatory.
11. In summary, the grounds complain that the judge ignored “agreed facts” when he did no such thing but had, in fact, rejected every part of the appellant’s evidence as unreliable. The grounds of appeal asserting that the judge failed to have proper regard to the rights of the appellant’s claimed partner and child fall away because the judge did not find that Ms Amadin and A were the current partner or biological child of the appellant. As regards the appeal concerning the exercise of Treaty Rights at the time of the divorce by the appellant’s former wife, I find that there was no obligation upon the respondent to take steps to prove the appellant’s case. In any event, as with the remainder of the appellant’s evidence, the judge had rejected as unreliable the appellant’s evidence regarding his former wife.
12. I find that the First-tier Tribunal did not err in law for the reasons asserted in the grounds of appeal or at all. This appeal is dismissed.

DECISION

13. This appeal is dismissed.

Signed

Date 20 July 2014

Upper Tribunal Judge Clive Lane