Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/41348/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 28th July 2014	**On 9th September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR PETER EHIDIAMEN FRANCIOS
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Charles
For the Respondent: Mr Diwnycz

DETERMINATION AND REASONS

1. This is an appeal by Mr Peter Ehidiamen Francios a citizen of Nigeria born on 12th August 1976. The Appellant applied for a residence card on 31st October 2008. He was refused. He reapplied on 15th January 2010 and

was again refused. In January 2013 he sought a derivative residence card. That application was refused by the Secretary of State on 22nd August 2013. His application was sought as confirmation of a right of residence as the primary carer of an EEA national minor who is a qualified self-sufficient person but the Appellant had failed to produce evidence that his EEA national is a qualified person as claimed.

2. The Appellant appealed and the appeal came before Immigration Judge Law sitting at Manchester on 10th April 2014. In a determination promulgated on 24th April 2014 the Appellant's appeal was dismissed.

3. On 1st May 2014 Grounds of Appeal were submitted to the Upper Tribunal. Those grounds contended so far as the claim pursuant to Article 8 was concerned the judge had failed to consider the case outside the Immigration Rules and to consider the family and private life of the minor D in accordance with Article 8. The grounds contended that at paragraph 23 Judge Law had stated that the Appellant was not entitled to a derivative residence card as the primary carer or carer at all of an EEA minor within the provisions of *Chen*. The grounds submitted that the Appellant is a carer for the child as he has more responsibility than the father, he resides with the mother and has been part of the child's life since the child was born. The grounds submitted that if the Appellant were removed from the United Kingdom it would have a detrimental and negative effect on the minor which the judge had failed to consider.

4. On 13th May 2014 Judge of the First-tier Tribunal Froom granted permission to appeal. In granting permission Judge Froom found to the extent that the grounds seek to reargue the case regarding the Appellant being a primary carer they amount to no more than disagreement. However permission to appeal was granted on all grounds because the judge arguably erred by failing to consider the Article 8 Grounds of Appeal. Judge Froom considered that Judge Law had declined to do so because no application had been made under the Rules but that he was entitled to appeal on human rights grounds and having done so was arguably required to determine it.

5. On 17th June 2014 the Secretary of State responded to the Grounds of Appeal under Rule 24. The Rule 24 response submitted that the grounds advanced raised no material arguable errors of law capable of having a material impact upon the outcome of the appeal and that the grounds advanced were mere disagreement with the negative outcome of the appeal. Based upon the negative credibility findings that were reasonable and open to the judge on the basis of the evidence concerning the nature and extent of the care provided by the Appellant to his sister's child it was reasonable and open to the judge to conclude that there was no arguable family or private life claim in respect of the Appellant and his sister's family within the meaning of Article 8 of the European Convention of Human Rights.

6. It is on this basis that the appeal comes before me to determine whether or not there is a material error of law. The Appellant is represented by his instructed solicitor Mr Charles. The Secretary of State is represented by her Home Office Presenting Officer Mr Diwnycz.

Submissions/Discussions

7. Mr Charles accepts the sole Ground of Appeal is that the First-tier Tribunal Judge has not considered the position pursuant to Article 8 of the European Convention of Human Rights. He takes me to paragraph 22 of the determination and acknowledges the Appellant cannot succeed under the 2006 EEA Regulations. He asked me to find that there is a material error of law to that extent.

8. I am considerably assisted by Mr Diwnycz in this matter in that he accepts the judge should have gone on to have considered the issue of the Appellant's appeal pursuant to Article 8 outside the Immigration Rules. He invites me to set aside the decision of the First-tier Tribunal and the parties invite me to give directions remitting the matter to Judge Law so that he can consider the outstanding issues.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

11. The Secretary of State acknowledges there was a requirement on the First-tier Tribunal Judge to give due consideration to the Appellant's appeal pursuant to Article 8 to give due consideration to that appeal outside the Immigration Rules. He further accepts, and acknowledges, and agree with him that the judge has not addressed those issues. He has at paragraph 22 of his determination indicated that he did not find an arguable family life had been maintained with D nor that there was a private life with the child but went on to say "However determination of those aspects is a matter for another day". I agree with the representative's contention that in fact that was not the case and that they should have been addressed. On that basis, and that basis alone, I find that there is a material error of law in the determination of the First-tier Tribunal and I set aside the decision reserving the findings of facts, remitting the matter to be heard, reserved to Immigration Judge Law in accordance with the directions set out below.

Decision and Directions

12. The decision of the First-tier Tribunal Judge contains a material error of law insofar as it relates to the failure of the First-tier Tribunal Judge to consider the Appellant's Article 8 claim outside the Immigration Rules. On that basis directions are given as follows:

    (1) That the appeal is remitted to the First-tier Tribunal reserved to Immigration Judge Law, to be heard at Manchester on the first available date, 42 days hence, with an ELH of two hours the appeal to be restricted to the issue of the Appellant's Article 8 claim outside the Immigration Rules.

    (2) That the findings of fact of the First-tier Tribunal Judge be preserved.

    (3) That there be leave to either party to file and serve any additional evidence upon which they seek to rely within 21 days of receipt of these directions.

    (4) Any skeleton arguments and/or bundle of authorities upon which either party intends to rely be provided within 21 days of service of this determination.

    (5) No interpreter required.

13. The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris