**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number IA/37548/2013**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination promulgated** |
|---|---|
| **On 20 November 2014** | **On 24 April 2015** |

**Before**

**Deputy Judge of the Upper Tribunal I. A. Lewis**

**Between**

**Gordon Yungsub Synn**
(Anonymity order not made)

**Appellant**

**and**

**Secretary of State for the Home Department**

**Respondent**

**Representation**
For the Appellant: Mr P Richardson of Counsel instructed by Gulbenkian Andonian.
For the Respondent: Ms J Isherwood, Home Office Presenting Officer.

**DECISION AND REASONS: ERROR OF LAW**

1. This is an appeal against the decision of First-tier Tribunal Judge Wright promulgated on 15 August 2014 dismissing the Appellant's appeal against the decision of the Respondent dated 2 August 2013 to refuse to issue a permanent residence card pursuant to the Immigration (European Economic Area) Regulations 2006.

**Background**

2. The Appellant is a national of the USA born on 8 June 1963. On 26 April 2002 he married Ms Tracey Jean Shields, an Irish national. The

couple subsequently had two children, Marlon (d.o.b. 28 August 2002) and Ancelle (d.o.b. 7 October 2006), both of whom are American citizens and who have been included as dependents in their father's application and appeal.

3. The family entered the UK on 24 April 2007. On 25 October 2007 the Appellant and his children were each issued with an EEA Family Permit as the family members of an EEA national. Applications for EEA Residence cards were granted and five year EEA Residence cards issued on 6 August 2008 valid until 6 August 2013. On 4 January 2013 the Appellant applied for a permanent residence card. His application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 2 August 2013 and a Notice of Immigration Decision was issued in consequence. In the meantime, in or about March 2014, the Appellant and his wife separated.

4. The Appellant appealed to the IAC (as noted above, including his children as dependents).

5. The First-tier Tribunal Judge dismissed the Appellant's appeal for reasons set out in his determination.

6. The Appellant sought permission to appeal which was granted by First-tier Tribunal Judge Cruthers on 1 October 2014, who also extended time.

7. The Respondent has filed a Rule 24 response dated 15 October 2014 resisting the challenge to the decision of the First-tier Tribunal.

**Consideration: Error of Law**

8. The Appellant's application was refused with reference to regulations 6(1)(a) and 15(1)(b) of the 2006 Regulations. It was a feature of the Appellant's application that his wife had been a jobseeker throughout the relevant five year period. In support of this he had submitted a single letter from a job agency dated 3 October 2007. The Respondent was not satisfied that it had been shown that Ms Shields was indeed a qualified person within the meaning of regulation 6, and accordingly in turn was not satisfied that the Appellant had been residing in the UK in accordance with the Regulations for the requisite period.

9. At the appeal hearing the Appellant gave evidence – supported by his (by now estranged) wife – to the effect that Ms Shields had been self-employed whilst in the UK and in particular had undertaken photographic work promoting her photography through her website and contacts. It was also Ms Shields evidence that she had actively pursued photographic work whilst in the UK. Although there was no further supporting documentary evidence before the First-tier Tribunal to this effect, Ms Shields claimed to have provided her husband's representatives with "*a suitcase of information*" (decision at paragraph 14), but have been told that it was not necessary to

submit such evidence. She had been registered with HMRC approximately one year before the hearing.

10. The First-tier Tribunal Judge made the following observation (at paragraph 24) in respect of the testimonies of the Appellant and his wife:

> "I have seen and heard the appellant and his (now estranged) wife give evidence and be cross-examined in person before me, finding their evidence to be inconsistent and unreliable and also lacking sufficient detail (besides coming rather late in the day)."

11. The Judge otherwise went on to conclude that the documentary evidence produced to show that Ms Shields had been exercising 'Treaty Rights was "*woefully inadequate*", and "*the oral evidence is simply insufficient to fill the void/bridge the gaps*" (paragraph 26).

12. At paragraph 27 the Judge addressed the alternative categories under Regulation 6(1), observing in part that "*it is not claimed that [Ms Shields] exercised Treaty Rights as "a self-sufficient person" under Regulation 6(1)(d)*", and in this context also commented upon the limited cover shown in respect of health insurance.

13. The Judge declined to address Article 8 of the ECHR (paragraphs 29 and 30), notwithstanding that he recognised that it had been raised in the Grounds of Appeal, and that, albeit limited, submissions were made (paragraph 19). In such circumstances no express consideration was given to the best interests of the children with reference to section 55 of the Borders, Citizenship and Immigration Act 2009 or otherwise.

14. The Grounds in support of the application for permission to appeal – which were criticised in the grant of permission to appeal as being "*ridiculously long*" at 16 pages, may be distilled to 4 points:

> (i) The Judge erred in his approach to the evidence said to confirm the exercise of Treaty Rights by Ms Shields;
>
> (ii) The Judge erred in his approach to the issue of regulation 6(1)(d) – "*self-sufficient person*";
>
> (iii) The Judge failed properly to consider the situation of the children under EEA law;
>
> (iv) The Judge erred in declining to undertake an Article 8 assessment.

15. At the commencement of the hearing before me Mr Richardson indicated that the ground summarised at paragraph 14(ii) was not pursued.

16. In respect of the Appellant's case under the EEA, in my judgement the submissions advanced by Mr Richardson essentially amount to a disagreement with the Judge's findings and do not as such identify an error of law. Mr Richardson sought to argue that the Judge in effect elevated the value that might be derived from supporting evidence to a *requirement* that there be independent supporting documentary

evidence. Further, he argued that the analysis at paragraph 26 amounted to an implicit rejection of the credibility of the witnesses, without the Judge otherwise making a clear finding on credibility.

17. Whilst I am prepared to accept that supporting documentary evidence is not an explicit requirement in order to establish the exercise of Treaty Rights, in my judgement a decision-maker is entitled to have regard to the quality of any supporting evidence submitted, and is also entitled to have regard to the absence of any supporting evidence that it might be reasonable to expect to be produced, in an overall assessment of whether or not an applicant/appellant has discharged the burden of proof. The Judge appropriately and sustainably identified discrepancies in the way in which the Appellant's case was advanced and discrepancies as between the evidence of the witnesses. In the circumstances the absence of clarifying supporting documentary evidence was a relevant matter for consideration. I do not accept that the Judge approached the case on the basis that it was a prerequisite that an applicant provide supporting documentary evidence of the exercise of Treaty Rights. The Judge evaluated the available evidence and reach sustainable findings.

18. I note that it was said that there was a body – indeed a suitcase - of further evidence that had been given to the Appellant's representatives, but in the absence of that evidence it was entirely open to the Judge to conclude that the Appellant had not discharge the burden of proof in demonstrating that his (estranged) wife had been exercising Treaty Rights.

19. In the event, however, because I have reached the overall conclusion that the appeal should be reheard with all issues at large, it will now be open - as indeed it has been all along – to the Appellant and his advisers to submit any such further evidence as is available to them that would support the claim that Ms Shields has been exercising Treaty Rights in the UK. Necessarily if such evidence is now not forthcoming it may be open to a future decision-maker to draw adverse inferences.

20. I accept that there is more substance to the challenge in respect of the approach to the position of the Appellant's children. I remind myself that the children were parties to the appeal by way of being dependents of the Appellant in the appeal.

21. I accept that the Judge was presented with a difficult circumstance in that the fact of the separation of the Appellant from Ms Shields only came to light at the appeal hearing – and that necessarily the evidence in respect of the family situation was "*less than clear from the evidence (or lack of) presented*" (paragraph 30). Further is not apparent that the case law to which reference is made in the grounds of challenge was raised during the course of submissions. Nonetheless, pursuant to section 84(1)(d) of the 2002 Act, the children being family members of an EEA national, it was incumbent

upon the Judge to consider whether the Respondent's decision breached their rights under the Community Treaties in respect of residence in the UK. The Judge has failed to reach any conclusion in respect of the children's rights under the EEA Regulations or otherwise. In particular Mr Richardson highlights a failure to have regard to the principles outlined in **Baumbast (C-413/99)**.

22. I am also persuaded that the Judge was in error in declining to give consideration to Article 8 of the ECHR. Whilst I recognise and understand the position adopted by Respondent in the RFRL, and repeated in submissions before the First-tier Tribunal, to the effect that the Appellant had not made an Article 8 application, and that it was always open to him to make such an application, I am satisfied that the approach taken in **JM (Liberia)** to the effect that the ground of appeal under section 84(1)(g) is available notwithstanding the absence of an actual removal decision, applies.

23. Accordingly, in all of the circumstances I find that the First-tier Tribunal Judge materially erred, and that the decision of the First-tier Tribunal must be set aside.

24. There has been no relevant fact-finding in respect of the situation of the children or otherwise in respect of Article 8. Further evidence will require to be heard. In the circumstances, and bearing in mind the indication given in respect of the availability of further documentary evidence in respect of Treaty Rights, and also having regard to the fact that any decision in respect of any EEA rights is essentially declaratory, I see no sound basis for limiting the scope of the rehearing. Accordingly the appeal is to be reheard with all issues at large, including both in respect of the EEA Regulations and the ECHR.

**Future Conduct of the Appeal**

25. No specific directions are required for the future conduct of the appeal: standard directions will suffice. The parties are to file and serve any further materials upon which they wish to rely at least 7 days prior to the rehearing date.

26. The Appellant is reminded of the observations at paragraph 19 above: it is incumbent upon him to put before the Tribunal all relevant materials that assist him in proving his case, and he should be aware that the failure to produce materials that might reasonably be expected to be available may result in an adverse inference being drawn. Notwithstanding the timetable adverted to above, as was discussed at the hearing, it is possible for the Appellant to send such further materials as he has to the Respondent at any time, and it is open to the Respondent to review the decision in the Appellant's case in light of such materials.

**Notice of Decision**

27. The decision of the First-tier Tribunal contained material errors of law and is set aside.

28. The decision in the appeal is to be remade before the First-tier Tribunal, before any judge other than First-tier Tribunal Judge Wright, with all issues at large.

**Deputy Judge of the Upper Tribunal I. A. Lewis  24 April 2015**