



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/03152/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Birmingham Employment
Tribunal
on 11 May 2017**

**Decision & Reasons
Promulgated
on 16 May 2017**

Before

**UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**SHERAZ AHMED
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr C Bates - Senior Home Office Presenting Officer
For the Respondent: Miss Kular of SH & Co Solicitors.

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Ghani ('the Judge') promulgated on 26 October 2016.

Background

2. Mr Ahmed is a citizen of Pakistan born on 2 February 1982. On 2 July 2015, he applied for a Residence Card as confirmation of a right to reside in the United Kingdom as the spouse of an EEA national exercising treaty rights in the United Kingdom. On 16 November 2015,

the Secretary of State refused to issue the Residence Card for the following reasons:

You have applied for a Residence Card as a person who is in a durable relationship with an EEA national. Your application has been considered in accordance with Regulation 8 of the Immigration (EEA) Regulations 2006 but you have failed to prove that you are in a durable relationship with an EEA national.

3. The Judge considered the evidence and noted that Mr Ahmed and his partner had married in an Islamic ceremony on 11 December 2014 and have lived together in a relationship akin to marriage. At [21] the Judge found that the evidence relied upon in support of the claim led to a finding that "*I find that this is not just evidence of cohabitation but in fact a subsisting relationship*".

4. At [22] the Judge found:

I find both the Appellant and the witness credible witnesses. They gave straightforward answers to the questions put to them. I did not find them to have rehearsed their evidence in this manner. There is photographic evidence of their relationship. The interview as a whole must be considered and I find that the few inconsistencies, to which the Respondent has alluded, do not undermine in any realistic sense the genuineness and subsistence of their relationship. I therefore find that the Appellant does meet the requirements of relevant 2006 Regulations.

5. At [23] the Judge states "*I allow the appeal under the 2006 Regulations.*"

6. Permission to appeal was granted by another judge of the First-tier Tribunal on the basis that an Islamic marriage is not accepted in the United Kingdom as a valid legal ceremony, meaning that the parties are therefore not legally married. The Judge found the parties were in a durable relationship and it was noted that the Secretary of State was not previously satisfied Mr Ahmed was an Extended Family Member and so had not proceeded to the second stage of deciding whether to exercise discretion in Mr Ahmed's favour by granting a Residence Card. The judge granting permission to appeal decided it was arguable that the Judge was constrained to allowing the appeal on the basis that the respondent's decision was not in accordance with the law, only.

Error of law

7. There is no challenge to the factual findings made regarding the relationship between Mr Ahmed and his partner. They are in a durable relationship. It is not disputed the partner is an EEA national exercising treaty rights in United Kingdom. As they are not married Mr Ahmed is therefore the Extended Family Member of the EEA national.

8. It is settled law that there are two elements to an appeal of this nature, the first being whether the individual concerned satisfies the definition of an Extended Family Member and secondly whether, having exercised discretion, the Secretary of State considers it appropriate to grant the Residence Card. This is the second stage referred to in the grant of permission.

9. The Judge did not assist the decision by failing to specify which Regulation Mr Ahmed met, either at [22] or [23]. Had the Judge specified it was Regulation 8 this may have focused the mind upon the second aspect in relation to which appropriate findings would need to be made or, as suggested by the Secretary of State, for the matter to be returned to the decision maker for the exercise of discretion to be considered.
10. There is however a more fundamental error in relation to this decision. The date of the hearing at Sheldon Court in Birmingham is 8 August 2016. The date the decision was promulgated is the 26 October 2016. On 19 September 2016, the Upper Tribunal published its decision in *Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC)* in which it was found that there is no right of appeal against a refusal of a Residence Card to an Extended Family Member.
11. A judgment 'speaks' from the date it is handed down or promulgated. Therefore, on the 26 October 2016 the Judge should have been aware of the Upper Tribunal decision and either reconvened the hearing to receive further submissions or recognised there was no jurisdiction to consider the merits of the appeal.
12. In any event, lack of jurisdiction is a matter that would have been equally applicable on 8 August 2016 as there had been no intervening change in the provisions relating to Extended Family Members between this date and the publication of *Sala*.
13. We find the Judge erred in law to the extent that the decision is set aside.
14. We cannot go on to remake the decision as in light of the finding in *Sala* we have no jurisdiction to do so. This Upper Tribunal is entitled to raise the jurisdictional point even if it was not raised before the First-tier Tribunal - *Virk v Secretary of State for the Home Department [2013] EWCA Civ 652* refers.
15. The correct avenue of challenge where no statutory right of appeal exists is by way of Judicial Review.

Decision

16. **The First-tier Tribunal Judge materially erred in law. We set aside the decision of the original Judge.**
17. **We are unable to remake the decision for want of jurisdiction.**

Anonymity.

18. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

We make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed.....

Upper Tribunal Judge Hanson

Dated the 1st of May 2017