Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/11788/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th June 2017	**On 9th June 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

MR VISHAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance and no representation
For the Respondent: Mr K. Norton, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India born on the 15th May 1985. He appeals with permission, against the decision of Upper Tribunal Judge Martin (sitting as a First-tier Tribunal Judge) who, in a determination promulgated

on the 2nd February 2017 considered that there was no jurisdiction to hear his appeal against the decision of the respondent (to refuse to grant residence card as an extended family member of an EEA national based on the decision in Sala (EFM's: right of appeal) [2016] UKUT 00411 (IAC).

2. There has been no appearance by or on behalf of the applicant. His previous solicitors Malik Law Chambers no longer act on his behalf and the grounds of appeal to the Upper Tribunal were completed by the applicant in person. The file demonstrated that the Notice of Hearing was sent by first class post to the appellant's address on the 8th May 2017. On checking with the Presenting Officer, he confirmed that the address where the NOH was sent was to the address notified to the Home Office of the appellant's address. Therefore in the circumstances I am satisfied that he has been served with the hearing notice and is aware of the appeal hearing. There has been no further communication from the appellant since the grounds were submitted. I therefore proceed in his absence, there being no explanation for his non-attendance.

3. No anonymity direction was made by the First Tier-Tribunal and no application has been made on behalf of the appellant or any grounds put forward to support such an application.

The background:

4. The appellant is a national of India. He entered the United Kingdom on 10 January 2011 on a student Visa. On 30 November 2011 he applied for further leave as a student which was granted in 2012 to expire on the 27 January 2014. On 16 January 2012 curtailment was considered but not pursued. He applied the further leave to remain as a student which was granted on 13 February 2014 which expired on 26 May 2015. On that day he applied for leave to remain as a general migrant which was refused on the 14th July 2015. On 25 August 2015 he applied the family life leave to remain which was refused on 8 February 2016.

5. He then submitted a further application on the 20th February 2016. He applied for a residence card as an extended family member of an EEA national exercising treaty rights, namely his claimed partner, a national of Poland.

6. The application was refused in a decision made on 30th August 2016. The notice of decision made reference to the basis of the application for a residence card as a confirmation of a right of residence on the basis that he was an extended family member.

7. Accompanying the notice of decision was a reasons for refusal letter which expanded on the reasons given for the refusal of the application and made reference to the documentary evidence that had been produced with the application. He claimed to have met his partner in a cafe in November 2015 and had begun residing with her on 19 February 2016. However he had failed to provide sufficient evidence of this. The Secretary of State

considered the documentation that had been provided with the application but was not satisfied that he had provided sufficient evidence to demonstrate that the parties were in a durable and subsisting relationship. Whilst he had provided a maternity record of 26 May 2016 the evidence did not demonstrate that the appellant was currently living with his partner or that he was the father of the unborn child. Thus it was not accepted that the appellant had demonstrated that he was in a genuine and subsisting relationship with his EEA sponsor (Regulation 8 (5) of the immigration (European economic area) Regulations 2006.

8. It was further considered that even if he demonstrated that the relationship was genuine and subsisting, the appellant had only provided one payslip dated 8 January 2016 as evidence of the sponsor exercising Treaty Rights in the United Kingdom. Therefore the Secretary of State not accept that the sponsor was a qualified Person as defined under Regulation 6 of the Regulations. The decision letter made reference to any Article 8 claim noting that if he wished UKBA to consider an application he must make a separate charged application using the specified application form. It further stated that as he had not made a valid application under Article 8, consideration had not been given as to whether his removal from the UK would breach Article 8 of the ECHR. The letter went on to state that the decision not to issue a residence card did not require him to leave the United Kingdom if he could otherwise demonstrate that he had a right to reside under to reside under the Regulations.

9. The appellant appealed the decision on the 27th September 2016. In that notice of appeal the appellant asserted that the secretary of state had not properly considered material presented and that he was a durable relationship and that his partner was exercising treaty rights in the UK. It was further submitted that the decision was contrary to section 6 of the Human Rights Act 1998 and that the appellant demonstrated in his evidence that his circumstances were “exceptional” and the Secretary of State should considered his human rights claim. The grounds were generic in nature and made no reference to the factual circumstances of the appellant by reference to the documentation that has been provided with the application. No further documents were provided with the grounds. Along with those grounds was an application for extension of time and statement of additional grounds. It was accepted that the appellant had failed to lodge his appeal grounds in time and section 3 of the form gave the reason for the delay on the basis that he did not have adequate funds to pay the appeal fee including representation. He claimed that he had an arguable appeal under paragraph 276ADE and EX 1 of Appendix FM. There was no reference to his appeal grounds relating to his appeal against the refusal of the residence card.

10. A notice of directions was sent to the appellant and his solicitors on 5 January 2017 drawing their attention to the upper Tribunal decision in Sala (EFM’s: right of appeal) [2016] UKUT 00411 (IAC). The directions went on to state, “as the subject of this appeal appears to be extended family membership pursuant to the EEA regulations 2006, the appellant or his

representative should, within 14 days of today sent to the Tribunal, any reasons why the Tribunal has jurisdiction to hear this appeal within 14 days of today it is proposed that a judge will determine the appeal on the papers."

11. On 25 January 2017 a letter was sent on behalf of the appellant which submitted that the decision in Sala was wrong and "contrary to the legislature's intentions in Regulation 26 and Regulation 17 of the 2006 Regulations. It went on to state that Regulation 26 conferred the right of appeal to both "family members" and "extended family members," of an EEA national provided they prove and establish that they family members and/or extended family members of the EEA national. The legislation made no distinction between the groups for the purposes of the right of appeal set out in Regulation 26. The letter made no further reference to any human rights claim nor any application for extension of time to appeal.

12. In accordance with those directions, the appeal came before Upper Tribunal Judge Martin on the 2nd February 2017 and was determined upon the papers. She took into account the letter sent on behalf of the appellant but did not consider that the contents of it altered the decision in Sala (as cited) (see paragraphs 2 and 3). I take that to mean that there was nothing in those submissions to undermine the ratio of Sala. Accordingly she found that the FTT did not have jurisdiction to hear the appeal. She went on to state that:

> "5. Even if there had been a valid appeal before the Tribunal, human rights issues could not have been argued in that appeal- Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466(IAC)."

She therefore dismissed the appeal for want of jurisdiction. There was no reference made to the application for extension of time which was attached to the grounds of appeal either in the directions issued or in the determination.

13. The appellant sought permission to appeal that decision advancing what can be described as generic grounds. It was submitted that the decision of the Tribunal was flawed in law; that the Tribunal failed to ascribe appropriate weight to the evidence; the reasoning of the Tribunal had no jurisdiction to hear the matter (although no reasons were given); the Tribunal erred in its approach to the question of compassionate and compelling circumstances and failed to ascribe appropriate weight to the circumstances of the appellant. It is further asserted the Tribunal failed to weigh the balance between the interests of the family and the public interest consistent with the decision in Huang. It is further submitted that the Tribunal set a higher standard of proof that is proper in EEA case and that the judge erred in law when assessing the credibility of the appellant and his witnesses in line with the case of Chiver. It further submitted that the judge had failed to consider Section 117 of the 2002 Act when conducting the proportionality assessment.

14. As can be seen from those grounds they did not reflect the determination of Upper Tribunal Judge Martin; the judge had not assessed the credibility the appellant or his witnesses nor did the judge consider any Article 8 issues for the reasons given.

15. On the 2nd May 2017 Upper Tribunal Judge Deans granted permission for the following reasons:

> "The application for permission to appeal ,which was made in time, refers not only to the appeal against refusal of a residence card but also to an appeal on human rights grounds, which it said the judge failed to consider properly.
>
> The appeal file shows that the appellant was subject to a decision dated 30th August refusing a residence card and a decision of the 1st June 2016 refusing a human rights claim. The notice of appeal was submitted out of time containing an application for extension of time which does not appear to have been considered by the Tribunal. The notice of appeal contains grounds relating to the human rights claim as well as the EEA application. Neither the covering letter with the notice of appeal nor the response to the directions made any reference to the human rights decision or to any appeal against it. It is at least arguable, however, that the judge ought to have had regard to the application for an extension of time in relation to the human rights grounds. In respect of the appeal against refusal of a residence card, the judge was entitled to follow Sala and did not arguably err in so doing."

16. The Secretary of State responded to the grounds of appeal under rule 24. That document opposed the appeal observing that the judge when granting permission identified there was no arguable error of law as the First-tier Tribunal who had no jurisdiction to hear the appeal following the decision in Sala (as cited) and thus there was no a procedural error and that there was no right of appeal before the First-tier Tribunal. Further that the Article 8 aspect was immaterial by reason of the decision of the Court of Appeal in Amirteymour v SSHD [2017] EWCA Civ 353.

17. At the hearing before the Upper Tribunal, Mr Norton relied upon the rule 24 response and the decision of Sala (as cited). He submitted that it clarified what the law should have been and that as such the decision of the respondent did not attract a right of appeal. He further submitted that there was no record on file of any human rights decision, whether the 1st June 2016 or any other date, made in respect of this appellant as referred to in the grant of permission by UT Judge Deans.

Discussion:

18. As set out earlier in the determination, permission to appeal was granted by the Upper Tribunal judge who took the point that there was no arguable error of law in the decision relating to the issue of jurisdiction in the light of the decision in Sala. The generic grounds advanced on behalf of the appellant make no reference to that decision nor do they offer any argument as to why the judge was wrong to follow that decision. Nor are there any further documents sent to demonstrate that the decision made to refuse his EEA application was wrong on the merits. Thus has not provided any evidence to demonstrate to address the grounds of refusal. I observe that at no time during the appeal process did the appellant provide any further documentation other than that sent to the SSHD for the purposes of the application and referred to in the decision letter.

19. The decision of Sala (EFM's: right of appeal) [2016] UKUT 00411 (IAC) was a decision of the Upper Tribunal which was reported on 19 August 2016 which was before the decision of the First-tier Tribunal. The conclusion reached by the Tribunal in that decision was that there was no right of appeal before the Tribunal against the refusal to issue a residence permit to an extended family member. On that basis, the Tribunal found that there was an error of law because there was no right of appeal and therefore set aside the first-tier Tribunal's decision and remade the decision finding that there was no valid appeal.

20. At paragraph 44 of the decision, the Tribunal stated that the fact that the right of appeal has been long assumed or accepted is not, in itself, determinative of how we should decide this appeal which must be based on the proper construction of the EEA Regulations 2006 taking into account detailed submissions on the point. The Tribunal went on to state "long-standing universal mistake" is not a Canon of construction of a legislative instrument…". Furthermore, the position is similar to circumstances which often come before this Tribunal whereby the Court of Appeal makes a contrary decision to that of the Tribunal (or other court) which changes the law. In those circumstances the law is assumed always have been what the higher court says that it then is as I understand the decision in Sala, the Tribunal was stating that the EEA Regulations should always have been interpreted as they have interpreted them in Sala.

21. Therefore I consider that the judge was right when she preferred the legal analysis in Sala to that in the letter and she found that there was no jurisdiction to hear the appeal In those circumstances, it was not necessary to consider any application to extend the time limits as there was no jurisdiction to hear the appeal for want of jurisdiction.

22. The grant of permission identified that the judge ought to have had regard to the application for an extension of time in relation to the human rights grounds. Judge Deans made reference to a decision made in respect of this appellant on the 1st June 2016 refusing a human rights claim. Mr Norton could find no trace of any decision made on the 1st June 2016 refusing a human rights claim. That is not surprising because the document referred to in the grounds did not relate to this appellant. In the

appeal file there was a letter from Malik Law Chambers in response to the directions sent out by the Tribunal. Annexed to that letter was a large bundle of documents including a decision letter of the 1st June 2016 refusing a human rights claim but those documents and the decision letter related to a different appellant and different appeal number HU xxx. Thus it is likely that the judge when granting permission was in error in taking the view that there was such a decision. I am satisfied that it was an error because Mr Norton can find no decision and importantly the appellant had not made any reference to a decision of the 1st June 2016 or provided any copy decision.

23. As the FTT stated in the decision, even if there had been a valid appeal (and in the event that an extension of time had been granted by the judge), human rights issues could not have been argued in that appeal (the decision in Amirteymour [2015] UKUT 00466(IAC) (since upheld in the Court of Appeal; see Amirteymour v SSHD [2017] EWCA Civ 353). The decision considered the provisions as they related to the decision made on the 21st January 2014 and therefore the legislative provisions in force at the time of the hearing and before the changes made to the appeal rights under the EEA Regulations which took effect on the 6th April 2015. Thus there was no jurisdiction to hear any appeal on human rights grounds.

24. Even if there had been any such jurisdiction, there was no material before the FTT concerning any factual basis for any analysis to take place, either within the Rules under Paragraph 276ADE of Appendix FM or outside the Rules relating to Article 8. The appellant did not provide any documentation other than that in support of his application for a residence card nor has he since that time provided any documentary evidence of his circumstances.

25. Therefore in the circumstances, the appellant has not demonstrated that there was any material error of law in the decision made by the First-tier Tribunal.

Decision:

The decision of the First-Tier Tribunal did not involve the making of an error on a point of law and the appeal is dismissed.

Signed S M Reeds

Date: 8/6/2017

Upper Tribunal Judge Reeds