



**Upper Tribunal  
(Immigration and Asylum Chamber)  
IA/17768/2015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 15<sup>th</sup> June 2017**

**Decision &  
Promulgated**

**On 7<sup>th</sup> July 2017**

**Reasons**

**Before**

**UPPER TRIBUNAL JUDGE JACKSON**

**Between**

**THE SECRETARY OF STATE FOR THE HOMR DEPARTMENT**

Appellant

**and**

**HALIT HUTJA**

(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr K Norton, Home Office Presenting Officer

For the Respondent: Mr D O'Callaghan and Mr P Bonaverro of Counsel

**DECISION AND REASONS**

1. The Secretary of State for the Home Department appeals against the decision of First-tier Tribunal Judge Khawar promulgated on 30 August 2016, in which Mr Hutja's appeal against the decision dated 27 April 2015 to refuse his application for an EEA Residence Card was allowed. For ease, I continue to refer to the parties as they appeared before the First-Tier Tribunal with Mr Hutja as the Appellant and the Secretary of State for the Home Department as the Respondent.

2. The Appellant is a national of Albania, born on 21 October 1992, who applied to the Respondent for an EEA Residence Card as the extended family member (partner) of Magdalena Naworska, a Polish national exercising treaty rights in the United Kingdom. The initial application was made on 4 September 2013 which was refused by the Respondent on 10 February 2014 on the basis that she was not satisfied that he was in a durable relationship as claimed. The Appellant successfully appealed against that decision on 8 October 2014 and the matter was remitted to the Respondent to consider the exercise of her discretion to issue an EEA Residence Card.
3. The application was refused on 27 April 2015 on the basis of a refusal to exercise discretion under Regulation 17(4)(b) of the Immigration (European Economic Area) Regulations 2006 (the “EEA Regulations”) because the Appellant had previously been apprehended attempting to enter the United Kingdom clandestinely (on 23 October 2011 in Dunkirk); had been arrested by the police on 9 September 2012 for possession of a Class A drug with intent to supply and had made declarations on his application form which failed to mention his arrest.
4. Judge Khawar allowed the appeal on 30 August 2016 under the EEA Regulations. He found that the Appellant had been arrested for possession of a class A drug but not of intent to supply and that there had been no failure to disclose the arrest on his application form. Overall, it was found that there were no issues of character for the Respondent to refuse to exercise discretion to issue an EEA Residence Card.
5. Judge Khawar also allowed the appeal on human rights grounds under Article 8 of the European Convention on Human Rights grounds for the same reasons, despite the Appellant not having raised this and despite hearing no submissions on it.

### **The appeal**

6. The Respondent appeals on two grounds, firstly that Judge Khawar exercised personal judgment as to the Appellant’s cocaine use and good character; and secondly, that he erred in law in allowing the appeal on human rights grounds.
7. Permission to appeal was granted by Judge McCarthy on both grounds on 22 December 2016. The grant of permission to appeal also raised the further issue of whether there was a valid appeal at all following the Upper Tribunal’s decision in **Sala (EFMs: Right of Appeal) [2016] UKUT 411**.
8. A preliminary issue was raised by Counsel for the Appellant at the outset of this hearing in relation to the **Sala** point which is being further considered both in the Upper Tribunal, with a possible preliminary reference to the European Court of Justice and potentially by the Supreme Court who were invited to deal with the issue in case of **SM (Algeria) v Secretary of State for the Home Department**. The Appellant had previously applied to have his appeal joined with another in the Upper

Tribunal raising the same issues that this was refused on the papers and none of the paperwork concerning this was available to me at the hearing.

9. Given the potential further detailed consideration of this point in other cases, it would serve no useful purpose for me to consider the point in detail in the context of this appeal. The parties were in agreement as to a pragmatic way forward as follows. Although the Upper Tribunal's decision in **Sala** is not binding on this appeal, it is persuasive and, as indicated to the parties at the hearing, I follow it in this appeal. The result is that the First-tier Tribunal had no jurisdiction to hear the appeal and it erred in law in doing so. For that reason I allow the appeal and substitute a decision that there was no valid appeal before the First-tier Tribunal. However, the Appellant has put forward detailed objections to the findings in **Sala** which are being raised and considered in other appeal hearings and clearly have arguable merit. In these circumstances, I set out below what would have been my findings on the substantive issues raised in this appeal had I jurisdiction to determine them.
10. As to the good character issue, the Home Office Presenting Officer confirmed that he had no knowledge of any relevant guidance on this and it should be determined on a case-by-case basis. It was accepted on the facts that the Respondent could not show that the Appellant had been arrested for possession with intent to supply, however it was sufficient that he had been arrested for possession of a class A drug for his application to be refused as matter of discretion on good character grounds.
11. Counsel for the Appellant relied on his skeleton argument prepared for the hearing and emphasised in his oral submissions that the Appellant had been arrested for possession of a small quantity of drugs but was never charged with any offence nor convicted. That was 3 to 4 years ago and it is simply not proportionate to refuse to issue an EEA Residence Card on that basis.

### **Findings and reasons**

12. As above, the First-tier Tribunal had no jurisdiction to hear the appeal and erred in law in doing so. The appeal is allowed and I substitute the decision that there was not a valid appeal before the First-tier Tribunal. If the First-tier Tribunal has jurisdiction to determine the appeal then I would have found a material error of law in the decision of Judge Khawar on both grounds of appeal.
13. As to the first ground of appeal, Judge Khawar's decision included his view of the Appellant's conduct and character in paragraph 22 as follows, "... In my judgement, the fact that the Appellant may have previously used cocaine does not represent adequate evidence of character which, within the context of Section 10 of the application form entitled "personal history (criminal convictions, war crimes, etc)" and in particular Section 10.5 to 10.10 (which deal entirely with questions relating to terrorism, terrorist acts and other serious criminal acts), is clearly not intended to be referring to an applicant who may occasionally have used a prophylactic drug. ...".

14. This part of the decision reads as a personal view of Judge Khawar as to the seriousness of otherwise of personal use of cocaine as a prophylactic drug and whether this was sufficient to consider a person being of bad character. However, the appeal was formally allowed on the basis that the Respondent failed to undertake a proper exercise of the discretion in accordance with the EEA Regulations, with particular reference to the failure to address the material consideration of the likely impact of the free movement rights of the Sponsor in refusing a Residence Card to the Appellant. Had such an exercise been undertaken, Judge Khawar found that the Appellant would have been granted an EEA Residence Card.
15. The Respondent submitted as part of the grounds of appeal that use of a class A drug plainly had a causative link to the wider supply drugs within United Kingdom and serious repercussions resulted from such criminal activities. In such circumstances and where there was no evidence as to how the Appellant could have used cocaine as a prophylactic drug, it was submitted that Judge Khawar, was not entitled to consider that a person engaging in the use of cocaine was of good character.
16. I find that the First-tier Tribunal Judge erred in law by the combination of setting out his personal views as to the seriousness of the use of cocaine in this particular case and his own view as to whether that amounted to bad character with a lack of reasons as to why the Appellant would have been granted an EEA Residence Card if the proper exercise of discretion had been undertaken by the Respondent. If I had jurisdiction in this appeal, I would have gone on to make the following findings to remake the decision on appeal.
17. Regulation 17(4) of the EEA Regulations provides that the Respondent may issue a Residence Card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if (a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15: and (b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card. In accordance with subsection (5), the Respondent shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying refusal unless this is contrary to the interests of national security.
18. The Upper Tribunal found in **RH (UTIAC - remittals) Jamaica [2010] UKUT 423 (IAC)** that the proper exercise of the discretion afforded by regulation 17(4) requires the decision maker to take into account whether or not the effect of refusal of a residence card to the appellant would hinder or frustrate the continuing exercise of free movement rights of the EEA family member.
19. The exceptions to the right of free movement must also be relevant to any such consideration. These are set out in Article 45(3) of the Treaty on the Functioning of the European Union that the rights to (a) accept offers of employment, (b) move freely between States to take up employment,

(c) residing other Member States, and (d) the right to stay in another Member State of employment has finished, are subject to 'limitations justified on grounds of public policy, public security or public health' together with further exceptions set out in Article 45(4), 51 and 62 which are not relevant for present purposes.

20. There is no express reference in Regulation 17(4) as to the grounds on which refusal could or should be made, but Part 4 of the EEA Regulations deals with refusal of admission and removal of EEA nationals and their family members in line with the limitations in Article 45(3) of the TFEU and can usefully be read across for present purposes. The grounds of refusal set out in Regulation 21 are the grounds of public policy, public security and public health and in Regulation 21B on the grounds of abuse rights and fraud. In accordance with Regulation 21(5), where a decision is taken grounds of public policy or public security, it must comply with the following principles:

- (a) the decision must comply with the principle of proportionality;
- (b) the decision must be based exclusively on the personal conduct of the person concerned;
- (c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
- (d) that is isolated from the particulars of the case which relate to considerations of general prevention do not justify the decision;
- (e) a person's previous criminal convictions do not in themselves justify the decision.

21. In accordance with Regulation 21(6), before taking such a decision on these grounds, the Respondent must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

22. With regard to the permissible limitations on the free movement rights of the Sponsor (as set out above), who has been exercising treaty rights in the United Kingdom since at least March 2013 when she started living together with the Appellant and to the principles and considerations which would apply to a decision taken on public policy or public security grounds, which is analogous to the refusal under challenge in this appeal, I would have found that the Respondent has not properly undertaken extensive examination of the personal circumstances of the Applicant not given sufficient reasons justifying refusal. The refusal on the grounds of the Appellant's use of a class A drug three or four years prior to the decision under appeal for which he was not charged or convicted of any criminal offence could not be proportionate to the impact on the ability of the

Sponsor to continue to exercise a free movement rights in the United Kingdom; nor could it represent a genuine, present and sufficiently serious threat affecting the fundamental interests of society even taking into account the wider societal problems caused by illegal drugs.

23. As to the second ground of appeal, as agreed by both parties, Judge Khawar erred in law in allowing the appeal on human rights grounds contrary to the Court of Appeals decisions in **Amirteymour v Secretary of State for the Home Department [2017] EWCA Civ 353** and **TY (Sri Lanka) v Secretary of State for the Home Department [2015] EWCA Civ 1233**.

### **Notice of Decision**

The First-tier Tribunal had no jurisdiction to hear the appeal and erred in law in doing so, the appeal is allowed.

The decision of the First-tier Tribunal is substituted that there was no valid appeal to it.

No anonymity direction is made.

Signed



Upper Tribunal Judge Jackson

Date 6<sup>th</sup> July 2017