



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/03231/2019

**THE IMMIGRATION ACTS**

**Heard at Field House  
On Thursday 21 November 2019**

**Decision & Reasons Promulgated  
On Thursday 28 November 2019**

**Before**

**UPPER TRIBUNAL JUDGE SMITH  
UPPER TRIBUNAL JUDGE O'CALLAGHAN**

**Between**

**SALMAN AMIN**

Appellant

**And**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr P Saini, Counsel, instructed by Londonium Solicitors  
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**BACKGROUND**

1. The Appellant appeals against a decision of First-Tier Tribunal Judge Bird promulgated on 2 August 2019 ("the Decision") dismissing the Appellant's appeal against the Respondent's decision dated 22 March 2019 refusing his human rights claim. The Respondent's decision was made in the context of a decision refusing to grant the Appellant indefinite

leave to remain and that is the focus of the Appellant's grounds of appeal both before the First-tier Tribunal and before us.

2. The Appellant asserts that he has been lawfully resident in the UK for ten years. The Judge did not accept that this was the case. She expressly considered an argument put forward for the Appellant that he had continuing leave under Section 3C Immigration Act 1971 ("Section 3C leave") based on his family relationship with his brother who is a British citizen and who it is said was exercising EU Treaty rights by reason of a short period spent in Ireland. It was said that, as a result of the Appellant's dependency on his brother, he was entitled to remain in the UK under EU law as his brother's extended family member and could benefit from Section 3C leave. The Judge rejected that argument. Her conclusion in that regard is not challenged - rightly so.
3. However, the Appellant also raised an argument that, since he was residing in the UK under EU law, such period of residence should be counted as lawful residence applying the Respondent's policy entitled "Long Residence: Version 15.0" published on 3 April 2017 (see in particular page [24] of [43]). At the very least, it is said, the Judge was obliged to consider the exercise of discretion in that regard and has failed to do so. That was then, says the Appellant, relevant to the public interest when coming to assess the Article 8 claim.
4. Permission was granted by First-tier Tribunal Judge ID Boyes on 2 September 2019 in the following terms so far as relevant:
  - "2. The grounds assert that the Judge erred in failing to consider a matter raised by the appellant.
  3. Permission to appeal is granted as the grounds are clearly arguable."
5. The matter came before us to decide whether the Decision does contain any error of law. At the end of the hearing, we indicated that we were satisfied that no material error of law was disclosed by the Appellant's grounds and that we would provide our reasons in writing for so finding which we now turn to do.

## **DISCUSSION**

6. In order to understand the reason why we found no material error of law, it is necessary to say something about the chronology in this case. The Appellant came to the UK as a student on 22 September 2007. His leave was extended, first in that category, thereafter as a Tier 1 Post-Study Worker and then again as a student to 30 March 2016. However, on 26 November 2014, his leave was curtailed to expire on 30 January 2015 because his sponsor's licence was revoked. He made an in-time application to remain outside the Immigration Rules ("the Rules") which was refused on 27 August 2015.

7. On 1 September 2015, the Appellant made the application for a residence permit under the Immigration (European Economic Area) Regulations 2006 (“the EEA Regulations”) to remain as his brother’s extended family member. That application was refused by the Respondent on 19 February 2016. His appeal against that decision came before First-tier Tribunal Judge Bell on 6 February 2017. The Appellant was not present nor represented. The Respondent was not present either. We infer that this may be because, at that time, the case of Sala (EFMs: right of appeal: Albania) [2016] UKUT 411 (IAC) was in force and meant that the Judge was bound to dismiss the appeal for want of jurisdiction. When doing so, however, the Judge recorded the content of the Respondent’s decision refusing the application at [2] and [3] of the decision promulgated on 21 February 2017. The Judge noted that the Respondent had not accepted the relationship because there was only a six months’ difference in age between the Appellant and the person he claimed was his “real brother”. Further, the Appellant’s brother had only resided in Ireland for a period of three months from April to July 2015 and the Respondent did not accept that he had genuinely transferred the centre of his life to Ireland and had therefore not exercised Treaty rights.
8. At the outset of the hearing, we drew Mr Saini’s attention to those facts. He confirmed on instruction that the Appellant and his brother were related as claimed. They could not explain the difference in age being less than nine months but said that they were prepared to undergo DNA testing to establish the relationship. Reliance was placed on the brother’s time spent in Ireland, notwithstanding the shortness of time spent there, as establishing rights under EU law. It was not said that the Appellant accompanied his brother to Ireland and that period of absence also undermined the statement made in this matter that the Appellant had continuously lived with his brother at his brother’s family home throughout the period from October 2008.
9. In order to complete the chronology, we note that, following the exhaustion of his appeal rights on 8 March 2017, the Appellant applied for leave to remain in the UK on the basis of his family and private life. He varied that application to one for indefinite leave on 11 December 2017. The Respondent refused that application and certified the human rights claim under section 94 Nationality, Immigration and Asylum Act 2002. The Appellant challenged certification. The judicial review papers are within the Appellant’s bundle and, we note, contain no reference to the Appellant’s residence being lawful by reason of time spent under EU law (although the application, refusal and dismissal of the appeal are part of the factual background there stated).
10. Although the application for permission to apply for judicial review was granted on the papers and subsequently resolved by consent so that the Respondent could reconsider her decision, we also observe that, at no time after February 2017 did the Appellant seek to challenge the decision of Judge Bell dismissing the appeal on “Sala” grounds, either by way of judicial review of the Respondent’s underlying decision or by way of an

application for permission to appeal out of time. As it transpires, he was right not to do so.

11. In addition to drawing Mr Saini's attention to the facts to which we refer at [7] above which elicited the response we have recorded at [8] above, we also drew his attention to a point which we accept Judge Bell had not noted which is the basis of the Appellant's brother's EU law rights. The Appellant's brother is a British citizen. The only basis on which he could be said to be exercising EU law rights was in 2015 when he went to Ireland for three months. However, in order to establish a case under Regulation 8 of the EEA Regulations, the Appellant would have to show not only present dependency on or membership of the household of an EEA national. He would also have to show that he was previously dependent on his brother or a member of his household before he came to the UK from Pakistan. Crucially, the Appellant's brother would at that time himself have to be exercising EU Treaty rights. The Appellant came to the UK in 2007. At that time, there is no evidence that the Appellant's brother was exercising Treaty rights. Put at its highest, the Appellant's case is only that he did so between April and July 2015. We have evidence that the Appellant's brother was a British citizen from January 2015 at the latest but nothing to show that he was entitled to benefit under EU law at that or any earlier time.
12. Mr Saini very fairly accepted that those facts put him in substantial difficulties. Although as he pointed out, and we accept, there is error in Judge Bird's failure to grapple with the Appellant's argument in this regard, as a matter of fact and law for the reasons we have given, the argument based on a lawful EU right of residence could not possibly have succeeded. Accordingly, the error asserted is not material.
13. The basis on which the Judge assessed the Article 8 claim was therefore factually correct. The Appellant had leave until 1 September 2015 (following the refusal of his application made on 28 January 2015). That decision did not give rise to a right of appeal and accordingly the Appellant's Section 3C leave ended when that decision was served. Thereafter, he did not have lawful leave nor, for the reasons we have already articulated, was there any basis for the Judge to consider that he did. The Judge was therefore entitled to dismiss the appeal against the refusal of the human rights claim for the reasons she gave at [40] to [44] of the Decision. There are and were no exceptional circumstances as asserted at [12] to [30] of the grounds. Contrary to what is there said, the Appellant would not have established lawful residence if his earlier appeal against the refusal of the residence permit had proceeded substantively. It was bound to fail for the factual and legal reasons which we have already set out.

## **CONCLUSIONS**

14. For those reasons, we are satisfied that there is no material error of law disclosed by the Respondent's grounds. We therefore uphold the Decision with the consequence that the Appellant's appeal is dismissed.

**DECISION**

**We are satisfied that the Decision does not contain a material error of law. We uphold the decision of First-tier Tribunal Bird promulgated on 2 August 2019 with the consequence that the Appellant's appeal stands dismissed**

Signed  
Upper Tribunal Judge Smith



Dated: 25 November 2019