



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

Appeal Number: EA/00717/2016

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

Heard on 11th of December 2017

On 10th January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MR SHOUKAT KHAN
(Anonymity order not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Heller of Counsel

For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS FOR FINDING AN ERROR OF LAW

1. The Appellant is a citizen of Pakistan born on 24th of September 1986. He appeals against a decision of Judge of the First-tier Tribunal Khawar sitting at Taylor House on 8th of February 2017 who dismissed his appeal against a decision of the Respondent dated 8th of January 2016. That decision was to refuse to issue the Appellant with a permanent residence card as confirmation of a right to reside in the United Kingdom as the spouse of an EEA national exercising treaty rights for a continuous 5-year period pursuant to the Immigration (European Economic Area)

Regulations 2006 (“the 2006 Regulations”). The Appellant’s case was that he and the sponsor [ZS] a Hungarian citizen, were married by way of an Islamic Nikkah in Pakistan and that the marriage broke down in 2015. His argued that he met the requirements of a retained right of residence following the couple’s divorce also finalised in Pakistan.

2. The Respondent refused the application on the basis that she was not satisfied the Appellant could prove that he had been in a durable relationship for a 5-year period with the sponsor or that the sponsor was exercising treaty rights in the United Kingdom for a continuous period of 5 years. The appeal was listed as an oral hearing but the Judge was informed that by the presenting officer that she had instructions not to engage with the appeal relying instead on a decision of the Upper Tribunal in **Sala [2016] UKUT 411** that extended family members did not have a right of appeal under Regulation 8 of the 2006 Regulations.
3. The Judge dismissed the appeal on 2 grounds. Firstly, that in the light of the Upper Tribunal decision there was no valid appeal before him. Secondly even if **Sala** was overturned by a later decision of the Court of Appeal (which in fact happened) the Appellant’s appeal failed on the merits because there was no evidence to establish that the marriage to the sponsor was legally valid in Hungary and therefore it fell foul of the Upper Tribunal authority of **Kareem [2014] UKUT 24**.
4. The Appellant appealed against that decision and permission to appeal was granted by Judge of the First-tier Tribunal Brunnan on 9th of October 2017. He found that it was arguable that the Appellant had a right of appeal for 3 reasons. Firstly, the Appellant had been issued with a residence card and was now seeking a permanent residence card. This was an exception to the ratio in **Sala** which only applied to 1st time applications for a residence card by extended family members. Secondly, it was arguable that the Appellant was not in fact an extended family member under Regulation 8 but a family member under Regulation 7 if the marriage to the sponsor was itself valid. Thirdly, **Kareem** had been overturned by the Court of Appeal in the case of **Awuku [2017] EWCA Civ 178**. The test was no longer whether the marriage was valid in the country of the EEA sponsor.
5. As envisaged by Judge Khawar, the Court of Appeal in the case of **MK Pakistan** did indeed overturn the decision in **Sala**. Whilst **MK Pakistan** is potentially subject to an onward appeal to the Supreme Court, for the purposes of this appeal it is clear that there were a number of material errors of law in the Judge’s determination such that it should be set aside and the matter remitted back to the first tier for a rehearing. I have some sympathy for the position the Judge was in because at the time he heard this case **Sala** was still good law but because the common law operates in a retrospective fashion, his decision now reveals a material error of law.

6. After some discussion in court I indicated that I did not think it was appropriate for this case to remain in the Upper Tribunal as the effect of the errors of law were such that no proper hearing had in fact taken place at first instance. Both advocates agreed with that and in accordance with the Senior President's direction I indicated that I would remit the matter back to the First-tier which I now do to be heard de novo with no findings preserved.
7. One further issue was raised by counsel. The Appellant had been unable to produce evidence of the sponsor's self-employment as he had lost contact with her. Counsel asked me to make a direction in the terms outlined in the case of **Amos [2011] EWCA Civ 552** for the Respondent to make enquiries of HMRC as to the sponsor's self-employment record. As this is material to the issues in the case and I accept that the Appellant has made reasonable if unsuccessful enquiries thus far I make a direction in the terms I set out below.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. The appeal is remitted back to the First-tier Tribunal at Taylor House to be reheard de novo by any Judge save Judge Khawar.

I make no anonymity order as there is no public policy reason for so doing.

I direct that the Respondent should use her best endeavours to make enquiries of HMRC as to the working record of the sponsor in this case, [ZS] date of birth [] 1970 national insurance number [-] and thereafter supply the Appellant with the results of those enquiries.

Signed this 15th of December 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge