Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23239/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th May 2017	**On 26th May 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

MD SADIKUR RAHMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F. Junior, of Lawland Solicitors
For the Respondent: Mr E. Tufan, Senior Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Bangladesh born on the 2nd February 1990, appeals with permission, against the decision of the First-tier Tribunal (Judge Moxon) who, in a determination promulgated on 11th July 2016 dismissed his appeal against the decision of the respondent to refuse to

grant residence card as a dependant family member of an EEA national (his cousin) . No anonymity direction was made by the First Tier-Tribunal and no application has been made on behalf of the appellant by his legal representatives.

2. The appellant submitted an application on the 17 March 2015. He applied for a residence card as a dependent family member of an EEA national exercising Treaty rights, namely his cousin Mr Azad, who was a French citizen and therefore an EEA national.

3. The application was refused in a decision made on 9 June 2015. 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 who had been dependent on the EEA national sponsor/a dependent member of his household and continued to be so in the UK. The decision set out that the applicant had failed to produce the original birth certificates as evidence that he was related as claimed to the EEA national. Furthermore, the family member had failed to provide evidence that they are a qualified person are set out in Regulation 6 of the Immigration (EEA) Regulations 2006.

4. 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. It noted that he had failed to produce evidence to demonstrate that he was related as claimed to the EEA national sponsor. The evidence provided of the relationship which was a foreign language document with no translation and 4 photo copies of Bangladesh birth certificates was not accepted as evidence of a relationship. The decision letter made reference to the need to see original birth certificates for the applicant, the sponsor and both of the fathers. As the applicant had not submitted original documentation, it could not be confirmed that he was a family member of an EEA national.

5. As to the issue of dependency, the Secretary of State considered that he had not provided sufficient evidence of dependency on the EEA national sponsor at any time, either in Bangladesh or the United Kingdom. As to the evidence provided, the four money transfer slips from Asad travel was considered but they were in form which could not be appropriately verified. The slips were not sufficient evidence of dependency prior to entering the country.

6. The applicants immigration history was also considered in which it was noted that he entered the United Kingdom as a Tier 4 (Gen) student from 7 October 2009 until 24 December 2012 and in the entry clearance application the applicant did not mention his alleged uncle and that he had shown the entry clearance officers evidence that he was able to support himself financially. The Secretary of State also considered that the applicant had not provided sufficient evidence of the EEA family member exercising Treaty rights in the United Kingdom as defined under

Regulation 6 of the EEA Regulations. The accountant's letter which had been provided was deemed insufficient evidence of self-employment. Thus the application was refused.

7. The appellant appealed the decision on 22 June 2015. A notice of hearing was sent to the applicant for a hearing on 2 June 2016. However a letter from his legal representatives dated 17 May 2016 requested the Tribunal to change the hearing listed as an oral appeal to a paper hearing. That request was accepted by the Tribunal and on 16 June 2016 further directions were sent to the appellant to provide any further documents by 16 June 2016. Pursuant to that direction, a bundle of documents was sent to the First-tier Tribunal under cover of letter dated 16 June 2016 which consisted of 221 pages.

The decision of the First-tier Tribunal:

8. The appeal came before the First-tier Tribunal (Judge Moxon) on 1 July 2016. As set out above, the matter was determined upon the papers as requested by the applicant. In a determination promulgated on 11 July 2016 Judge Moxon dismissed his appeal on all grounds. In doing so, he made reference to the large bundle of documents that had been provided under cover of letter dated 16 June 2016 and observed that there had been no original copies of documents sent either in that bundle or otherwise. He also made reference to the bundle containing statements from the appellant and the sponsor dated 16 June 2016 (see paragraph 13 of the determination).

9. The Judge identified from the reasons for the refusal of the application that there were three issues that he was required to resolve. The First issue related to whether or not the applicant had demonstrated sufficient evidence of his relationship to the EEA sponsor. At paragraphs 14 – 17 of the determination the Judge set out the evidence before him concerning the relationship which included the witness statement in which the appellant explained that the sponsor was his cousin (his father's brother's son and adduced letters from two brothers-in-law to corroborate this. At paragraph 15 the Judge set out that the appellant had asserted that he had submitted original birth certificates for the First-tier Tribunal Judge to consider. However Judge Moxon observed at paragraph 16 that no original birth certificate had in fact been included within the bundle. The Judge also made reference to the photographs at paragraph 17.

10. His findings of fact in respect of this issue are set out at paragraphs 33 to 38. He found that whilst the appellant had indicated within his statement that the bundle supplied to the Tribunal included original birth certificates that was in fact incorrect and that the bundle only included copies. The Judge observed that despite the respondent expresses stating that originals would be preferable the appellant had failed to provide them. At paragraph 34 he made reference to the Bangladesh country of origin information (COI) report dated 31 August 2013 which made reference to the use of fraudulent documents, including birth certificates in Bangladesh

and cited objective material relating to the "significant prevalence of fraudulent documents in Bangladesh". At paragraph 35 the Judge considered the evidence to support the relationship, he found that none of the individuals had given live evidence and thus had not been tested for any inconsistencies. Thus he attached limited weight to those statements and letters. In respect of the photographs, he was not satisfied that the photographs as they stood did not necessarily show that they were related. Whilst the appellant and the sponsor knew each other, the Judge found that he had no reliable evidence that they were in fact cousins thus the appellant had failed to satisfy him on the balance of possibilities that he was a family member of an EEA national, namely the sponsor.

11. The second issue identified was that relating to the evidence of the sponsor exercising Treaty rights. The Judge recorded the evidence on this issue at paragraph 18 – 26. This included the appellant's account of his sponsors work history (paragraph 18), and consideration of documents within the bundle, including a premises licence, documentation including a P60 and P45 concerning employment that ceased in December 2014, and accountant's letter dated the 10th of every 2015 and tax return relating to work as a minicab driver and HSBC bank statements.

12. The Judge's findings on this issue were set out at paragraphs 39 to 44. When considering the work history of the sponsor he found that there was insufficient evidence to demonstrate that the sponsor had his own business and that the licensing document for the purported business was of the type that could be easily fabricated and that the land Registry document made no reference to the property which it concerns being a business. In addition, there were no business accounts, invoices such documentation which would have been a suitably obtainable (paragraph 39). The Judge accepted that there was sufficient documentary evidence to demonstrate that the appellant was employed until 31st of December 2014 (see paragraph 40). The Judge thereafter did accept the sponsor had worked as a taxi driver referring to the taxi licence and payments from Uber within the bank account. However he found that the only evidence of continuing self-employment of the sponsor was a renewal of the licence and no original documentation had been disclosed and that had the sponsor continued to work as a taxi driver, documentation would have been provided such as bank statements showing payments, invoices et cetera. He found that the evidence did not demonstrate that the sponsor had continued to work as a taxi driver since the 5th of February 2015 which is the date of the last payment within the account. No further evidence had been provided.

13. The last issue related to dependency. As to prior dependency the Judge set out the evidence relied upon at paragraphs 27 to 32. The findings of fact made are at paragraphs 45 to 47. The Judge was not satisfied that the appellant was dependent upon the sponsor prior to arriving in the United Kingdom. He considered the money transfer forms which had been completed by hand which purported to demonstrate money transfers from the sponsor to the appellant on four occasions during the time the

appellant was resident in Bangladesh. The Judge noted that there was no signature and where the form required details of who would process the transaction, where it had asked for the ID type it is completed "any" and no ID number was provided. The box in which to include the "order number" is also left uncompleted (see paragraph 27). At paragraph 46, the Judge found that the appellant could not rely upon that documentation for the reasons set out at paragraph 27 relating to the content of those documents. As the Judge found at paragraph 46 the documents or copies, there are various details that are omitted from them. The company was based in Cardiff, was at the time the sponsor was living in London. Thus he did not accept that that documentation could be relied upon and did not place weight upon them. Furthermore he found that the appellant had failed to provide any reason as to why he would have been dependent upon his cousin rather than any other family member. The Judge made reference to the evidence of the sponsor's income and that that did not demonstrate that he had earned "significant sums".

14. As to the current dependency, the Judge set out the evidence of paragraphs 30 to 32 and the findings at paragraph 48 to 50 of the determination. The Judge made reference to a number of documents in the bundle (including electricity bills and bank statements addressed to the same address of the sponsor) at paragraph 48 which he found suggested that the appellant and sponsor have lived together for some time. However he found the documents from organisations which would have relied upon evidence from the appellant and the sponsor and as such the credibility was "central" as to whether he could accept that documentation is a true reflection upon the living together. He found, however, that the credibility had been undermined the reasons given in the determination and therefore had not been satisfied that they had lived together at any stage. In any event, at paragraph 50 the Judge did not accept that the appellant demonstrated that he was dependent upon the sponsor. In this respect he repeated his observations in relation to prior dependency that it was unclear why the sponsor was responsible for the appellant but importantly, noted the lack of any documentary evidence, such as bank transfers or proof that the sponsor had purchased items or services that the appellant. He also noted the lack of detail as to how the sponsor supported the appellant, for example, it was not outlined as to whether he provided him with a specific sum of money.

15. The Judge went on to consider article 8 at paragraphs 55 to 71 and the Judge dismissed his appeal on all grounds.

<u>The hearing before the Upper Tribunal:</u>

16. The appellant sought permission to appeal that decision advancing four grounds. On 16 March 2007 First-tier Tribunal Judge Andrew granted permission. However the Judge did not grant permission by reference to the grounds provided on behalf of the appellant stating as follows:

> "irrespective of the complaints made by the appellant in the application there is an arguable error of law in this decision in that in accordance with the decision in Sala [2016) UKUT 411 as an OFM the appellant had no right of appeal against the decision made."

17. The Secretary of State responded to the grounds of appeal under Rule 24. That document oppose the appeal observing that the Judge granting permission identified as an arguable error of law that the First-tier Tribunal Judge had no jurisdiction to hear the appeal following the decision in Sala and thus there was a procedural error and that there was no right of appeal before the First-tier Tribunal. In those circumstances, the issues raised in the grounds did not fall for consideration.

18. At the hearing before the Upper Tribunal, Mr Tufan 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

19. Mr Junior, on behalf of the appellant submitted that at the time of the hearing before the First-tier Tribunal the decision in Sala had not been made and therefore the Judge could not have been aware of the existence of this decision and therefore the Judge should have considered the legislation in force at that time and prior to the decision of Sala.

20. As to the grounds of appeal, he relied upon the written grounds. In respect of ground one he began by submitting that the appellant had produced original birth certificates but later accepted that in fact there had been no original documents sent as the Judge had observed in the determination. However he submitted the Judge fell into error by seeking to conduct his own enquiries are set out at paragraph 34 and had not given the applicant the opportunity to address those matters. As to ground 2 and the evidence of dependency, the Judge erred in law by his failure to attach appropriate weight to the remittance slips and that the receipts were available to the Secretary of State who could have verified their authenticity. In this respect Mr Junior relied upon the evidence in the bundle to show that they were living together (ground 4) and that the Judge erred in law by failing to provide cogent reasons as to why the documents could not constitute proof of shared residence in the UK. As to ground three, which related to whether or not the sponsor was exercising Treaty rights, he invited the Tribunal to consider paragraph 39 and the licensing document that there was no evidence of fabrication and that the Judge had failed to attached appropriate weight to the evidence relating to his employment.

21. Mr Tufan on behalf of the Secretary of State relied upon the decision in Sala that there was no right of appeal and thus the First-tier Tribunal Judge erred in law in this respect. In any event, he submitted that the grounds had no merit and that the Judge attached appropriate weight to the evidence in the light of the documents that had been presented. He submitted the Judge had gone through the evidence and had given cogent and sufficient reasons for reaching the conclusions. As to looking at the

evidence in the COI S report, that was evidence of the public domain and thus it was open to the Judge to consider that evidence. As to exercising Treaty rights, there was no evidence in relation to his present employment other than a historic taxi licence thus it was open to the Judge to find that there was no evidence of any economic activity. Consequently the decision on its merits was open to the Judge to make.

Conclusions:

22. As set out earlier in the determination, permission to appeal was granted by the First-tier Tribunal Judge who took the point that the arguable error of law in the decision related to the issue of jurisdiction in the light of the decision in Sala. The Judge did not give any reasons as to why permission should be granted on the grounds as advanced by the appellant.

23. 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 after the decision of the First-tier Tribunal. It is not necessary to set out in any detail the substance of that decision as neither party have submitted before this Tribunal that the decision was wrongly decided. 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.

24. I have recorded above the submission made by Mr Junior on behalf of the appellant. In essence he submitted that it could not be an error of law in the circumstances where the Judge could not have known about the decision in Sala and which was not available to the Judge at the time of the hearing. I cannot accept that submission. As set out above, the decision in Sala was an error of law decision where the Judge could not have known that the law would be decided as it subsequently was by the Upper Tribunal. In any event 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 to 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.

25. Therefore I consider that the First-tier Tribunal Judge Andrew was right when stating that there was an error of law on the basis that there was no jurisdiction to hear an appeal against the refusal. In those circumstances, and having found an error on a point of law I set the decision aside and remake the decision that there was no valid appeal before the First-tier Tribunal.

26. However, I did hear submissions from the parties which did relate to the merits of the appeal. I did so in the event that should the decision in Sala be reconsidered on a later appeal that I have considered and dealt with the grounds advanced on behalf of the appellant. I have summarised those submissions earlier in this determination. Having had the opportunity to hear argument from the parties and having considered them in the light of the determination of the First-tier Tribunal and the documentation before the Judge, I am satisfied that the decision on its merits did not disclose any error of law as submitted by Mr Junior or as set out in the written grounds. I shall give my reasons for reaching that conclusion.

27. The first ground relates to the findings of the Judge relating to whether or not the appellant demonstrated that the parties were related as claimed. Whilst the appellant had submitted birth certificates to show the relationship, it is plain from the refusal letter that as evidence of the relationship with his cousin and sponsor, the documents had not been accepted as no original documentation had been provided. The Secretary of State could not therefore confirm from that there was evidence of the relationship. Whilst the appellant had stated in his witness statement that the bundle provided for before the First-tier Tribunal included original birth certificates to counteract that reason for refusal, it is plain from the decision of the Judge at paragraph 33 that no such original documents had in fact been provided.

28. Mr Junior began by submitting that the original document had in fact been sent but later accepted that no original documents had been sent but that there were copies of those documents. Mr Junior submitted that the Judge fell into error by conducting his own enquiries at paragraph 34. I do not consider the ground what is made out. The Judge was entitled to take into account evidence that was in the public domain. He was further entitled to take into account that evidence because it supported the reasoning in the decision letter as to why the Secretary of State was not satisfied that they were related as claimed because the original birth certificates had not been provided. The applicant was on notice that this was an issue and did not take the opportunity to provide the original documents or any further evidence. The appellant had an opportunity to deal with this issue and the burden of proof remains on the appellant. Contrary to the grounds, the Judge did give cogent reasons for his finding on this issue and considered the other evidence was provided including the photographic evidence at paragraph 36. That was a finding open to the Judge on the evidence that whilst the appellant and sponsor knew each other, there was no reliable evidence that they were in fact cousins and related as claimed. I am therefore satisfied ground one is not made out.

29. Dealing with ground 2 and the evidence of dependency, it is submitted that the Judge added law by failing to attach appropriate weight to the remittance slips and that the respondent could have sought to verify their authenticity by contacting the company. I have set out earlier the Judge's findings on this issue. The Judge gave full regard to the evidence of prior dependency at paragraphs 27 – 29 and in his findings at paragraphs 45 to 47. He gave cogent and sustainable reasons for reaching the conclusion that he could not place any weight upon the money transfer documents for the reasons amply demonstrated in his determination. It was open to the Judge to consider the content of those documents when reaching a conclusion upon their reliability (see Tanveer Ahmed). He identified that the money transfer documents had no signature and that where the form required details of who had processed the transaction, no ID number been provided; other parts of the form were left uncompleted. At paragraph 46, the Judge noted they were copies and is outlined in paragraph 27 there were various details that were omitted from the documents which undermined their reliability. He further found that the company used was based in Cardiff but at the time the sponsor was said to be living in London. It was therefore open to the Judge to consider the reliability of those documents in the context of the evidence as a whole and this included the Judge's finding that the appellant had failed to provide any reason as to why he would have been dependent upon his cousin rather than any other family member. The Judge reached that conclusion which was open to him by considering the evidence that had been produced relating to the sponsor's income which did not demonstrate that he had earned significant sums. Ground two was therefore not made out either.

30. As to ground three, it is submitted that the Judge erred in his failure to attach appropriate weight to the documentation as to whether the sponsor was exercising Treaty rights in the United Kingdom. This included the sponsor's accountant's letter and the annual tax returns. I find no merit in this ground. The Judge gave careful consideration to all the documents that had been provided relating to the issue of the exercise of Treaty rights are set out at paragraphs 18 – 26. Mr Junior has not identified any documentation that the Judge has failed to take into account. In essence his submission was that the Judge had not attached appropriate weight to those documents. However in the findings of fact the Judge carefully considered the appellants account of the sponsor's work history and did so in the light of the evidence provided. It was open to the Judge to find at paragraph 39 that in relation to the earlier work history there was insufficient evidence to demonstrate that the appellant had his own business. The Judge made reference to the licensing document as a document of the type which could be "easily fabricated". However that was not the only reason, the Judge went on to state that the land Registry document which had been provided made no reference to the property which concerned his business and importantly, the Judge recorded his finding that there had been no business accounts, invoices or documentary evidence of that type which would have been easily obtainable to support his claim. Those were findings that were open to the

Judge. As to the sponsor's employment thereafter, the Judge was satisfied that he had been employed by Shapla until 31 December 2014. The documents in that respect related to the P 45 and P60 and payslips which have been produced. However it was open to the Judge to find that whilst he accepted that the sponsor had worked as a taxi driver, having seen a taxi licence and payments from Uber in the sponsor's bank account, the evidence in this respect was time-limited and that the bank statements only showed work in this capacity to 5 February 2015. The documents before the Tribunal in the form of bank statements supported that finding to show that there were no payments between November 2014 to January 2015 but payments in February. There was no evidence in the bundle dealing with the period after that which dealt with the period for the application and the date of the hearing. Whilst the grounds assert that the evidence was sufficient relying on the accountant's letter, in the light of the documentary evidence before the Judge it was open to him to reach the conclusion that if there was evidence of exercise of Treaty rights it could have reasonably provided but the appellant and sponsor had failed to do so. The grounds simply a disagreement with those findings which were open to the Judge to make on the evidence that was before him.

31. Dealing with ground 4, it is submitted that the Judge erred in law in failing to provide cogent reasons as to why the documents relied upon by the appellant could not have constituted proof of shared residence in the United Kingdom. The Judge considered the evidence in this respect at paragraphs 48 to 50. It can be seen from reading the determination as a whole that the Judge gave proper regard to all the documents (including electricity bills and bank statements et cetera which were addressed to the same address of the sponsor). However it was open to the Judge to find that those documents were from organisations which would have relied upon evidence from both the appellant and the sponsor thus the issue of credibility was a matter that the Judge could take into account. As a result of the earlier findings, it was open to the Judge to find that the credibility had been undermined. However even if the Judge accepted that they lived together at the same address, it was open to the Judge to reach the conclusion that the appellant had failed to produce any documentary evidence to show financial or other dependence upon the sponsor. The Judge gave cogent reasons at paragraph 50 of the determination for reaching this view; it was unclear as to why the sponsor was responsible for the appellant but also there was no evidence of any bank transfers of amounts of money or evidence that the sponsor purchased items or services for the appellant. The Judge also noted the lack of detail as to how the sponsor had supported the appellant, for example, it was not outlined by the provided him with a specific sum of money per week. The appellant had provided copies of his bank accounts but there was no reference in those statements to monies emanating from the sponsor. Consequently it is not been demonstrated the Judge made any error of law in his approach on this issue.

32. As a result of the decision in Sala as set out above, the decision discloses an error of law on the basis of the Judge lacked jurisdiction to hear and

decide the appeal. In those circumstances I set the decision aside and remake the decision that there is no valid appeal before the First-tier Tribunal. However for the reasons that I have given, even if the decision in Sala was wrong, I have considered the merits and I am not satisfied that the grounds advanced on behalf the appellant demonstrate any error of law in the decision reached by the First-tier Tribunal.

Decision:

The decision of the First-Tier Tribunal did involve an error on a point of law on the basis that the Judge lacked jurisdiction. I set aside the decision and remake the decision that there was no valid appeal before the FTT.

Signed
Upper Tribunal Judge Reeds Date: 22/5/2017