



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

Appeal Number: IA/33203/2015

THE IMMIGRATION ACTS

Heard at Field House

Decision

&

Reasons

On 18 October 2017

Promulgated

On 26 October 2017

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

MD ABU TAHER

(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Chowdhury, solicitor from Kingdom Solicitors

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal to dismiss the appellant's appeal against the decision of the Secretary of State refusing the appellant an EEA residence card as an extended family member.
2. I begin by considering the First-tier Tribunal's decision. This notes that the appellant is a citizen of Bangladesh who claimed that he was entitled to a residence card as the extended family member of an EEA national, who I identify simply as Ms S, who is a citizen of Hungary.
3. The respondent refused the application by letter dated 5 October 2015 under Regulation 8 of the Immigration (European Economic Area) Regulations 2006. The respondent was not satisfied that the parties were in a durable relationship. She did not give any other reason for refusing the application.
4. The judge noted that although that decision was appealed the claim was not brought on human rights grounds. Given that this is an EEA decision and there

is no decision to remove the applicant it is very hard to see how the decision could be contrary to the Appellant's rights under Article 8 of the European Convention on Human Rights with the judge's observation clarifying the position. This was not a human rights appeal.

5. In the Reasons for Refusal Letter dated 6 October 2015 the respondent explained that the appellant and his alleged partner had not lived together for long enough or provided sufficiently persuasive evidence of their relationship for the respondent to be satisfied that theirs was a durable relationship within the meaning of the Rules.
6. It was the appellant's case that cohabitation had commenced in February 2014 and the application was made in April 2015 which is a period of about 14 months.
7. The respondent also found the supporting photographs to appear "staged" and the bank statements showed only limited transactions so that even cumulatively these things were not persuasive.
8. The judge noted that the Presenting Officer asked for the appeal to be dismissed for want of jurisdiction and relied on a decision of this Tribunal in **Sala (ESMs - right of appeal) [2016] UKUT 00411 (IAC)**. The respondent objected saying that it would be unfair to deny the appellant a hearing at that stage. The judge then said at paragraph 21:

"After consideration I took the view that, while accepting the ruling in **Sala**, given the impact on the appellant of dismissal at this stage that it was in the interests of justice and in accordance with the overriding objective of the Tribunal under its procedure rules to make findings of fact. I explained this to the parties."
9. The Presenting Officer decided not to assist further and the appellant's representative made submissions unopposed.
10. The judge decided that the appellant is a national of Bangladesh living in the United Kingdom. He entered the United Kingdom with a student visa in January 2011. That visa was due to expire on 30 April 2014 but that leave was cancelled in April 2012 because of his failure to attend college. He remained as an overstayer and was served with notice as an overstayer in January 2014 and failed to report to the Home Office on several occasions. He made an application for leave to remain on the basis of a durable relationship with an EEA national on 1 April 2015.
11. The appellant had applied previously for permission to remain on the basis of his relationship with the sponsor but that application was unsuccessful. The judge received evidence that they lived together and had bank statements in their joint names but there was nothing such as a rental agreement to indicate the basis of the occupation of the property. The judge noted that sharing an address does not prove a durable relationship. It could indicate that they are simply "flatmates". There was clear evidence that they are co-directors of a company but the judge took the view that that was not evidence of life partnership. The judge noted there was no evidence other than their own testimony that they had had an Islamic marriage ceremony at their home address.

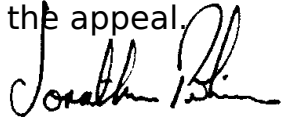
12. The judge considered the bank statements carefully and found little evidence of there being any income paid from the sponsor into the account. In short the bank accounts showed at most some modest sharing of resources.
13. The supporting photographs were not dated and although there was some “flirtatious” chat messages the judge found that they fell short of showing a durable relationship. The judge noted the oral evidence and that the appellant and his sponsor could not agree about where they first met. The judge found that a revealing inconsistency. The judge said unequivocally and helpfully at paragraph 34:

“Looking at all of the above evidence in the round, if I were to find in this case I would find that, on the balance of probabilities, the appellant and sponsor are not in a durable relationship and accordingly the appellant does not meet the criteria of Regulation 8.”
14. The grounds of appeal are unhelpful. They contend that because the appellant was told he had a right of appeal before the decision was promulgated in **Sala** his right of appeal must remain and that the judge erred by not considering the case on Article 8 grounds and that findings were unclear.
15. Permission was given because a First-tier Tribunal Judge thought it reasonably arguable that the findings of fact should not have been made. I find that a potentially interesting point but it was not developed before me.
16. Mr Chowdhury argued very assertedly that the judge was wrong to have made findings when he had no jurisdiction without addressing the fact that the judge was encouraged to make findings by a different representative from Mr Chowdhury’s firm. I see no merit in the submission. The judge’s findings are clear and reasoned. They do not become “wrong” by reason of his not having jurisdiction. I can see that in a case where a judge has decided there is no jurisdiction the hypothetical findings might be perfunctory or ill considered but that is patently not the case here. They are detailed and reasoned and indicate no fault.
17. It is known that the decision in **Sala** has been criticised in the Court of Appeal and although at the time of writing the judgments are not available it is accepted by both parties that the authority of **Sala** has been much diminished by the clearest possible indication by the Court of Appeal that it is wrong.
18. It follows that to the extent that the judge decided he had no jurisdiction he erred. However he had jurisdiction and the consequence of this is that any argument based on his findings being hypothetical because he did not have jurisdiction are misconceived. It follows that I see absolutely nothing in the grounds that begins to undermine the lawfulness of the findings. They are reasoned and explained and manifestly open to the judge.
19. I reinforce the observation of Mr Kotas and the finding of the judge that there is authority to say that refusals of residence cards cannot be expected to involve consideration of Article 8 of the European Convention on Human Rights and there is no removal decision here. I do not begin to see how the application could have succeeded on Article 8 grounds. If the applicant thinks he is entitled to remain on Article 8 grounds then he can make a suitable application

and let it be considered in detail. Asserting a right to remain and asking for a card to confirm that right is an entirely different process.

20. Mr Kotas also, helpfully, pointed out that this is not a case where, for example, the appellant and his sponsor have been accused of taking part in a marriage of convenience. Rather the respondent and later the First-tier Tribunal Judge decided that the evidence of their cohabitation was too shallow and too short lasting to establish a durable relationship. None of this prevents a further application on better evidence if there is better evidence to produce.
21. I see no merit in the grounds of appeal or the arguments raised before me. It follows that although the judge was wrong (albeit for very understandable reasons) to find that there was no jurisdiction to entertain the appeal the error is immaterial because the decision that the appellant does not in fact meet the requirements of the Rules was clearly open to the judge and in no way dependent on the earlier decision that there was no jurisdiction, if such a decision was in fact made.
22. For all these reasons I dismiss the appeal.

Signed



Jonathan Perkins, Upper Tribunal Judge

Dated: 25 October 2017