Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03503/2016

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 8 June 2017	**On 21 June 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CHIDINMA GOODNESS UBAH
(anonymity direction not made)

Respondent

Representation:

For the Appellant: Mrs Petterson Senior Home Office Presenting Officer
For the Respondent: Mr Kenneth of SLA Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge Colvin promulgated on 28 June 2016, following a hearing at Taylor House, in which the Judge allowed Ms Ubah's appeal under the Immigration (EEA) Regulations 2006.

Background

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2. Ms Ubah is a national of Nigeria born on 17 March 2014.
3. In an earlier application filed on 23 May 2014 Ms Ubah applied for a Residence Card in recognition of a right to reside in the United Kingdom as the spouse of Samuel Joel Sinnan, who is said to be an EEA national exercising treaty rights in the UK. The application was refused against which Ms Ubah appealed. On 28 July 2015 Ms Ubah made a further application for Residence Card this time claiming to be the unmarried partner of Samuel Sinnan.
4. The decision maker was aware of the earlier appeal and considered not only whether Ms Ubah was entitled to a Residence Card as a spouse but also whether Ms Ubah could be considered to be an unmarried partner of Mr Sinnan. It is recorded in the Reasons for Refusal letter, in relation to the 2015 application, that a number of findings were made by the first judge at paragraphs 28 to 31 and 33 to 35 of the decision in the following terms:

> "I cannot find that the Appellant has addressed the concerns of the Respondent about the lack of documentary evidence to demonstrate that he is in a durable relationship with the sponsor. I set out my reasons as follows;
>
> The Appellant relied on her witness statement and that of Mr Sinnan. The Appellant relied on her witness statement and that of Mr Sinnan. The Appellant elected not to attend an oral hearing. That of course is a matter for her; she has exercised her right to have the matter decided on the papers. However, the consequence is that the evidence of the Appellant and Mr Sinnan cannot be tested by cross-examination. Without the opportunity to see both witnesses and to hear their oral evidence the weight that can be placed on these documents is limited.
>
> I cannot find a reference in either witness statement to any cohabitation made by the couple prior to the date of marriage in March 2014. I further observe that the Appellant has not taken issue with the statement made by the Respondent in the refusal letter that at the date of application she could show a period of cohabitation of no more than three months duration.
>
> I accept that the documents provided link the Appellant and the sponsor to the same address, but that it is rather different from showing that the couple are maintaining a common household and have done so for an appreciable period of time. If the Appellant was indeed in a durable relationship with Mr Sinnan I would have expected to see considerably more information about their shared life and joint financial commitments.
>
> For the reasons given above, even if I am prepared to accept that the Appellant and the sponsor have shared the same address since March 2014, I am not satisfied that the Appellant has provided sufficient evidence to show the couple share a common household or are in a relationship akin to marriage.
>
> For the reasons given above, I conclude that the Appellant has not shown that she is entitled to a residence card as confirmation of her right to reside in the United Kingdom."

5. The Secretary of State noted that the current application was for a Residence Card as an unmarried partner of Mr Sinnan as opposed to the earlier application for a Residence Card as the spouse of Mr Sinnan. That aspect of the earlier application was rejected by the original judge who upheld the Secretary States conclusions that the

marriage was not considered valid as it was said to be a marriage of convenience. It was also noted, as stated above, that the relationship was not deemed to be akin to marriage.

6. In refusing the application made as an Extended Family Member, the decision-maker considered the previous history and thereafter certified the decision pursuant to Regulation 26(4) and (5) in the following terms:

> "As outlined in the evidence listed above, you have not provided anything materially different from your first application, or in the appeal dated 11 November 2014 which would demonstrate your marriage is not one of convenience. You have therefore been refused a residence card with reference to regulation 2 of the Regulations.
>
> In addition regulation 26(4) and (5) of the Regulations states the following …
>
> Based on the information provided in your application dated 23 May 2014, in your appeal dated 11 November 2014 and in your current application dated 28 July 2015, the Secretary of State considers that your claim to be in a genuine marriage with Samuel Joel Sinnan should be certified in accordance with regulation 26(5). You may not, therefore, bring an appeal or rely on such a ground in any appeal under these Regulations.

7. Judge Colvin was aware of the decision to certify but finds [5] of the decision under challenge:

> 5. However, in this appeal the appellant is relying on the ground of being the unmarried partner of the sponsor and not on the ground of being married. I consider that this aspect of the appellant's claim has not been specifically certified by the respondent under Regulation 26(5) and therefore the appellant may appeal on this ground alone.

8. The Judge considered the merits of the case before concluding at [15]:

> 15. After careful consideration I have decided that this new medical evidence is significant and is sufficient to show that the appellant and the sponsor are not merely residing at the same address but are, in fact, in a relationship. This does, in my opinion, substantially alter the previous appeal Decision as I am satisfied on a balance of probabilities that, taken together with all other evidence submitted, that they are in a durable relationship akin to a marriage so as to fulfil the requirements of the Immigration (EEA) Regulations 2006.

9. The Judge accordingly allowed the appeal.

10. The Secretary State sought permission to appeal on two grounds which was initially refused by another judge of the First-tier Tribunal. Renewed grounds asserted a material misdirection of law in the Judge deciding the certificate related very narrowly to the claim to be in a valid marriage, hence creating a right of appeal, and although relying on the original grounds, in also asserting that the Judge had no jurisdiction to hear the appeal against the refusal of a Residence Card to a person claiming to be an Extended Family Member.

11. Permission to appeal to the Upper Tribunal was granted by Dr H H Storey in the following terms:

"The grounds disclose an arguable error of law. First, it is arguable that the decision to certify the appellants EEA claim against and EEA decision related to all aspects of it. Second, even if the judge was right to conclude the appeal was not caught by regulation 26 (5) because it was a claim to be in a durable relationship with an unmarried partner, there is no jurisdiction to hear such an appeal: see Salah [2016] UKUT 411".

Error of law

12. The Immigration (European Economic Area) Regulations 2006 (as amended) provide at Regulation 26(4) and (5):

    (4) A person may not bring an appeal under these Regulations on a ground certified under paragraph (5) or rely on such a ground in an appeal brought under these Regulations.

    (5) The Secretary of State or an immigration officer may certify a ground for the purposes of paragraph (4) if it has been considered in a previous appeal brought under these Regulations or under section 82(1) of the 2002 Act.

13. Section 82(1) of the Nationality, Immigration and Asylum Act 2002 was amended by section 26 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 to facilitate these amendments to the original text of the Regulations.
14. Mr Kenneth put up a robust defence to the Secretary of States arguments. In relation to the *Sala* point it was submitted that the decision in which the Upper Tribunal found there was no jurisdiction to appeal a decision to refuse a Residence Card by an Extended Family Member was only promulgated on 19 August 2016 after the promulgation of the decision under challenge.
15. Whilst the chronology is not disputed, the Upper Tribunal in *Sala* did not refer to legal provisions that had come into existence since the date of the impugned decision or judgment on appeal, and considered those related only to the correct interpretation of the existing Regulations. The Judge was required to consider this issue even though there is a great deal of sympathy for the Judge in relation to this matter as prior to *Sala* it was thought an Extended Family Member had a right of appeal against the refusal of a Residence Card.
16. *Sala* is a reported decision of the Upper Tribunal and sets out what is considered to be the correct interpretation of this specific appeal right, or lack thereof.
17. Mr Kenneth also submitted that at the error of law stage the question of jurisdiction could not be raised and it was only if an error of law was found that the Upper Tribunal could consider jurisdiction when remaking the decision.
18. The difficulty with this argument is that it means there could never be a finding of arguable legal error for want of jurisdiction and that, if the jurisdiction issue was the only reason why a decision had to be set aside, the Upper Tribunal will be prohibited from raising it as an issue unless it was specifically argued before the First-tier Judge.
19. There was some confusion in relation to jurisdiction in the past, which has been resolved by the case of *Virk v Secretary of State for the*

Home Department [2013] EWCA Civ 652 it which it was held that although the Secretary of State for the Home Department had failed to raise before the First-tier Tribunal the issue of that Tribunal's jurisdiction to entertain a family's application for leave to remain, the Upper Tribunal was entitled to dismiss the family's subsequent appeal against the First-tier Tribunal's decision on the basis that the First-tier Tribunal had not had jurisdiction, notwithstanding that the point had not been raised below. In *Virk* it was said "Statutory jurisdiction cannot be conferred by waiver or agreement; or by the failure of the parties or the tribunal to be alive to the point". It was also said however that if the issue had not previously been raised then fairness required that the parties should be given the opportunity to address it.

20. The important point is that if the First-tier Tribunal never had jurisdiction, statutory jurisdiction could not be conferred by waiver, agreement, or the failure of the parties of tribunal to be alive to the point, hence the Upper Tribunal is able to consider the specific issue.

21. In light of the decision in *Sala*, even if the Secretary of State is wrong in relation to the first ground of appeal the Judge materially erred in law as there was no valid right of appeal available to Ms Ubah on the facts of this case.

22. Returning to the first ground of appeal, the wording of Regulation 26 specifically prevents Ms Ubah from bringing appeal on a ground that has been certified or to rely on such a ground in an appeal brought under the Regulations. The basis of certification is that the ground had been considered in a previous appeal.

23. I do not accept there is any merit in Mr Kenneth’s argument that certification cannot take effect unless there is specific mention of the decision to certify the current grounds beyond that referred to in the Reasons for Refusal letter, as the letter of 4 March 2016 clearly sets out all applications and decisions made relating to this issue and the reason for the certification decision.

24. It appears from the refusal letter that the original grounds of appeal in relation to the impugned decision are in a generic form asserting:

1. The decision of the Secretary of State is not in accordance with the provisions of Regulation 26 of the EEA Regulations 2006 by denying the appellant right of appeal.
2. The Secretary of State erred in law and on facts when he refused the appellant’s application for residence cards in the United Kingdom as a family member of EEA national. The decision is not in accordance with the provisions of Regulation 8(5) Immigration (European Economic Area) Regulations 2006.
3. The decision is unlawful because the Secretary of State failed to acquiesce himself with the whole facts of our clients application. The EEA national is exercising treaty rights in the United Kingdom. The decision of the Secretary of State breaches the appellant’s rights under Article 8 European Convention on Human Rights. The European Convention recognises the fact that once an EEA national exercising treaty rights in the United Kingdom, all rights enjoyed by him/her should be extended to their family members.
4. The appellant will contend at the hearing that his rights as guaranteed under the community treaties in respect of leave to remain in the United Kingdom is likely to be breached as a result of the decision.
5. The Secretary of State decision is not in accordance with the immigration rules and in law when he refused the appellant on the basis that the appellant had his

wife were not living together in the UK whilst there is enough evidence show that they have been living together for more than 2 years as required by the Regulations.

6. The EEA national is exercising treaty rights in the United Kingdom. The decision of the Secretary of State breaches the appellant's rights under Article 8 European Convention on Human Rights.
7. The Secretary Stayed erred in fact and in law by the deliberate isolation and a wilful mistake of facts which gives rise to automatic right of appeal on a point of law. The applicant relies upon the decision of the court in E&R v Secretary of State for the Home Department [2004] EWCA Civ 49.
8. Acting incorrect basis of fact R (Alconbury ltd) v Secretary State for Home Department (2001) WLR 1389, 2001 UKHL 23, para 53 per Lord Slynn) R v Secretary Stage the Home Department [2002] EWCA Civ 49. Secretary of State for Education v Tameside MBC (1997) AC 1014, 1030.
9. The EEA national is exercising treaty rights in the United Kingdom under Regulation 6 of Immigration (EEA Economic Area) Regulation 2006.
10. Further and in the alternative, the decision of the Secretary of State is unreasonable, illegal, perverse and contrary to Human Rights Act 1998.
11. The discretion under the Immigration Rules should have been exercised differently.
12. The decision of the Secretary of State should not be allowed to stand by the Tribunal because it is unlawful and illegal.

25. As can be seen, a number of the grounds of appeal fail to establish any arguable error and are wrong in law. For example, there is nothing illegal made out in the decision of the Secretary of State, the immigration rules have not been shown to apply as no decision has been made under the UK domestic immigration rules, and there is no right of appeal on the facts of this matter to the human rights element as no application for leave on human rights grounds has been made and no decision refusing a human rights application was before the Judge. The question of whether the EEA national is exercising treaty rights does not appear to have been an issue.
26. Ms Ubah has not provided copies of the previous grounds of appeal that were drafted to challenge the earlier decision. Although there was a claim to be entitled to a Residence Card, on the basis of a genuine marriage between Ms Ubah and Mr Sinnan, if the grounds of appeal were drafted as the current grounds appear to have been approached there is a strong possibility that within the claims made the issue of the durable relationship may have arisen.
27. The core issue in relation to this matter is the relationship itself. The earlier claim was a claim by Ms Ubah to be in relationship with Mr Sinnan which is indeed the core of the most recent claim.
28. The Judge fails to examine the nature of the grounds considered in the previous appeal especially as the original judge considered not only the question of whether Ms Ubah was in a marriage but also whether she was in a relationship akin to marriage.
29. Unless and until the specific detail has been considered, and the clear inference from the decision of 4 March 2016 was that the decision to certify the grounds related to the relationship and not simply the validity of the marriage, it cannot be said the Judge had sufficient evidence available to find that the current appeal was being pursued on grounds that had not been previously considered.

30. The issue is not the basis of claim but nature and content of grounds of appeal in relation to Regulation 26 certification.
31. I find the Secretary of State has established arguable legal error by the Judge in relation to the assessment of the certification decision and in finding that the appellant had a right of appeal contrary to Regulation 26. I set this aspect of the decision aside.
32. In light of the failure to adduce the correct documentation to enable comparison of the grounds of appeal in relation to the current and earlier decision, it cannot be said the appellant before the First-tier Tribunal has established a valid right of appeal.
33. As stated above, even if the certification had no effect, this tribunal has no jurisdiction to remake the decision in light of *Sala*.

Decision

34. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. The Upper Tribunal is unable to remake the decision for want of jurisdiction.**

Anonymity.

35. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated the 20 June 2017