



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/00751/2015

THE IMMIGRATION ACTS

Heard at Field House
On 8th May 2017

Decision & Reasons Promulgated
On 26th June 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MISS JINOREKA VARATHARAJAN
(ANONYMITY NOT DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms. S Iqbal, instructed by Marsh and Partners
For the Respondent: Ms. K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal ("FtT") Judge A W Khan promulgated on 15th September 2016. The Judge dismissed the appellant's appeal against a decision made by the respondent on 7th July 2015 to reject the appellant's application for a residence card as confirmation of the right

of residence, as the extended family member of an EEA national exercising treaty rights in the UK.

2. The grounds of appeal are twofold. First, on 19th September 2016, the Upper Tribunal published its decision in Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC), which establishes that there is no statutory right of appeal against the decision of the Secretary of State not to grant a Residence Card, to a person claiming to be an Extended Family Member. Second, if a right of appeal did exist, the Judge erred in his consideration of the evidence, and reached findings upon material matters that are irrational, and were not open to him.
3. Permission to appeal was granted by Upper Tribunal Judge Cruthers on 22nd March 2017. The Judge noted that based on the decision of the Upper Tribunal in Sala, arguably, there was no right of appeal to the FfT. In granting permission, the Judge expressed no view as to the merits of the appellant's challenge to the findings made by the FfT Judge. The matter comes before me to consider whether the decision of the FfT Judge involved the making of a material error of law, and if the decision is set aside, to re-make the decision.
4. At the hearing before me, Ms Iqbal applied for an adjournment of the hearing. She submits that the question as to whether a statutory right of appeal exists against the decision of the Secretary of State not to grant a Residence Card, is one of the matters to be considered by the Court of Appeal in MK (Pakistan) in July 2017. She submits that the issue is also to be considered in a reference made by the Upper Tribunal to the European Court in SSHD -v- Rozanne Banger (C-89/17). Ms Iqbal accepts that any decision from the European Court is some way off, but submits that the hearing of the appeal before me should be adjourned pending the decision of the Court of Appeal.
5. The application for an adjournment was opposed by Ms Pal. She submits that Sala establishes that the refusal to exercise discretion under Regulation 17(4) of the 2006 EEA Regulations, does not attract a right of appeal, as it is not an 'EEA

decision'. However, here, the Judge also found that the appellant does not meet Regulation 8(2)(a) of the 2006 Regulations as an extended family member.

6. I refused the application for an adjournment. In my judgement, the decision of the Court of Appeal in the forthcoming appeal will be of no assistance to the appellant, and there is nothing to be gained by an adjournment. The appellant's first ground of appeal is that the FtT had no jurisdiction to entertain an appeal. If the appellant is correct in her first ground of appeal, and the decision in Sala is upheld by the Court of Appeal, the Upper Tribunal equally has no jurisdiction to entertain this appeal. That will be the end of the matter.
7. If, however, the Court of Appeal finds that the decision of the Upper Tribunal in Sala was wrong and there does exist a statutory right of appeal before the FtT, the appellant has been able to exercise her statutory right of appeal. Here, the Judge found that the appellant does not meet Regulation 8(2)(a) of the 2006 Regulations as an extended family member.
8. Having refused the application for an adjournment of the hearing, I went on to hear the parties' submissions upon the two grounds of appeal advanced on behalf of the appellant.
9. Ms Iqbal maintains that the decision of the Upper Tribunal in Sala establishes that there is no statutory right of appeal against the decision of the respondent not to grant a residence card to a person claiming to be an extended family member and so, whatever the parties might have thought at the time, there was in fact no right of appeal. The FtT had no jurisdiction to entertain an appeal. The Tribunal erred in hearing the appeal and its decision should be set aside.
10. She submits that if the Tribunal did have jurisdiction, the FtT Judge makes findings that are irrational and or inadequately reasoned. She submits that at paragraph [12], the Judge fails to give adequate reasons for his finding that the appellant was not financially dependent upon her brother, whilst she was living

in Sri-Lanka. She submits that in the appeal of the appellant's sister, Diana Varatharaja, the FtT Judge accepted that the appellant's sister was financially dependent on the same brother. Ms Iqbal submits that the decision of the FtT Judge in the sister's appeal should have formed the starting point for the Judge's assessment of whether the funds sent by the brother to Sri-Lanka, was evidence of financial dependency in the manner described by the appellant. She also submits that the Judge failed to reach an adequate finding regarding the appellant's evidence that she receives £50 every week from her brother, and has been doing so since 2009, as evidence of her current dependency on her brother. Finally, she submits that the Judge failed to properly assess the evidence before him as to the address at which the appellant claimed to be living, and fails to give adequate reasons for his finding that the appellant had practised deception.

11. The respondent has filed a rule 24 response dated 5th April 2017. The respondent states in the Rule 24 response that the appellant's claim that the Tribunal did not have jurisdiction, proceeds on a misunderstanding of the ratio of the decision in Sala. The respondent claims that the decision in Sala is limited to the discretion to be exercised by the respondent under Article 17(4) of the 2006 Regulations, whereas here, the appellant was unable to satisfy the requirements of Regulation 8, such that the question of discretion does not arise. Before me, Ms Pal conceded that the effect of the decision in Sala is that there is no statutory right of appeal against the decision of the Secretary of State not to grant a Residence Card, to a person claiming to be an Extended Family Member, and the Tribunal had no jurisdiction to hear the appeal.
12. Ms Pal submits that in any event, the Judge has carefully set out the evidence before him and has reached findings that were open to him, and given adequate reasons for those findings. She submits the Judge was entitled to reject the explanations provided by the appellant during her evidence as to financial dependency upon her brother whilst the appellant lived in Sri Lanka, and since her arrival in the UK. She submits the Judge carefully considered the competing

and conflicting evidence, and it was open to the Judge to reach the findings that he did, on the evidence before the Tribunal.

Discussion

13. The Judge cannot be criticised for dealing with the appeal in the way that he did. It was commonly accepted that extended family members of EU nationals residing in the United Kingdom enjoyed a statutory right of appeal to the Tribunal against a decision by the respondent to refuse to issue them with a residence card. The appellant's appeal was heard on 25th August 2016 and the decision of the FfT Judge was promulgated on 15th September 2016. Neither party claimed that there was in fact no right of appeal, and that the Tribunal therefore had no jurisdiction to entertain the appeal.

14. This appeal, like Sala, concerns the right of appeal of an extended family member as defined in Regulation 8 of the 2006 Regulations. Regulation 8(2) defines an extended family member as including someone who satisfies the conditions in Regulation 8(2). That is the provision which the appellant in this appeal claimed to satisfy, and which the judge concluded, she did not satisfy. Regulation 17 provides that the respondent must issue a residence card to a person who is not an EEA national and is the family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15 or to a person who is not an EEA national but who is a family member who has retained the right of residence. However, Regulation 17(4) provides that the respondent may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if (a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and (b) in all the circumstances it appears to the respondent appropriate to issue the residence card. In Sala, the Tribunal held that an extended family member of an EEA national has no right of appeal under Regulation 26 of the Immigration (European Economic Area) Regulations 2006 against the refusal of a residence card. The

Tribunal held that the rights of extended family members derive not from EU law, but from the respondent's discretion to issue a residence card following an extensive examination of their personal circumstances under Regulation 17(5).

15. The decision of the Upper Tribunal in **Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC)** was published on 19th September 2016, just four days after the decision of the FtT Judge was promulgated. It is now common ground between the parties before me, that on the present state of the law, there is no statutory right of appeal against the decision of the Secretary of State not to grant a Residence Card, to a person claiming to be an Extended Family Member.
16. The FtT had no jurisdiction to hear the appeal and the decision of the FtT is therefore set aside.
17. I do not in the circumstances need to consider the remaining grounds relied upon by the appellant. However, I have carefully read the paragraphs that the appellant seeks to criticise and the decision as a whole. The Judge carefully sets out the evidence before him and considers the inconsistencies in the evidence, and the explanations given by the appellant and her brother in their evidence. It is now well established that although there is a legal duty to give a brief explanation of the conclusions on the central issue on which the appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the Judge. It is equally well established that a finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence. On appeal, the Upper Tribunal should not overturn a judgment at first instance, unless it really could not understand the original judge's thought process when the Judge was making material findings. If the FtT had had jurisdiction to determine the appeal, I would have had no hesitation in concluding that the appellant's further grounds amount to nothing more than a disagreement with findings that were properly open to the Judge.

