**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Numbers: EA/01885/2015**

**E**

**A/01886/2015**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 30th May 2017** | **On 6th June 2017** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCGINTY**

**Between**

**MR RASHID MARIKAR MAUJUD MARKAR**
**MISS FATHIMA BUSHRA MOHAMMADU FAROOK**
(ANONYMITY DIRECTION NOT MADE)

Appellants

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: No representative
For the Respondent: Mr P Armstrong, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellants in this case, Mr Rashid Marikar Maujud Markar, and Miss Fathima Bushra Mohammadu Farook are husband and wife. They are citizens of Sri Lanka and they have sought to appeal against the decision of First-tier Tribunal Judge Moran promulgated on 4th November 2016 who

refused, on the basis of a lack of jurisdiction, their appeal against the Respondent's decision to remove them from the UK which had been made on the basis that they did not have or ceased to have a right to reside under the Immigration (EEA) Regulations 2006.

2. Within the decision of First-tier Tribunal Judge Moran, who heard the case on 11th October 2016 at Hatton Cross, it was noted that the appeal arose out of a decision made on 10th September 2015 as set out in the notice of a person liable to removal under the Immigration (EEA) Regulations 2006 and that the notice stated that the Appellants had no right to reside under the Regulations and they were liable to be detained in paragraph 62 of Schedule 2 of the Immigration Act 1971 pending the decision of whether or not removal directions would be made. It stated within the notice that fraud had been used in order to obtain or attempt to obtain a right to reside, because the Sponsor who Mr Markar confirmed was a Swedish national, it was said did not live in the UK and was not exercising treaty rights.

3. Judge Moran decided that there was no jurisdiction to hear the appeal. He stated in paragraph 6 of his decision that since the application was made the Upper Tribunal had decided the case of **Sala (EFMs: Right of Appeal: Albania) [2016] UKUT 00411 (IAC)**. Judge Moran found that **Sala (EFMs: Right of Appeal: Albania)** had considered the issue as to whether or not an extended family member refused a residence card had a right of appeal under Regulation 26 of the Immigration (EEA) Regulations 2006 and the fact that the Upper Tribunal found there was no such right of appeal. Judge Moran stated that if there was no right of appeal in such a case, then it follows that there can be no right of appeal against the decision of the Respondent to set out in the notice dated 10th September 2015 that was issued to the Appellants. He stated the crucial reasoning being that the Appellants have no entitlement to a residence card as extended family members. He stated the issue was one of a matter of discretion only and therefore he found that there was no EEA decision within the meaning of Regulation 2 that gave rise to a right of appeal under Regulation 26.

4. The Appellants have now sought to appeal against that decision. At the hearing before Judge Moran, when filing their Notice of Appeal and as at today they were not legally represented.

5. Within the Grounds of Appeal it is stated that:-

> "I am appealing this, the Judge decision to refuse my case. I had resident card before which Home Office gave to me. They took it back, but because they have previously given to me. I do not think the new law applies to me."

6. Clearly the judgment under appeal was the judgment of Judge Moran and permission to appeal has been given in this case by First-tier Tribunal Judge Landes on 21st April 2017 who in granting permission to appeal extended the time for filing the application by a period of one day on the

grounds that she found that the Appellants were unrepresented and it was thought that the period for lodging the application for permission to appeal runs from the date the decision is received, rather than the date of the decision itself, and therefore she did find there was a good explanation for the delay and extended time accordingly. She further found that it was arguable that the judge had made an error of law in dismissing the appeal for want of jurisdiction based upon the **Sala** case and found that it was arguable that in this case the actual decision under appeal was the decision to remove the Appellants from the United Kingdom under Section 10 of the 1999 Act which arguably was an EEA decision for the purposes of Regulation 2.

7. I am grateful to the assistance I have had this morning from Mr Armstrong, the Home Office Presenting Officer, in respect of this appeal. I have fully taken account of the Respondent's Rule 24 notice dated 4th May 2017 in which it was argued that the Respondent opposed the appeal. It was argued that the judge entirely directed himself appropriately. It was stated within the Grounds of Appeal that it was not clear what the Appellants were appealing against and therefore it was said that the Respondent at that stage was unable to comment further until more information had been obtained. I note that Mr Markar had written to the Tribunal on 19th May 2017 saying that **Sala** did not apply to his case.

8. I bear in mind that the Appellants are not legally represented but they have clearly appealed the jurisdictional decision taken by Judge Moran that there was no jurisdiction to hear their appeal in the circumstances of their case.

9. I am grateful to the assistance I have been given by Mr Armstrong in that regard who has quite properly told me that the decisions under appeal were the decisions which were taken to remove the Appellants from the United Kingdom pursuant to Section 10 of the Immigration and Asylum Act 1999 and which were made in accordance with Regulations 19(3)(a) and 19(3)(c) of the Immigration (EEA) Regulations 2006 pursuant to Regulation 21(b)(2) and Regulation 24(2). It was stated specifically within both of the Notices of Immigration Decision and the decision to remove dated 9th October 2015, in respect of each Appellant that they were entitled to appeal that decision while they were in the UK by virtue of Regulation 26.

10. I am grateful to Mr Armstrong for his concession that the decision as to whether or not they are removed from the UK does amount to an EEA decision under Regulation 2 and therefore in fact it does give rise to a right of appeal. The definition of an EEA decision in Regulation 2 includes under sub-paragraph (c) a person's removal from the United Kingdom.

11. The Regulations further make clear that under Regulation 19(3)(a) a family member of an EEA national may be removed if he does not have or ceases to have a right to reside under the Regulations and under Regulation 24(2) where a decision is taken to remove under Regulation 19(3)(a) or (c) a person is to be treated as if he were a person to whom Section 10(1)(a) of

the 1999 Act applied and that Section 10 of that Act, removal of certain persons unlawfully in the UK, is to be applied accordingly.

12. The decision by the Upper Tribunal in the case of **Sala** was not considering the circumstances of a person in respect of whom a decision to remove from the United Kingdom had been made under Section 10. It was dealing specifically with the situation of someone who was seeking a residence card confirming whether or not they were entitled to reside in the UK as an extended family member and the Upper Tribunal in that case found that if someone was seeking a residence card on the basis of them claiming to be an extended family member that there no right of appeal against that decision, because in effect it was a matter of discretion for the Secretary of State rather than a matter of right to any entitlement in terms of the issue of the residence card. That is a far cry from the situation that is faced by these Appellants where a decision has been made to remove them from the United Kingdom which is being appealed to the First-tier Tribunal. As is now conceded by Mr Armstrong it is clear that in that regard First-tier Tribunal Judge Moran did err in terms of jurisdiction. There was jurisdiction to hear this appeal and he should have proceeded to hear the appeal.

13. Given the fact it amounts to an error in jurisdiction, the Appellants were deprived of a fair hearing at the First-tier Tribunal. This was therefore a material error in law such that the decision should be set aside and remitted back for a re-hearing de novo in respect of both Appellants before any First-tier Tribunal Judge other than First-tier Tribunal Judge Moran. I do not accept when the Appellants did not have a full hearing at the First-tier Tribunal that it can be said that any error was not material and the judge would have necessarily dismissed their appeals in any event.

14. I therefore allow both Appellants' appeals.

## Anonymity Direction

15. I note that no anonymity direction was made by First-tier Tribunal Judge Moran and no anonymity direction has been sought before me. There is no reason in this case why there should be anonymity and therefore I do not make any anonymity direction.

## Notice of Decision

I set aside the decision of First-tier Tribunal Judge Moran as containing a material error of law.

I remit the appeals of both Appellants back to the First-tier Tribunal for a rehearing de novo before any First-tier Tribunal Judge other than First-tier Tribunal Judge Moran.

Signed Date 5th June 2017

Deputy Upper Tribunal Judge McGinty