



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/03110/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal
On 1 September 2017

Decision & Reasons Promulgated
On 4 September 2017

Before

UPPER TRIBUNAL JUDGE HANSON

Between

CHINWENDU EBENEZER IBENECHÉ
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sarwar instructed by Syeds LawCare Solicitors

For the Respondent: Mr P Singh Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a decision of Designated First-tier Tribunal Judge McCarthy determined without a hearing on 13 March 2017 in which the Judge dismissed the appeal for want of jurisdiction.

Background

2. The appellant, a citizen of Nigeria, was born on 1 July 1990.
3. On 23 November 2015, the respondent refused to issue a permanent residence card to the appellant as she was not satisfied the appellant had provided adequate evidence to show he had been dependent upon his EEA national sponsor or a member of her household for a continuous period of five years.
4. On 30 November 2015, the appellant lodged notice of appeal with the First-tier Tribunal although on 27 February 2016 that Tribunal wrote to the parties drawing their attention to the decision of the Upper Tribunal in *Sala [2016] UKUT 00411*. It was stated that as the subject of the appeal appears to be an extended family member under the EEA Regulations 2006 the appellant's representatives were asked to submit legal reasons as to why the appeal should be regarded as valid.
5. The Designated Judge notes that neither party replied to the directions within the period provided. This is disputed before the Upper Tribunal by Mr Sarwar who refers to a letter having been sent by the appellant's representatives in response to the direction, dated 8 March 2017.
6. There is within the First-tier Tribunal file a letter of this date stamped as having been received by the First-tier Tribunal at Sheldon Court on 10 March 2017. The appellant has also provided a copy of proof of delivery showing the document was delivered and 'signed for' on 10 March 2017 at 8:46 AM. For whatever reason, it does not appear that the letter was in the file when the documents were placed before the Designated Judge.
7. During the Error of Law hearing Mr Sarwar was advised that the content of the letter will be considered from the viewpoint of ascertaining whether the failure to produce this document to the Judge amounted to a procedural irregularity sufficient to amount to a material error of law.
8. Having considered the content of the letter no material error of law is made out on this basis for, even had the letter been before the Designated Judge, it is highly unlikely that any other decision, other than that appearing in the decision under challenge, would have been made. The letter sets out the fact the appellant considers the decision under challenge by the Secretary of State was made in error as he had been previously granted a "five-year extended family route Visa". This comment is factually incorrect. It is accepted by all that the appellant was issued a Residence Card confirming his right to reside in the UK as an extended family member of an EEA national exercising treaty rights. This is not a document that grants permission to remain in the United Kingdom as that right flows from European law.
9. The appellant also states he lodged the appeal before the decision of the Upper Tribunal in *Sala* and that whilst the case of *Sala* stated there was no right of appeal for extended family members of an EEA national it did not give insight on applications made after the end of an initial five years given to family members of EEA nationals. The letter asserts the appellant has paid for the appeal and as such deserves a fair hearing and that he was advised at the

material time that an appeal was possible and on that basis continued with the process of application for the appeal. The letter asserts the appellant will be disadvantaged if the case was not heard as scheduled. The letter continues, on the second page, in the following terms:

“We submit that given the information above, this application subject to the appeal was made long before the above case, the decision of *Sala* [2016] should not affect the client. It would be unfair for our clients rights to family life to be stripped off due to a case, which was decided more than a year after her application was submitted.

We are hopeful that an independent judge would find that the decision made by the Home Office was unfair and completely in error. The appellant has integrated into the society and would be difficult for the family if removed from the United Kingdom. In addition, this would affect his progression in pursuit of education.

10. At [5 – 8] the Judge writes:

5. It is for the Tribunal to decide whether a person has a right of appeal and it will do so by application of the law. I have considered whether the appellant might have a right of appeal because he was previously issued a residence card as an extended family member and therefore might benefit from reg 7(3). However, that card expired on 29 July 2015. As such, he is no longer a person with a valid residence card. There is no provision in law for a residence card to be extended automatically by an application. The appellant does not benefit from reg 7(3) even though he applied for a permanent residence card before his five-year card expired.
6. For the reasons given in *Sala* the appellant does not have a right of appeal against a decision to refuse a residence card as an extended family member. It is immaterial whether the application is for a five-year or permanent residence card. The only course for redress is by judicial review.
7. I mentioned, in case it is of any relevance, that the Tribunal cannot address any arguments relating to the appellant’s protected human rights for the reasons given by the Court of Appeals judgment in *TY (Sri Lanka) v SSHD* [2015] EWCA Civ 1233. They can only be argued if the respondent refuses a human rights claim, which is not the case here.
8. These reasons, I find there is no valid appeal and dismiss the appeal for want of jurisdiction.

11. The appellant sought permission to appeal which was granted by another Designated Judge of the First-tier Tribunal on the basis it was arguable that *Sala* does not apply to an extended family member applying for a permanent residence card who has previously been issued with a residence card (as the Appellant had been). It is said to be arguable this is an exception to the case of *Sala* as the grounds indicate.
12. The Secretary State opposes the application and submitted in her Rule 24 response of 13 July 2017 that the First-tier Tribunal was correct to find that the appellant did not have a right of appeal and that the date of application matters not in this appeal. The case of *Sala* has made it expressly clear that individuals who apply under the same basis as this appellant, as an extended family member, do not have a right of appeal.

Error of law

13. The point taken in relation to the timing of the decision in *Sala* has no arguable merit on the facts. It was held 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 based upon the wording of the Regulations. It is not made out that there has been any change in the legal provisions applicable between when the decision was submitted and the decision in *Sala* that may have any relevance, making the effluxion of time arguably irrelevant. The appellant also fails to establish that it is the provisions applicable to the date of application that should be considered which, in relation to a decision under the EEA Regulations, is arguably incorrect.
14. In *SGC and Others [2005] UKAIT 00179* the Tribunal said that (i) in an EEA appeal under the 2002 Act the relevant date is the date of the hearing.
15. Mr Sarwar argued that the Judge has erred in law in the statement in [6] of the decision under challenge that it is immaterial whether the application is for a five year or permanent residence card.
16. Mr Sarwar also refers to the conclusion of the Upper Tribunal in *Sala* in which it is stated:
 84. Although we have found the issue raised in this appeal a difficult one, we see no sustainable argument to deflectors from the natural meaning of the decision of an "EEA decision" in reg2(1) point (b) that we identified earlier. A decision, taken by the Secretary of State in the exercise of her discretion, not to issue an EFM with a residence card under reg 17(4) is not a decision under the EEA Regulations 2006 which "concerns..... a person's entitlement to be issued with..... a residence card".
17. Mr Sarwar argues that if the Secretary of State has no discretion whether or not to issue a residence card a refusal in that situation must confer a right of appeal as it is a decision which concerns a person's entitlement to be issued with a residence card.
18. Mr Sarwar referred to Regulation 19 of the Immigration (European Economic Area) Regulations 2016 which is the version of the regulations in force at the date of the decision under challenge and at the date of the hearing before the Upper Tribunal. Regulation 19(2) states:
 - (2) the Secretary of State must issue a person who is not an EEA national who has a right of permanent residence under regulation 15 with a permanent residence card no later than six months after an application is received and the production of-
 - (a) a valid passport; and
 - (b) proof that the person has a right of permanent residence.
19. It was argued that as the regulation contains the word "must" there was no discretion conferred upon the Secretary of State.
20. Mr Sarwar was asked on what basis it is argued that it was established before the Designated Judge that the appellant satisfies this provision to which the

response was to claim that this was a matter that will be established through any appeal. When asked on what basis it is claimed such a right was made out before the Designated Judge and on what basis it is asserted the appellant is entitled to a right of permanent residence, Mr Sarwar referred to the bundle of evidence before the Designated Judge and stated the appellant was able to satisfy the requirements of Regulation 15(1)(b) of the 2016 Regulations.

21. Regulation 15(1)(b) states a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years can acquire the right to reside in the United Kingdom permanently.
22. The Designated Judge was clearly aware of the relevant provisions of European law and at [5] specifically considered whether the appellant might have a right of appeal because he was previously issued a residence card as an extended family member and might benefit from regulation 7(3), although that card expired on 29 July 2015. It was not arguably made out on the documents made available to the First-tier Tribunal in the bundle submitted on the appellant's behalf that the appellant was able to satisfy the requirements of Regulation 15.
23. Regulation 7 provides:

“Family member”

7. – (1) In these Regulations, “family member” means, in relation to a person (“A”) –
 - (a) A's spouse or civil partner;
 - (b) A's direct descendants, or the direct descendants of A's spouse or civil partner who are either –
 - (i) aged under 21; or
 - (ii) dependants of A, or of A's spouse or civil partner;
 - (c) dependent direct relatives in A's ascending line, or in that of A's spouse or civil partner.
- (2) Where A is a student residing in the United Kingdom otherwise than under regulation 13 (initial right of residence), a person is not a family member of A under paragraph (1)(b) or (c) unless –
 - (a) in the case of paragraph (1)(b), the person is the dependent child of A or of A's spouse or civil partner; or
 - (b) A also falls within one of the other categories of qualified person mentioned in regulation 6(1).
- (3) A person (“B”) who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card must be treated as a family member of A, provided –

(a)B continues to satisfy the conditions in regulation 8(2), (3), (4) or (5); and

(b)the EEA family permit, registration certificate or residence card remains in force.

(4) A must be an EEA national unless regulation 9 applies (family members of British citizens).

24. It is not disputed that the appellant claimed an entitlement to reside in the United Kingdom as an extended family member of an EEA national exercising treaty rights in relation to which he was issued a Residence Card on 29 July 2010 which expired on 29 July 2015.
25. The Secretary of State in refusing the application for a permanent residence card noted from the evidence submitted that the appellant was no longer residing with the EEA national and that as he was not residing with the EEA national sponsor anymore it was stated the respondent would expect to see detailed bank transfers between the appellant and the EEA sponsor to show financial dependency of which there is no evidence of any such transfers or dependency in the documents provided. The application was therefore refused by reference to regulation 15(1)(b) by reference to regulation 8 of the EEA Regulations.
26. Mr Sarwar submitted there was evidence in the bundle before the Designated Judge of dependency. The limited number of bank statements provided refer to transfers of funds from the EEA national but satisfying the definition of dependency involves more than just showing funds being transferred. It was not made out on the evidence before the Designated Judge or Secretary of State that the appellant had established financial dependency.
27. The Designated Judge refers to the fact the appellant's earlier Residence Card had expired on 27 July 2015. Having been given additional time to make further enquiries Mr Sarwar accepted that the matter is as recorded by the Designated Judge regarding the date of expiry and accepted this was a point against the appellant.
28. Mr Sarwar also sought to take a second point regarding regulation 7(3)(b) and whether, even though the date the card expired is correct, there was some sort of residual benefit with a similar effect to section 3C in a statutory appeal which would have the effect of the residence card remaining in force.
29. After being given time to research this matter in further detail, Mr Sarwar accepted the wording of the regulation was in the context of the residence card and that it was accepted that the card had expired.
30. The Designated Judge does specifically consider whether there was a provision for a residence card to be extended automatically by an application but finds at [5] that no such provision exists.
31. Having considered the evidence and submissions made to the Upper Tribunal, I find no legal error material to the finding of the Designated Judge that the appeal is dismissed for want of jurisdiction made out. The determination shall stand.

Decision

32. **There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity

33. The First-tier Tribunal made no anonymity order. I make no order for the identity of the appellant to be anonymized as there is no basis for such an order being made on the facts of this appeal.

Signed.....
Judge of the Upper Tribunal

Dated the 1 September 2017