Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/02682/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 16 March 2018	**On 20 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

CHITRAKALA SUBRAMANIAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: appellant in person
For the Respondent: M D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Shimmin promulgated on 29 June 2017, which dismissed the Appellant's appeal for want of jurisdiction.

Background

3. The Appellant was born on 21 April 1973 and is a national of Sri Lanka. On 23 February 2016 the Secretary of State refused the Appellant's application for certification of a right to permanent residence under the Immigration (EEA) Regulations 2006.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Shimmin ("the Judge") dismissed the appeal against the Respondent's decision for want of jurisdiction, relying on Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC).

5. Grounds of appeal were lodged and on 14 December 2017 Judge O'Garro granted permission to appeal.

The hearing

6. The appellant was present and represented herself. She moved the grounds of appeal. The Home Office presenting officer immediately indicated that the appeal will not be resisted. He told me that the Judge failed to consider regulation 7(3) & (4) of the 2006 Regulations, and that in any event the Court of Appeal has found that Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC) was wrongly decided.

Analysis

7. The appellant was issued a residence card as the dependent of an EEA national on 25 August 2010. She applied for a document certifying entitlement to permanent residence on 25 August 2015. Regulation 7 of the Immigration (EEA) Regulations 2006 therefore applies to this appellant. Regulation 7(3) & (4) say

> (3) Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.
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> (4) Where the relevant EEA national is a student, the extended family member shall only be treated as the family member of that national under paragraph (3) if either the EEA family permit was issued under regulation 12(2), the registration certificate was issued under regulation 16(5) or the residence card was issued under regulation 17(4).

8. In Khan v SSHD [2017] EWCA Civ 1755 the Court of Appeal held that Sala (EFMs: Right of Appeal) [2016] UKUT 411 (IAC**)** was wrongly decided and that the decision whether to grant an extended family member a residence card was a decision which concerned an entitlement as it was a

decision whether to grant such an entitlement and hence an "EEA decision" for the purpose of the 2006 regulations. Extended family members do therefore, under the 2006 regulations have a right of appeal to the tribunal from an adverse decision.

9. The Judge's decision contains a material error of law. The Judge relied on Sala to reach the conclusion that the appellant did not have a valid right of appeal. That is clearly wrong. The First-tier Tribunal had jurisdiction to consider the appeal. Regulation 7 of the 2006 Regulations should have been considered.

10. Because the decision contains a material error of law I set it aside. I find that I cannot substitute my own decision because this is a case in which the judicial fact-finding exercise has not yet been carried out.

Remittal to First-Tier Tribunal

11. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

12. I have determined that the case should be remitted because the initial fact-finding exercise is required. A complete re-hearing is necessary.

13. I remit this case to the First-tier Tribunal sitting at Bradford to be heard before any First-tier Judge other than Judge Shimmin.

Decision

14. The decision of the First-tier Tribunal is tainted by material errors of law.

15. The Judge's decision promulgated on 29 June 2017 is set aside. The appeal is remitted to the First-tier Tribunal to be determined of new.

Signed Paul Doyle Date 19 March 2018

Deputy Upper Tribunal Judge Doyle