



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/10609/2016**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 13 February 2018**

**Decision & Reasons
Promulgated
On 15 February 2018**

Before

Deputy Upper Tribunal Judge Pickup

Between

Janasenthuran Kanagenthiran
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mrs A Basharat, instructed by Linga & Co
For the respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Callow promulgated 16.10.17, dismissing his appeal against the decision of the Secretary of State, dated 19.7.16, to refuse his application for an EEA Residence Card as the dependent extended family member (EFM) of an EEA national exercising Treaty rights in the UK.
2. First-tier Tribunal Judge Andrew granted permission to appeal on 15.11.17.
3. Thus the matter came before me on 13.2.18 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons briefly summarised below, I found an error of law in the making of the decision of the First-tier Tribunal such that the decision of Judge Callow should be set aside and remitted to the First-tier Tribunal to be remade.
5. Applying the then current and binding case authority of Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC), Judge Callow found that there was no statutory right of appeal for a person claiming to be an EFM. The judge did not address the merit of the appeal but found that there was no jurisdiction to hear the appeal.
6. Subsequently, the Court of Appeal in Khan v Secretary of State [2017] EWCA Civ 1755 held that Sala was wrongly decided, and that there, is after all, a statutory right of appeal.
7. It follows that, with no criticism of Judge Callow, the decision of the First-tier Tribunal was in error of law and cannot stand. The appeal will have to be reheard and remade.
8. Whilst the appellant has served a supplementary bundle and seeks the admission of new evidence pursuant to Rule 15(2A), the practice of the Upper Tribunal in the very many of these similar Sala/Khan appeals is to remit the appeal to the First-tier Tribunal to be heard afresh.
9. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. As there has not been a valid determination of the issues in the appeal, this case falls squarely within the Senior President's Practice Statement at paragraph 7.2. In the circumstances, the appropriate course is to remit this appeal to the First-tier Tribunal to be remade.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the attached directions.



Signed
Deputy Upper Tribunal Judge Pickup

Consequential Directions

- 10. The appeal is remitted to the First-tier Tribunal sitting at Taylor House;
- 11. The ELH is 2 hours;
- 12. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judge Callow;
- 13. The appellant is to ensure that all evidence to be relied on is contained within a single consolidated, indexed and paginated bundle of all objective and subjective material, together with any skeleton argument and copies of all case authorities to be relied on. The Tribunal will not accept materials submitted on the day of the forthcoming appeal hearing;
- 14. The First-tier Tribunal may give such further or alternative directions as are deemed appropriate.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.



Signed
Deputy Upper Tribunal Judge Pickup