Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02431/2015

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 11 September 2017	**On 13 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR HAMID HUSSAIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G. Norman, Counsel instructed by KQ Solicitors
For the Respondent: Mr C. Bates, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal (Judge Shanahan) dismissing his appeal against the decision of the Secretary of State to refuse to issue him with a residence card as confirmation of his right to reside in the United Kingdom as an extended family member ("EFM" or "OFM") of an EEA national exercising Treaty rights here. The First-tier Tribunal did not make an anonymity direction in favour of the appellant, and I do not consider that he requires anonymity for these proceedings in the Upper Tribunal.

2. In his decision promulgated on 29 November 2016, Judge Shanahan

dismissed the appeal on the ground that the Tribunal had no jurisdiction to hear it, following **Sala (EFMs: rights of appeal) [2016] UKUT 00411 (IAC)**.

3. Permission to appeal was refused by Judge Gillespie on 9 May 2017 on the ground that "[t]he proposed point of law is not arguable and must be regarded as settled and binding".

4. However, on 7 July 2017 Upper Tribunal Judge Blum held that it was arguable that **Sala** was wrongly decided, and so (he implied) it was arguable that the First-tier Tribunal Judge was wrong to hold that the appellant did not have a right of appeal.

The Hearing in the Upper Tribunal

5. Mr Bates reported that there were a number of **Sala** appeals pending in the Court of Appeal, of which the first had an expedited hearing scheduled for early October. He also produced a print out of Case C-89/17 (SSHD v Rozanne Banger) in which the President of the Upper Tribunal had made a reference to the ECJ on 20 February 2017 for a preliminary ruling on *inter alia* the following question:

> Is a rule of national law which precludes an appeal to a court or tribunal against a decision of the executive refusing to issue a residence card to a person claiming to be an extended family member compatible with the Directive?

6. Ms Norman, who did not appear below, adopted the case which had been advanced by her colleague, which was that the Regulations 2006 – as interpreted by the UT in **Sala** - were incompatible with the Citizens Directive of 2004. This was because, upon a proper construction of the Directive, EFMs had the same appeal rights as direct family members.

7. At the outset of the hearing, Ms Norman invited me to stay the proceedings until the Court of Appeal had given a ruling as to whether or not **Sala** correctly stated the law. I declined to do so, as I did not consider such a course would be in accordance with the overriding objective. A definitive decision from the Court of Appeal might be some way off, and whatever the Court of Appeal decided, the outcome of the ECJ reference might change the landscape, and there was no indication that the ECJ was going to deliver a ruling in the near future.

Discussion

8. The *ratio decidendi* of **Sala** is that a decision taken by the Secretary of State "in the exercise of her discretion" not to issue an EFM with a residence card is not an appealable decision under the EEA Regulations 2006.

9. The Tribunal in **Sala** held that such a decision is not an appealable decision as it does not meet the definition of an EEA decision in Regulation

2(1) which is that the decision "concerns" a person's entitlement to be issued with a residence card, whereas deciding that a person is not an EFM is not a decision which concerns his entitlement to be issued with a residence card.

10. The Judge was right to apply **Sala**, as it was binding on him. However, the law always speaks, so he could be held retrospectively to have erred in law, if **Sala** is declared to be wrongly decided.

11. The representatives were in agreement that I am not bound to follow **Sala**. However, while there is reasonable doubt as to whether the decision is correct (and hence Upper Tribunal Judge Blum granted permission to appeal), it is indisputably a very comprehensive and well-reasoned decision by two eminent judges of the Upper Tribunal and, as such, it commands respect.

12. It is also important to recognise that the appellant's error of law challenge to **Sala**, and hence to the decision of Judge Shanahan, is an oblique one. The appellant does not attempt to engage with **Sala** on the territory over which **Sala** was fought. Although Ms Norman clarified that one of her arguments was that the Tribunal was wrong to construe the Regulations 2006 as excluding appeal rights for EFMs, no reasoned argument to this effect is advanced in the grounds of appeal.

13. The jumping off point for the appellant's error of law challenge is the statement in **Sala** at paragraph [23] that it was not suggested before the Tribunal, *"that our domestic law in the EEA Regulations 2006 is, in any way, inconsistent with the provisions of the Citizens Directive".* Ms Norman submits that in fact the Regulations are inconsistent with the Directive.

14. I have reviewed the provisions of the Directive, and especially the Articles relied on by Ms Norman – which include Article 9 - in order to ascertain whether there is any merit in the argument summarised in paragraph [6] above. I am unable to find any support for the argument.

15. The Directive draws a clear distinction between Family Members, who are defined at Article 2(2), and "any other family members", who are defined at Article 3(2)(a) as being a family member who does not fall within the definition of Family Members at Article 2(2) and who also satisfies the additional criteria of present and past dependency and/or membership of the Union citizen's household.

16. There is a requirement on the Member State to facilitate entry and residence for such persons, to undertake an extensive examination of their personal circumstances, and to justify any denial of entry or residence to these people. The Directive does not address the question of appeal rights, and so it cannot be said that the Directive expressly requires that EFMs should enjoy the same appeal rights as Family Members.

17. I accept that in, for example, Article 10 (issue of residence cards) the

Directive refers to “family members” in a broad sense, encompassing both direct family members and EFMs. But while Article 10 stipulates the documents and/or the proof that particular classes of person – for example, persons in cases falling under Article 3(2)(a) - must provide for a residence card to be issued, it is silent on the question of how and where the examination of personal circumstances exercise contemplated in Article 3(2) fits in, and it is also silent (as is the rest of the Directive) on the question as to how and in what forum a putative EFM can challenge a Member State’s reasoned denial of entry or residence.

18. Accordingly, I am not persuaded that the Regulations 2006 are incompatible with the Directive. Thus, the First-tier Judge is not shown to have been wrong to follow **Sala (EFMs: Right of Appeal) [2016] UKUT 411 (IAC).**

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed Date 12 September 2017

Judge Monson
Deputy Upper Tribunal Judge