



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/00524/2016

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre On 4th August 2017	Decision & Promulgated On 20th September 2017	Reasons
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Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MR VICNESWARAN SELVARTNAM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Sharma (Counsel)

For the Respondent: Ms H Aboni (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge V A Cox promulgated on 17th March 2017, following a hearing at Stoke-on-Trent on 16th March 2017. In the determination, the judge dismissed the appeal of the Appellant on the basis that in **Sala (EFMs: Right of Appeal) [2016] UKUT 00411**, a vice presidential panel of the Upper Tribunal decided that “there is no statutory right of appeal against a decision of the Secretary of State not to grant a residence card to a person claiming to be an extended family member” (paragraph 2).

2. On 26th May 2017, permission to appeal was granted on the basis of two fundamental points. First, that the appeal fell to be determined within the 2006 Regulations rather than the 2016 Regulations, and that the 2012 amendment to the 2006 Regulations, adding Regulation 26(2A), showed that there was a right of appeal. Second, that the Regulations are not consistent with the Citizens Directive.
3. In granting permission, the First-tier Tribunal also noted that the “**Sala** point” was on its way to the Court of Appeal and that a reference had been made to the CJEU by the President of the Upper Tribunal. An additional point raised in granting permission by the Tribunal was that the Secretary of State has now changed the position that she had adopted in **Sala** (that there was an appeal right) and the 2016 Regulations now reflect that case.
4. The issue was a live one and proceedings were before the Court of Appeal and the CJEU. A final point taken by the Tribunal was that it was arguable that the judge, although understandably refusing the appeal on the basis of the “**Sala** point” had nevertheless a legal obligation to address the legal submissions made at the hearing.
5. A Rule 24 response dated 12th June 2017 was to the effect that the Tribunal was correct below in deciding that there was no jurisdiction to hear the appeal in the first place because the case of **Sala** applied and that this case had not been overturned, and until such time as it was, it had full effect on the current state of the law.
6. At the hearing before me on 4th August 2017, Mr Sharma, appearing on behalf of the Appellant submitted that, of the points taken by the Tribunal in granting permission on 26th May 2017, one important issue was whether the judge had addressed the legal submissions made at the hearing. At paragraph 4 Judge VA Cox does not address all the issues that were submitted before the Tribunal. For example, she does not address the enabling provisions that allowed for the finding of a right of appeal within the jurisdiction of powers of this Tribunal.
7. In the same way, there is no discussion about what Regulation 8 is all about, as this was a matter addressed to the judge as well. Mr Sharma submitted that he was Counsel in the case of **MK (Pakistan) C9/2016/4413** which had been floated before the Court of Appeal in July 2017, and raised the same issue, but the case had now been set down for a hearing in the new term in September 2017. He referred me to documentation on his laptop in the form of a letter dated 5th June 2017 from the government legal department and another letter dated 5th May 2017 from the Supreme Court in relation to **SM (Algeria) (aka Mediouni)** which, he submitted, pointed to this Tribunal having the power to adjourn and stand out all cases involving the “**Sala** point” until such time as a definitive ruling with given either by the Court of Appeal or the CJEU.

8. Mr Sharma's submission before me today, therefore, was that I should either adjourn this matter, or find that there was an error of law, and remit this matter back to the First-tier Tribunal, to be determined on the basis of the arguments fully addressed to the Tribunal, in the manner that they were not fully addressed by Judge V A Cox below.
9. For her part, Ms Aboni submitted that the judge plainly had addressed the issues fully because she states (at paragraph 3) that Counsel appearing for her had "suggested that the decision in **Sala** is incorrectly decided. Detailed reasons are given in the skeleton".
10. Second, she had specifically taken instructions this morning from the London office and had been informed that the position set out in the Rule 24 response, namely, that the ruling in **Sala** that there is no jurisdiction to hear the appeal, remains the position of the Respondent Secretary of State.
11. Accordingly, these cases involving the "**Sala** point" should neither be adjourned, nor be remitted back to the First-tier Tribunal to be heard afresh.

Error of Law

12. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.
13. First, the grant of permission by the First-tier Tribunal on 26th May 2017 sets out a number of reasons, not least one which is the application of Regulation 26(2A) for why permission should have been granted, and also refers to the fact that there was a legal obligation on the Tribunal to address the legal submissions made at the hearing.
14. Second, whilst it is the case that in **Sala** the Upper Tribunal found that there is no jurisdiction to hear an appeal because an EFM has no entitlement to a residence card in that the issue of residence card is discretionary and not mandatory, the argument before the Tribunal below was that the Regulations are not consistent with the Directive. This is because there was a wider definition of a family member under the Directive, which encompassed an EFM, and that Article 2(2) of the Directive defines a family member and that Article 3(2) defines "other family members" and those in a durable relationship. Article 3(2) also requires the State to facilitate their entry and residence in the Member State. The issue of residence card was a mandatory requirement and it therefore followed that there was an entitlement, and if there was an entitlement then there would be a right of appeal to a refusal to that entitlement.

15. Indeed, the entirety of the remainder of the Directive, as to the rights and procedural requirements, treats all family members (under Article 2(2) and Article 3(2)) in the same manner.
16. For all these reasons, the Tribunal below should have given a much more extensive consideration to these arguments than appeared at paragraph 4 of the determination, if only because these are live issues that are presently before the Superior Courts and Tribunals, before a proper decision could be made in respect of them.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed under Practice Statement 7.2(a) because 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. I direct that the matter is heard before the First-tier Tribunal by a judge other than Judge V A Cox. I cannot end this determination without echoing the words of the First-tier Tribunal that the decision of Judge V A Cox was entirely "understandable" in the light of the accepted impact of **Sala** in the jurisdiction, nevertheless. This appeal is allowed to that extent.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

19th September 2017