



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

Appeal Number: EA/03986/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 4th January 2018**

**Decision & Reasons Promulgated
On 8th January 2018**

Before

**UPPER TRIBUNAL JUDGE REEDS
DEPUTY UPPER TRIBUNAL JUDGE FARRELLY**

Between

**ISSA OLUSEGUN OLADEJI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Oladeji in person

For the Respondent: Mr T. Melvin, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on the 18th October 1977. He appeals with permission against the decision of the First-tier Tribunal (Judge Cameron) who, in a determination promulgated on the 19th April 2017 considered that there was no jurisdiction to hear his appeal against the decision of the respondent to refuse to grant residence card as an

extended family member of an EEA national based on the decision in Sala (EFM's: right of appeal) [2016] UKUT 00411 (IAC).

2. No anonymity direction was made by the First Tier-Tribunal and no application has been made on behalf of the appellant or any grounds put forward to support such an application.
3. The history of the appellant is set out in a letter sent by his former legal representatives dated 23 June 2015. The appellant entered the United Kingdom on the 22nd of July 2009 as a visitor and was granted six months leave to enter to visit his uncle who was residing in the United Kingdom. The appellant overstayed his leave. In or about 2013 he met his ex-spouse he was an EEA national and a marriage took place by proxy in Nigeria on 22 August 2013. An application was made on 27 January 2014 for a residence card based on that relationship which was refused on the 17 March 2014. The letter from the solicitor makes reference to the relationship with his then spouse as having deteriorated but that the appellant lodged an appeal through his solicitors at that time. She subsequently left the United Kingdom and the appellant lodged a divorce petition.
4. The appellant met an Italian national, Miss Bennis and began a relationship with her. An application was made on 23 June 2015 for a residence card as extended family member of EEA national exercising treaty rights.
5. The application was refused in a decision made on the 25th November 2015. The notice of decision made reference to the basis of the application for a residence card as a confirmation of a right of residence on the basis that he was an extended family member.
6. Accompanying the notice of decision was a reasons for refusal letter which expanded on the reasons given for the refusal of the application and made reference to the documentary evidence that had been produced with the application. It stated that he had claimed to have been residing with his partner since 25 March 2015 but that he had not provided sufficient documentation to suggest that he was in a durable relationship. The evidence stated that he had lived with his sponsor since March 2015 only a period of three months prior to the application being submitted and this was not considered long enough to prove that he was in a durable and subsisting relationship. In addition, he stated that he met his partner in March 2014 but in January, he had made an application for a residence card as a spouse of EEA qualified person. That application was refused on 17 March 2014 and at the time he claimed to have met his current partner, he had an ongoing appeal against the refusal which was launched on 24 March 2014. The appeal was on 27 May 2015, a month before the new application. Thus it suggested that at the time he had met his current partner, he was still married to his wife and actively pursuing an application as the spouse of an EEA national. The letter went on to make reference to the dissolution of marriage certificate relating to his previous

marriage but for the reasons given in the refusal letter it could not be verified.

7. As to the current relationship, the refusal letter considered the claim that they had been in a relationship of 15 months prior to the application but that this could not be accepted without further evidence. The decision made reference to the documentary evidence that had been provided but was not considered to be independent objective evidence of a durable subsisting relationship. The letter also made reference to other documentary evidence in the form of bills and a tenancy agreement and a birth certificate relating to the child on 27 June 2015. Consequently for the reasons given in the letter and due to the lack of evidence submitted, the respondent did not accept that he was in a durable relationship for the purposes of the EEA Regulations.
8. Thus, it was not accepted that the appellant had demonstrated that he was an Extended Family Member (Regulation 8 (5) of the Immigration (European Economic Area) Regulations 2006).
9. The appellant appealed the decision on 22 December 2015 without a fee. As a result of that the appeal was struck out on 4 February 2016 because the fee had not been paid by 19 January 2016. A letter was then received on the 9th February 2016 making reference to a fee being paid and requesting that the case be reinstated. That request was accepted by the Tribunal on 11 February 2016 and thus the appeal was to proceed with a hearing date of 9 January 2017.
10. A notice of directions was sent to the appellant and his solicitors on the 8th December 2016 drawing their attention to the Upper Tribunal decision in Sala (EFM's: right of appeal) 2016] UKUT 00411 (IAC). The directions went on to state, "in these circumstances, the Tribunal is minded to place this appeal before a Judge of the FTT with a view to determine on the papers for want of jurisdiction. If you want to provide reasons why the Tribunal should not proceed as proposed you must provide written notification no later than 4pm on the fifth working day after the date of these directions."
11. The hearing listed on the 7th January 2017 was adjourned.
12. It appears that on the 12th December 2016, the appellant requested that the Tribunal should admit post-decision evidence relating to the marriage of the applicant and the birth of a child and further evidence relating to the exercise of Treaty Rights.
13. In accordance with the directions issued in December, the appeal came before the FTT Tribunal Judge Cameron on the 24th March 2017 and was determined upon the papers.
14. In a decision promulgated on the 19th of April 2017 the judge made reference to the directions relating to the decision in Sala (as cited above). At paragraph 4 it made reference to the letter dated 12 December 2016 in

which it was indicated that the appellant had now married an EEA national and that they had a British national child born 27 June 2015. In his findings of fact the judge observed that the appellant had applied for a residence card on the basis of being in a durable relationship with an EEA national and that there had been no section 120 notice issued therefore human rights were not arguable. Furthermore, having taken into account the decision in Sala (as cited) the judge found that in relation to extended family members they would be no right of appeal against the refusal to issue a residence card. At paragraph 7 the judge made reference to the appellant's changed circumstances in which it was stated that he had married an EEA national but that as it was not information before the respondent at the time of the application or at the date of decision, the appellant would be in a position to make a further application on the basis of this marriage and that the respondent would then consider the position fully. The judge concluded that as the application made was as an extended family member it did not carry a right of appeal therefore there was no jurisdiction of the Tribunal to consider the appeal now.

15. Accordingly he found that the FTT did not have jurisdiction to hear the appeal. He therefore dismissed the appeal for want of jurisdiction.
16. The appellant sought permission to appeal that decision and on the 30th October 2017 First-tier Tribunal Judge Brunnen granted permission to appeal. Thus the appeal came before the Upper Tribunal. The appellant appeared in person but was accompanied by Mr Slater, an employee of the solicitors who were on record as acting for the appellant. He provided a letter as to his circumstances and the terms of his employment and qualifications. He did not suggest that he was able to act as a legal representative to deal with the law and the evidence. He wanted the consent of the Tribunal to act as a McKenzie friend but that it should not be taken that the solicitors were "off the record" in these proceedings. Thus the solicitors who have been acting for the appellant remain as acting solicitors but had not attended the hearing by sending someone entitled to act on his behalf but instead an employee of their firm had attended as a McKenzie friend. We did not think that in those circumstances he would be able to act as a McKenzie friend for the purposes of any substantive hearing dealing with law and evidence. In any event the appellant would not be disadvantaged in understanding the nature of the proceedings, which was the primary concern referred to in the letter from Mr Slater, as we were content that he would be able to assist the appellant in this aspect.
17. In our judgement we were satisfied that the decision of Judge Cameron was in error for two reasons. Firstly the decision of Sala (EFM's: right of appeal) 2016] UKUT 00411 (IAC) was a decision of the Upper Tribunal which was reported on 19 August 2016. The conclusion reached by the Tribunal in that decision was that there was no right of appeal before the Tribunal against the refusal to issue a residence permit to an extended family member. However, whilst the judge did not have the advantage of the recent decision of Khan v Secretary of State for the Home Department

[2017] EWCA Civ 1755, it has established that in fact the Tribunal has jurisdiction. Thus it was unarguably wrong in law to have concluded that it did not have jurisdiction to hear the appeal given the judgment in that case. Secondly, the appellant had provided some evidence which related to the alteration to his circumstances, namely that he had married his EEA national partner and had become a family member. The judge did not consider that issue substantively because he erroneously considered that the appeal could only be decided on the evidence as at the date of the decision. In those circumstances, the decision of Sala did not apply and thus the Tribunal did have jurisdiction to consider substantively the appeal.

18. As a result of the decision made that there was a want of jurisdiction, the appellant has not been able to proceed in challenging the decision of the Secretary of State at a substantive hearing nor has the respondent been able to challenge the updated evidence or engage with any of the arguments the appellant would seek to advance.
19. Mr Melvin on behalf of the Secretary of State relied upon the Rule 24 response which did not oppose the application for permission to appeal or the basis upon which there was an error of law and invited the Tribunal to remit the matter to the First-tier Tribunal for all issues and the evidence to be considered.
20. Mr Slater made reference to the observation recorded in the determination of Judge Cameron at paragraph 7 that “the appellant is in a position to make a further application on the basis of his marriage”. The appellant confirmed that an application had been made on this basis in August 2017 and that subsequent to that both he and his partner had been invited for an interview but that he had heard nothing further since then. Mr Melvin could not assist any further other than to say that the marriage certificate had not been accepted. It does not appear that any application made by the appellant has been the subject of any notice of immigration decision yet and therefore remains outstanding. If that application is successful there will be no requirement for any further litigation but that is a matter for the respondent. There does remain an appeal outstanding which requires determination before the First-tier Tribunal where both parties will be able to present their evidence.
21. Therefore in the circumstances, the appellant has demonstrated that there was a material error of law in the decision made by the First-tier Tribunal. It shall be set aside and in accordance with the agreement of the parties shall be remitted to the First-tier Tribunal for a hearing.
22. The First-tier Tribunal judge did not make a fee award because he found that there was no jurisdiction. As we have remitted the appeal to be heard by the First-tier Tribunal, it will be open to the appellant to make an application for a fee award at the conclusion of that hearing.

Decision:

The decision of the First-Tier Tribunal did involve the making of an error on a point of law and the appeal is remitted to the First-tier Tribunal for hearing.

SM Reeds

Signed

Date: 4/1/2018

Upper Tribunal Judge Reeds