



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

Appeal Number: IA/21975/2015

THE IMMIGRATION ACTS

Heard at Birmingham

**Decision &
Promulgated**

Reasons

On 9 January 2017

On 2 May 2017

Before

**DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**SHAHID ALI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mrs H Aboni, Home Office Presenting Officer

For the Respondent: Mr H Sawar, Counsel instructed by M A Consultants

DECISION AND REASONS

1. The appellant (hereafter the Secretary of State or SSHD) brings a challenge with permission to the decision of First-tier Tribunal Judge Carlin dated 23 February 2016 allowing the appeal outright of the respondent (hereafter the claimant) against a decision made by the SSHD dated 28 May 2015 refusing to issue a residence card as a confirmation of a right of

residence under the Immigration (European Economic Area) Regulations 2006 as the unmarried partner of an EEA national exercising Treaty rights.

2. At the outset of the hearing I pointed out that there has been a recent decision of the Upper Tribunal, **Sala (EFMs: Right of Appeal: Albania) [2016] UKUT 411 (IAC)** of 19 August 2016. Clearly, given that this decision is very recent, neither the SSHD nor the judge who granted permission to appeal on 25 July 2016 had any reason to refer to the issue of jurisdiction, which has hitherto been assessed to exist. Mrs Aboni requested permission to amend her grounds. Mr Sawar opposed that. I had no hesitation in ruling that the **Sala** point must be in play in this challenge as it is a straightforward matter of law and cannot be left to the contingency of pleading. Indeed the sequence of events in this case is a perfect attestation of why Parliament has never sought to bar the Upper Tribunal from amending grounds or indeed in certain circumstances addressing them if need without prior notice.
3. Mr Sawar did not seek to persuade me to depart from the statement of law set out in **Sala**. Accordingly I conclude that the SSHD must succeed in her challenge because the decision of the FtT is vitiated by legal error. The judge erroneously considered he had jurisdiction to deal with the appeal. However, for the reasons set out in **Sala**, there is no right of appeal against a refusal of a residence card to extended family members (EFMs).
4. In light of the fact that there may be challenges to **Sala** in the Court of Appeal I shall deal, albeit only summarily, with the grounds as presented by the SSHD and as opposed by Mr Sawar. It is quite clear in my view that in the claimant's case the SSHD did not seek to exercise her discretion under Regulation 17(4). It is entirely understandable why she did not – because she did not accept the underlying premise that there was a durable relationship between the claimant and his Dutch partner. The furthest the SSHD went at page 3 of her refusal letter was to give her provisional view (“it is unlikely we would be inclined to exercise discretion in your favour”).
5. That being so, there is no basis for a Tribunal seeking to exercise the discretion. That is abundantly clear from established case law in Regulation 17(4).
6. Mr Sawar sought to argue that this position had been rendered redundant by a clear concession made by the HOPO representing the claimant before the FtT Judge that the SSHD would not take any point about discretion if the judge decided the claimant fell within the personal and material scope of Regulation 8. Leaving aside the difficulty that the judge did not record any such concern, I do not consider the HOPO could have intended anything other than to say that the issue before the Tribunal was confined, as far as he was concerned, to the Regulation 8 issue. There is nothing to suggest that the HOPO had the legal power to exercise the discretion concerned – decisions on whether to issue a residence card to EFMs are

the responsibility of designated officials dealing with EEA cases. Further, such discretion cannot properly be exercised until there has been a definitive finding on the Regulation 8 issue – and at the point in time when Mr Sawar says the concession was made the Regulation 8 issue had not been decided definitively.

7. Hence, even if **Sala** did not determine the outcome of the SSHD's challenge, I would still have allowed her challenge, as the FtT Judge was not entitled to allow the appeal outright. At most he would have been entitled to allow it insofar as remained outstanding before the SSHD to exercise her Regulation 17(4) discretion.

Notice of Decision


8. For the above reasons:

The appeal brought by the SSHD against the decision of the FtT Judge is granted.

The FtT Judge materially erred in law.

The decision I re-make is that there is no right of appeal.

9. No anonymity direction is made.



Signed

Date 28 April 2017

Dr H H Storey
Judge of the Upper Tribunal