



**Upper Tribunal
(Immigration and Asylum Chamber)**
Number: IA/27391/2015

Appeal

IA/27394/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 5 May 2017**

**Decision & Reasons Promulgated
On 17 May 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MAHENDRAM THANANJEYAN
THURKA THANANJEYAN
(anonymity direction not made)**

Respondents

Representation:

For the Appellant: Mr Staunton Senior Hine Office Presenting Officer.
For the Respondent: Mr Solomon instructed by Jein Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Lingam ('the Judge') who in a decision promulgated on 10 October 2016 allowed the above respondents' appeals under the EEA Regulations 2006.

2. The first respondent was born on 9 March 1983 and his wife, the second respondent, was born on 17 June 1983. Both are citizens of Sri Lanka. The respondents applied for a Residence Card in recognition of a right to reside in the United Kingdom under Regulation 8(2) of the Immigration (European Economic Area) Regulations 2006 as Extended Family Members of the first respondent's uncle, a naturalised citizen of Norway, who is exercising treaty rights in the United Kingdom.
3. The application was refused as it was said the first respondent was unable to show that he was dependent upon and/or had resided with his sponsor prior to residing with him in the UK: and/or that they had entered the UK with the EEA national sponsor.
4. The Judge noted the oral and documentary evidence received before setting out the findings of fact at [21] to [49] of the decision under challenge. The Judge concluded at [43] that on the evidence he was satisfied the first respondent had shown past membership of the sponsors household and financial dependency on his sponsor. The Judge found at [46] current membership of the household in the United Kingdom and ongoing dependency.
5. The Secretary of State sought permission to appeal on two grounds relating to both appellants (the above respondents) and one ground specifically relating to the second appellant (the above second respondent).

Grounds

6. The grounds are as follows:

Grounds for both appellants

Ground 1. No jurisdiction to hear appeals - case of Sala.

Between the First-tier Tribunal hearing and the promulgation of the determination the Upper Tribunal reported the decision in Sala (EFM: Right of Appeal) [2016] UKUT 00411 (IAC), in which it was held that the definition of "EEA decision" at EEA Regulation 2 meant that no right of appeal lies against a decision not to recognise a person as an Extended Family member under Regulation 8. Although the case could not have played any part at the hearing the Tribunal erred by not having regard to its principles.

Ground 2. Limited jurisdiction to allow appeals in Extended Family member case.

In any event the Judge erred in not referring to the need before documentation of an extensive examination of circumstances under Regulation 17(4) and (5) and allowing the appeal on the basis that simple findings of necessary relationship was sufficient. In respect of the second appellant this compounded the error that in fact there was no eligibility at all under Regulation 8.

Grounds specifically for the second appellant

Ground 1: Material misdirection as to the relevant statutory framework

Irrespective of jurisdiction or scope of permitted allowing as alleged in Ground 1 (for both appellants), there is simply no way on the Judge's fact-finding that the second appellant could succeed in her appeal. Regulation 8(2) requires for any appellant the

relevant dependence/membership of household outside the United Kingdom (Regulation 8(2)(a), a prerequisite to succeed under (b) or (c). It was accepted that the second appellant was not dependent on the sponsor until after she married the first appellant in the United Kingdom. She thus had no possible claim to be an extended family member. This right does not pass side wards to relatives of those who are documented under Regulation 7(3) as a Regulation 8 Extended Family member, and consideration for this status was acknowledged to be the only issue in the appeal. For the same reason the couple's child (born in the United Kingdom) could not possibly have a claim to be a Regulation 8 extended family member.

7. Permission to be appeal was granted to the Secretary of State on the basis that all grounds are arguable.

Discussion

8. In relation to the jurisdiction point, in *Sala (EFMs: Right of Appeal) [2016] UKUT 411 (IAC)* it was held that there is no statutory right of appeal against the decision of the Secretary of State not to grant a Residence Card to a person claiming to be an Extended Family Member. The Judge therefore erred in law in proceeding to hear the appeal against the refusal to issue a Residence Card to persons claiming to be Extended Family Members when there was no jurisdiction so to do.
9. In *Virk v Secretary of State for the Home Department [2013] EWCA Civ 652* it was held that although the Secretary of State had failed to raise before the First-tier Tribunal the issue of that Tribunal's jurisdiction to entertain a family's application for leave to remain, the Upper Tribunal was entitled to dismiss the family's subsequent appeal against the First-tier Tribunal's decision on the basis that the First-tier Tribunal had not had jurisdiction, notwithstanding that the point had not been raised below.
10. In relation to the point that *Sala* was handed down between the hearing of the appeal and publication of the decision under challenge, a judicial decision is given at the date that judgment is handed down or promulgated. The obligation upon the Judge was to ensure that at the date that occurred, 10 October 2016, the decision was in accordance with the law. Had the Judge noted the decision in *Sala* and understood the impact upon this appeal, it was always open to the Judge to reconvene the hearing to receive further submissions, if required. At the date the decision was handed down the Judge had no jurisdiction to make a decision allowing or dismissing the appeal.
11. In his skeleton argument, Mr Solomon asserts the decision in *Sala* was wrongly decided for the reasons set out at [4] of the skeleton argument. Such matters have been considered but do not appear to warrant this tribunal finding in Mr Solomon's favour on this point.
12. For the sake of completeness, but no further, the ground asserting the Judge erred in allowing the appeal outright also has arguable merit. In *Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340(IAC)* it was held at paragraph (iii) that regulation 17(4) makes the issue of a Residence Card to an extended family member a matter of discretion. Where the Secretary of State has not yet exercised that discretion the

most an immigration judge is entitled to do is to allow the appeal as being not in accordance with the law leaving the matter of whether to exercise this discretion in the appellant's favour or not to the Secretary of State.

13. In relation to the ground relating solely to the second respondent, the facts as found by the Judge support the Secretary of State's argument that the second respondent could not satisfy the definition of an extended family member. Mr Solomon challenges this finding in that the first and second appellants before the Judge were not married in the UK, as asserted in the respondent's application for permission to appeal, but were married in Sri Lanka on 11 February 2013 leading to the second respondent named above, being granted leave to enter as a Tier 4 (General) Dependent Partner on 30 November 2013. That party stated in her witness statement "I have not taken up any employment since I got married" [13]. It was also stated that that party's husband's uncle has been her sole provider since marriage and that her husband has been responsible for all her financial needs and because her husband's uncle is responsible for her husband's financial needs, automatically she is dependent on her husband's uncle for everything. The Judge accepted the relationship between this party and her husband was formed only after the marriage and although there has been clear exaggeration regarding the length of dependency in the witness statement where it is claimed "he has been my sole provider for as long as I can remember" it is said the core account has remained consistent. Whether the uncle making provision to the husband and the husband making provision to his wife would infer that the wife was in fact dependent upon the EEA national rather than dependent on her husband, as appears more likely to be the case, is a moot point.
14. Even if both parties were Extended Family Members of the EEA national exercising treaty rights there would still have been no jurisdiction for the Judge to have heard the appeals. For that reason, the Secretary of State has made out arguable legal error such that the decision allowing the appeal is set aside. There are no preserved findings.
15. The observations made by the Secretary of State regarding the two-stage process required when considering the grant of a Residence Card to an Extended Family Member also has arguable legal merit, but need not be taken any further in light of the jurisdictional issue.
16. The Upper Tribunal has no jurisdiction to remake the decision.
17. The Judge refused to consider an Article 8 application for reasons given in [50] which are legally sustainable and which has not been challenged by way of cross-appeal by the above respondents.
18. Mr Solomon, in his grounds, claimed the Judge should have considered article 8 ECHR as a new matter, notwithstanding *Armiteymour*, given the change in the appeal regime in April 2015 but such claim has no arguable merit. The decision relied upon by the Judge in the decision under challenge was that of the Upper Tribunal [2015] UKUT 00466 (IAC) which has been recently upheld by the Court of Appeal in

Nasrolah Amirteymour v The Secretary of State for the Home Department [2017] EWCA Civ 353.

19. The application to the Secretary of State was for the issue of a Residence Card on the basis of being an Extended Family Member under the EEA Regulations, not an application for leave to remain on article 8 grounds. The new regime confers a right of appeal against the refusal of an article 8 application but this requires such application to be made or for an individual to fall within an exempt class where such issues can be considered even if a formal application has not been made. Mr Solomon fails to make out that his clients fall within any such category or to show that they have satisfied the requirements identified in the case law which would enable the Judge to consider article 8. On the facts known to the Upper Tribunal it therefore appears arguable that this is not a matter in relation to which the Judges conclusions are infected by arguable legal error for the reasons set out in the decision under challenge.

Decision

20. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I cannot remake the decision as the Upper Tribunal has no jurisdiction to hear an appeal against the refusal of the Residence Card by an Extended Family Member of an EEA national exercising treaty rights or the appeal on Article 8 grounds, for the reasons set out above.**

Anonymity.

21. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 4 May 2017

