



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

Appeal number: EA/11911/2016

THE IMMIGRATION ACTS

**Heard at: Field House
On: 9 FEBRUARY 2018**

**Decision & Reasons promulgated
On: 16 FEBRUARY 2018**

Before

Upper Tribunal Judge Gill

Between

**Yusupha Jabbi
(Anonymity Order Not Made)**

Appellant

And

Entry Clearance Officer

Respondent

Representation:

For the appellant: Ms C Record, of Counsel.

For the respondent: Ms Z Ahmad, Home Office Presenting Officer.

Decision and Directions

1. Judge of the First-tier Tribunal Ford granted the appellant, a national of the Gambia born on 1 October 1990, permission to appeal the decision of Judge of the First-tier Tribunal C A S O'Garro who dismissed his appeal against the respondent's decision of 2 September 2016 to refuse his application as an extended family member for an EEA family permit in order to join Bouly Diaby, a French national (the "sponsor"), in the United Kingdom under the Immigration (European Economic Area) Regulations 2006 (hereafter the "EEA Regulations").

2. The respondent refused to grant an EEA Family permit for the following reasons:
 - (i) the appellant had not established his relationship with his sponsor; and
 - (ii) he had not established his dependency on the sponsor.
3. Judge O'Garro dismissed the appeal on the ground that the First-tier Tribunal did not have jurisdiction to decide the appeal of an extended family member under the EEA Regulations. In this respect, Judge O'Garro relied upon Sala (EFMs: Right of appeal) [2016] UKUT 00411 (IAC).
4. At the hearing, Ms Ahmad requested me to adjourn the hearing to await the decision of the Supreme Court in SM (Algeria) in which the issue of whether the First-tier Tribunal and the Upper Tribunal have jurisdiction to decide appeals from extended family members under the EEA regulations arises in connection with the Supreme Court's jurisdiction to hear the appeal to it.
5. I refused the adjournment request, having regard to the overriding objective and the fact that the judgment of the Court of Appeal in Khan [2017] EWCA Civ 1755 is binding upon the Upper Tribunal until and unless the principle it decided is held by the Supreme Court to be wrong.
6. I therefore proceeded to decide the appellant's appeal to the Upper Tribunal.
7. It is clear from the Court of Appeal's judgment in Khan that the First-tier Tribunal and the Upper Tribunal have jurisdiction to decide appeals from extended family members under the EEA Regulations. I am therefore satisfied that, through no fault of her own, Judge O'Garro materially erred in law in dismissing the appellant's appeal for want of jurisdiction. I am satisfied that this led Judge O'Garro to fall into the error of not deciding the disputed facts in this appeal, as summarised at my para 2 above.
8. I therefore set aside the decision of Judge O'Garro in its entirety.
9. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:
 - (a) 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; or
 - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."
10. In my judgment this case falls within both para 7.2 (a) and (b). In addition, having regard to the Court of Appeal's judgment in JD (Congo) & Others [2012] EWCA Civ 327, I am of the view that a remittal to the First-tier Tribunal is the right course of action.

Notice of Decision

The decision of Judge of the First-tier Tribunal O'Garro involved the making of a material error of law such that the decision to dismiss the appeal for want of jurisdiction is set aside.

This case is remitted to the First-tier Tribunal for a fresh hearing on the merits on all issues by a judge other than Judge of the First-tier Tribunal O'Garro.

A handwritten signature in blue ink, appearing to be 'DKG', is located to the left of the typed name.

Upper Tribunal Judge Gill

Date: 10 February 2018