



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/00564/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 9 October 2017

Decision & Reasons Promulgated  
On 18 October 2017

Before

**DEPUTY UPPER TRIBUNAL JUDGE A M BLACK**

Between

**MR MOAZAM ALI**  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: none  
For the Respondent: Ms K Pal, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Pakistan born on 1 July 1988. He appealed against the respondent's decision to refuse him a residence card as confirmation of a right of residence under the *Immigration (European Economic Area) Regulations 2006*. His appeal against that refusal was dismissed by Judge of the First-tier Tribunal McIntosh ("the FTTJ") in a decision promulgated on 9 January 2017.
2. No anonymity direction has been requested and none is required.
3. Permission to appeal was granted by First-tier Tribunal Judge Doyle on 25 July 2017 on the grounds that it was arguable the FTTJ did not have jurisdiction to consider the appeal in the light of **Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC)**. Thus the appeal has come before me.

4. The appellant did not attend the hearing. His representatives, MA Consultants, had requested that the hearing take place on the papers but this request had been refused by Upper Tribunal Judge Perkins on 6 October 2017. The Tribunal had attempted to telephone the appellant's representatives on that date to notify this decision but there had been no answer in response to the telephone call. A letter had been sent on 6 October 2017 to MA Consultants to confirm the outcome of their request. Despite the refusal of that request no representative attended for the hearing before me. The usher attempted to telephone the appellant's representative but there was, again, no answer. Ms Pal submitted that the hearing should go ahead and I decided that was appropriate, given that the appellant had been served with notice of hearing; his representatives were aware of the hearing date and no application had been made for an adjournment. There was no suggestion from the papers before me that, if the hearing were adjourned, the appellant or his representative would attend an adjourned hearing. It was in the interests of justice that the matter should be decided expeditiously.

### Submissions

5. I bore in mind the grounds of appeal to this tribunal. For the appellant it was submitted the FTTJ had jurisdiction because **Sala** had been wrongly decided. Various reasons were given for this proposition. In essence the judgment was not compatible with Directive 2004/38/EC and Article 19 of the TEU. There was also a vicarious entitlement through Regulation 8 and 7(3). It was also submitted that **Sala** was not binding on the FTT. **LO (Partner of EEA national) Nigeria [2009] UKAIT 00034** was preferred. It was submitted the decision in **Sala** breached the principles of "equivalence". It was further submitted that where no issue was taken on the matter of jurisdiction, the FTT should proceed (**Anwar & Or v SSHD [2010] EWCA Civ 1275** and **Pokhriyal v SSHD [2013] EWCA Civ 1568**, albeit the latter related to the application of the Immigration Rules).
6. For the respondent, Ms Pal adopted the Rule 24 reply. She submitted that the FTTJ did not have jurisdiction following the decision of the Upper Tribunal in **Sala** and that there was therefore no error of law.

### Discussion

7. The appellant had applied for a residence card as an extended family member, pursuant to the EEA Regulations. That application was refused by the respondent pursuant to Regulation 8(2).
8. The appellant had the benefit of legal representation and his representatives lodged a notice and grounds of appeal in the following terms:
 

"The decision breaches the appellant's rights under the ECHR under EU treaties in relation to entry or residence in the United Kingdom".
9. The appellant does not suggest in the grounds of appeal to this tribunal that the FTTJ should have decided whether the decision was in breach of the Convention. In any event, such an approach would have been unsuccessful in the light of the guidance in **Amirteymour v Secretary of State for the Home Department [2017] EWCA Civ 353**.
10. The appellant's representative accepted in the Grounds of Appeal to this tribunal that, according to **Sala**, there was no right of appeal against a decision by the respondent to refuse a residence card to a person who claimed to be an extended family member. It was submitted, instead, that **Sala** was wrongly decided. Whether or not it was wrongly decided, it was not an error of law for the FTTJ to follow the guidance in **Sala** which is binding on the FTT. While the matter is to be considered afresh in the Court of Appeal no judgment has yet been handed

down by that Court. The UT's judgment in **Sala** addresses exactly the issue which was before the FTTJ and the FTTJ identified as much at paragraphs 10 and 20 of the decision.

11. For the avoidance of doubt, I also find that, in the absence of the appellant or any representative on his behalf, the FTTJ was entitled to decide the issue of jurisdiction. In **Virk v SSHD [2013] EWCA Civ 652**, it was said that "Statutory jurisdiction cannot be conferred by waiver or agreement; or by the failure of the parties or the tribunal to be alive to the point". Whilst fairness would have required this being raised, given that it had not been raised previously, neither the appellant nor any representative attended the hearing; furthermore, the appellant did not request an adjournment of the hearing in the FTT and this appeal is not grounded on a submission that the failure to consider an adjournment was a procedural irregularity amounting to an error of law. In such circumstances, it was wholly appropriate for the FTTJ to decide the issue of jurisdiction.
12. The decision of the FTTJ contains no material error of law: the appellant had no right of appeal as is clearly stated at paragraph 20 of the decision under the heading "Decision and Reasons".

### **Decision**

13. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.
14. I do not set aside the decision.

Signed **A M Black**

Date

16 October 2017

Deputy Upper Tribunal Judge A M Black