



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/01446/2015**

Appeal Number:

THE IMMIGRATION ACTS

Decided on the papers

Decision & Reasons

On 2 June 2017

Promulgated

On 6 June 2017

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR MUHAMMAD TALHA USMAN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. This is an appeal by a national of the Pakistan who applied for a residence card as the extended family member of his EEA national (Swiss) sponsor who is said to be his paternal uncle. The Appellant appeals against the Respondent's decision dated 25 September 2015 refusing to issue him with a residence card. His appeal was dismissed by First-tier Tribunal Judge Kempton in a decision promulgated on 12 September 2016 ("the Decision"). The Appellant did not attend the hearing and instructed his (then) representatives that he wished to have the appeal determined on the papers.
2. The Judge did not accept that the Appellant was an extended family member on the basis that she did not accept that the sponsor was an EEA national at all relevant times and that the Appellant had not shown dependency/membership of the same household before coming to the UK and since.
3. The Appellant seeks permission to appeal the Decision on the same basis as his case was presented to the Judge. He says in conclusion that the Judge and the Respondent have not taken into account "the importance of living together as family member of a EEA national, by ignoring the fact

that I am dependent and being supported by my uncle/sponsor since childhood and provided evidences.” The grounds are merely a disagreement with the Judge’s findings on the evidence.

4. Permission to appeal was refused by First-tier Tribunal Judge Easterman by a decision sent on 15 December 2016. The terms of the refusal so far as relevant are as follows:-

“[3] Since the decision by Judge of the First-tier Tribunal Kempton, the case of Sala (EFMs: Right of Appeal) [2016] UKUT 00411(IAC) has been promulgated. That case decides that the First-tier Tribunal has no jurisdiction to hear appeals against refusals to issue residence cards for extended family members under regulation 8. This was an appeal about a refusal under regulation 8, and as a result the Judge should have found (as we now know) that there was no valid appeal. As a result, permission cannot be granted to appeal this decision to the Upper Tribunal. In my view the decision discloses no arguable error of law that could make any difference to the outcome of the appeal.”

5. On application to this Tribunal, I granted permission on the basis that the Judge had no jurisdiction to make the Decision and this amounts to an arguable error of law. If a Judge lacks jurisdiction to make a decision, then the decision is wrong in law and should not be allowed to stand. Judge Easterman was correct to observe that the case of Sala means that there was no valid appeal before the First-tier Tribunal but wrong to conclude that as a result the Decision discloses no arguable error of law. There is an arguable error of law precisely because the Judge made the Decision which she had no jurisdiction to make. Accordingly, I granted permission by decision dated 28 February 2017 in the following terms (so far as relevant):-

“[2] This is an appeal which is affected by the Upper Tribunal decision in Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC). In that case, the Upper Tribunal decided that there is no right of appeal in extended family member cases such as this. As such, there is an arguable error of law disclosed by the Decision because the Tribunal had no jurisdiction to hear and decide this appeal. The Judge does not refer to Sala which had been promulgated prior to the Decision. The refusal of permission to appeal on the basis that if the First-tier Tribunal did not have jurisdiction to decide the appeal then the First-tier does not have jurisdiction to set aside the Decision is wrong in law. Although the First-tier Tribunal (and indeed the Upper Tribunal) did not have jurisdiction to substantively decide the appeal, it retains jurisdiction to decide whether the appeal is a valid one...”

I then gave directions as follows:-

“Unless either party files and serves objections in writing to be received within 14 days from the date when this decision is sent, I propose to find an error of law in the Decision on the basis that the Judge lacked jurisdiction to make it. I then propose to set aside the Decision and re-make it dismissing the appeal as invalid.”

6. By letter dated 7 March 2017 I received the following response from the Respondent (again so far as relevant):-

“[2] As outlined in the grant of permission to appeal, the case of *Sala* is applicable to this appeal and should have been considered by the First-Tier judge, with the result that there had been no right of appeal (contrary to what is stated in the First-Tier refusal of permission to appeal, the decision in *Sala* was promulgated in advance of Judge Kempton’s decision relating to this appellant). Therefore, the only decision to be made was whether there was jurisdiction to decide the appeal. There is a material error of law in the failure of the judge to address this point. It being clear that there was no valid appeal, had she done so, she would have found that she lacked jurisdiction to decide the appeal.

[3] In granting permission to appeal, Upper Tribunal Judge Smith proposes to find an error of law on the *Sala* point, and to then proceed to set aside Judge Kempton’s decision and remake it dismissing the appeal. The respondent wishes to confirm her accordance with this approach and does not intend to avail herself of the invitation provided in the directions to serve objections.”

7. There has been no response from the Appellant to my decision and directions. Contrary to my directions, the Tribunal listed the appeal for an error of law hearing on 25 May 2017 in Bradford. That hearing was vacated as neither party had requested the hearing.
8. As indicated in my grant of permission, the Judge made the Decision after the decision in Sala was promulgated. The decision in that case was promulgated on 19 August 2016. I do not need to go into the substance of that decision in detail because neither party challenges the decision on the basis that it was wrongly decided. In short, the Upper Tribunal (Mr CMG Ockelton, Vice President and UTJ Grubb) concluded that in a case such as this involving the refusal to issue a first residence permit to an extended family member there is no right of appeal against that refusal. In that case, the Tribunal found for that reason that there was an error of law because there was no right of appeal before the First-tier Tribunal. The Tribunal therefore set aside the First-tier Tribunal’s decision and substituted its own decision finding that there was no valid appeal.
9. As I indicate, neither party challenges the correctness of the decision in Sala in this appeal. For the same reasons as given in Sala, I find that the Judge had no jurisdiction to make the Decision. I therefore set aside the Decision for that reason. Since there is no right of appeal to the Tribunal, I have no jurisdiction to decide the appeal. I therefore substitute my own decision finding that there was and is no valid appeal.

Decision

The decision of First-tier Tribunal Judge Kempton discloses an error of law because she made the decision when she had no jurisdiction to consider the appeal as the appeal was not valid. I therefore set aside the decision of First-tier Tribunal Judge Kempton dated 12 September 2016 and substitute a decision that there was and is no valid appeal in this case.

Signed

A handwritten signature in black ink, appearing to read 'E. Smith', written in a cursive style.

Upper Tribunal Judge Smith

Dated: 2 June 2017