



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal numbers: EA/00120/2016
EA/00321/2016
EA/00319/2016
EA/00323/2016

THE IMMIGRATION ACTS

Heard at: Field House
On 31 January 2018

Decision and Reasons promulgated
On 13 February 2018

Before

Upper Tribunal Judge Gill

Between

Poliana [S]
[M B]
[J M]
[S A]

Appellants

(ANONYMITY ORDER NOT MADE)

And

Secretary of State for the Home Department

Respondent

Representation:

For the appellants: M D Krushner, of Counsel.

For the respondent: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer.

Decision and Directions

1. Judge of the First-tier Tribunal R C Campbell granted the appellants, nationals of Brazil born (respectively) on [] 1984, [] 2015, [] 2012 and [] 2009, permission to appeal the

decision of Upper Tribunal Judge Martin, sitting in the First-tier Tribunal (Immigration & Asylum Chamber), who dismissed their appeals against the respondent's decisions of 14 December 2015 to refuse to grant them EEA residence cards as extended family members of Luis [S] (the "sponsor") under the Immigration (European Economic Area) Regulations 2006 (hereafter the "EEA Regulations").

2. The respondent refused to grant EEA residence cards because she was not satisfied that the appellants had established that they were residing with and/or dependent upon the sponsor either immediately before their arrival in the United Kingdom or since their arrival in the United Kingdom.
3. Judge Martin dismissed the appeals on the ground that the First-tier Tribunal did not have jurisdiction to decide the appeals of extended family members under the EEA Regulations. In this respect, Judge Martin relied upon Sala (EFMs: Right of appeal) [2016] UKUT 00411 (IAC).
4. At the hearing, Ms Brocklesby-Weller informed me that it was her understanding that, subsequent to the parties agreeing to settle the appellants' previous judicial review claim (JR/4452/2017), the respondent had reconsidered the decision as she had undertaken to do in the consent order. She was also under the impression that the decisions dated 14 December 2015 had been withdrawn. I adjourned the hearing for a short while so that Ms Brocklesby-Weller could confirm the position. However, she was unable to do so. In the circumstances and having regard to the overriding objective, I decided to proceed with the hearing.
5. Mr Krushner and Ms Brocklesby-Weller agreed that Judge Martin had materially erred in law, that her decision should be set aside and the appeals remitted to the First-tier Tribunal for a fresh hearing.
6. It is clear from the Court of Appeal's judgment in Court of Appeal in Khan [2017] EWCA Civ 1755 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 Martin materially erred in law in dismissing the appellants' appeals for want of jurisdiction. I am satisfied that this led Judge Martin to fall into the error of not deciding the disputed facts in this appeal, as summarised at my para 2 above. I therefore set aside the decision of Judge Martin in its entirety.
7. 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."
8. 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.

9. **If the respondent has withdrawn the decisions, the parties are directed to inform the First-tier Tribunal forthwith and, in any event, before the appeals are listed for hearing.**

Notice of Decision

The decision of Upper Tribunal Judge Martin, sitting in the First-tier Tribunal, 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 Upper Tribunal Judge Martin.



Upper Tribunal Judge Gill

Date: 10 February 2018