



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number EA/00592/2016

**THE IMMIGRATION ACTS**

Heard at Centre City Tower  
On 19<sup>th</sup> March 2018

Decision and Reasons Promulgated  
On 20<sup>th</sup> March 2018

Before

**DEPUTY UPPER TRIBUNAL JUDGE PARKES**

Between

**MIRIAMA MARONG**  
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Pipe (Counsel, instructed by BHB Law)  
For the Respondent: Mr D Mills (Home Office Presenting Officer)

**DETERMINATION AND REASONS**

1. The Appellant, a national of Gambia, had applied for a residence card as the spouse of an EEA national in the UK exercising treaty rights, her children were also applicants. The applications were refused on the 6<sup>th</sup> of December 2015 and the Appellants appealed. The Grounds of Appeal asserted that the marriage was valid and genuine and that that the decision was flawed. The appeal was heard by First-tier Tribunal Judge Bart-Stewart in Birmingham on the 24<sup>th</sup> of March 2017.
2. The appeals were allowed by Judge Bart-Stewart in a decision promulgated on the 4<sup>th</sup> of April 2017. The decision in the appeals of the children are not in issue and do not form part of the proceedings before the Upper Tribunal. So far as the Appellant was concerned the Sponsor had previously supported a previous application by someone else on the basis of their being married, a marriage certificate had been provided and there was no evidence of divorce. The Judge found that the Appellant was an extended family member (EFM) but allowed the appeal on the basis that the Appellant was a family member having been previously granted a residence permit on that basis.

3. At the time of the hearing the case of Sala (EFMs: right of appeal) [2016] UKUT 411 (IAC) was the case that governed rights of appeal for EFMs under the EEA Regulations 2006. In paragraph 19 of the decision Judge Bart-Stewart distinguished the circumstances of this appeal from those in Sala. The Judge allowed the appeal on the basis that the Appellant was a family as that was the basis on which she had been granted entry to the UK in that capacity.
4. The grounds of application submitted by the Secretary of State maintained that there had been no application on the basis of a durable relationship under regulation 8 of the EEA Regulations 2006. Even if there had been such an application there would have been no right of appeal following Sala. The family permit that had been issued to the Appellant had been obtained on false pretences as it was now clear that the Appellant and Sponsor were not married and the declaration that they were was wrong.
5. The Appellant's application was as a family member which conferred a right of appeal, she had not applied as an EFM. I would have found that the Appellant did have a right of appeal on the basis of the application that had been made. It would have failed on that basis and the Judge did not on the basis of the law as then understood have the power to consider the alternative basis following the decision in Sala. However the point about Sala is now entirely academic as the case of Khan [2016] EWCA Civ 1755 has overturned the Upper Tribunal decision and found that in EFM cases there is a right of appeal.
6. At the hearing the representatives indicated that they were agreed on the way forward for the appeal. As the Appellant could only be found to be an EFM, given the date of the divorce, it was not open to the Judge to allow the appeal on the basis that the Appellant was a family member. The findings at paragraph 18, that the Appellant and Sponsor are in a durable relationship, are not challenged by the Respondent.
7. I was invited to find that the decision of Judge Bart-Stewart contains an error of law to the extent that the Appellant is a family member and that the appeal was allowed under regulation 7, to set the decision aside. I was invited to remake the decision on the basis of the findings in paragraph 18 and allow the appeal under regulation 8 as an EFM for the Secretary of State to exercise her discretion under regulation 17(4) with regard to the issuing of a residence card.
8. Having regard to how this case has proceeded and with regard to the way that the law and appeal rights have changed I agree that the approach proposed is the appropriate way for this appeal to be disposed of. The effect is that the appeal is now allowed to the limited extent that the Appellant is found to be an EFM and it is for the Secretary of State to make a decision on the exercise of discretion under regulation 17(4) of the EEA Regulations 2006.

## **CONCLUSIONS**

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal allowing the appeal of Mariama Marong to the extent that I find that she is an extended family member within the meaning of the regulation 8 of the EEA Regulations 2006. It is for the Secretary of State to make a decision on the exercise of discretion under regulation 17(4) of the EEA Regulations 2006.

**Anonymity**

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

**Fee Award**

In the light of the decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

The First-tier Tribunal's fee award of £140 stands.

Reasons: The Appellant's original application was on an erroneous basis but the appeal has been allowed on the basis of facts found by the First-tier Tribunal Judge.

Signed:

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

Deputy Judge of the Upper Tribunal (IAC)

Dated: 19<sup>th</sup> March 2018