



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/01494/2016  
EA/04077/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 23 February 2018

Decision & Reasons Promulgated  
On 19 March 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE APPELYARD

Between

MRS HAYSINTH RANAWEERAGE DON - FIRST APPELLANT  
MR MALAN RAJAPAKSE ARACHCHIGE- SECOND APPELLANT  
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellants: Mr R Solomon, Counsel.

For the Respondent: Mr L Tarlow, Home Office Presenting Officer.

**DECISION AND REASONS**

1. The first Appellant is a national of Sri Lanka who appealed the Respondent's decision refusing to issue a Residence Card on the basis that she had failed to provide evidence that the Sponsor was a qualified person. The second Appellant, the husband of the first Appellant is also a citizen of Sri Lanka who similarly was refused

a Residence Card under the Immigration (European Economic Area) Regulations 2006. The Appellants appealed the Respondent's decisions and following a hearing, and in a decision promulgated on 3 March 2017, Judge of the First-tier Tribunal Davy dismissed the Appellants' appeals relying on the authority of **Sala (EFMs: Right of Appeal)** [2016] UKUT 00411 (IAC). Albeit that this was the outcome of the appeal hearing the Judge did find both Appellants credible witnesses.

2. On 9 November 2017 in **Khan v SSHD and Anor** [2017] EWCA Civ 1755, the Court of Appeal held that **Sala** was wrongly decided and that a decision to refuse admission or a Residence Card to an extended family member is an "EEA decision" within the meaning of the Immigration (European Economic Area) Regulations 2006 (as amended) and therefore attracts a right of appeal.
3. Mr Tarlow's initial position was a material error of law is contained within Judge Davy's decision and that the appeal should be remitted to the First-tier Tribunal for a de novo hearing.
4. Mr Solomon relied on the authority of **Ihemedu (OFMs - meaning) Nigeria** [2011] UKUT 340 (IAC) and in particular (iii) of the head note which states:

"iii) Regulation 17(4) makes the issue of a residence card to an OFM/extended family member a matter of discretion. Where the Secretary of State has not yet exercised that discretion the most an Immigration Judge is entitled to do is to allow the appeal as being not in accordance with the law leaving the matter of whether to exercise this discretion in the appellant's favour or not to the Secretary of State."

He invited me to allow the appeal on this limited basis. Mr Tarlow did not strongly object indicating that he was "ambivalent" to the submission.

5. I accept the submissions put forward by Mr Solomon.

### **Decision**

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The facts found within Judge Davy's decision are preserved and the appeal is allowed on the limited basis detailed above.

No anonymity direction is made.

Signed

Date 16 March 2018.

Deputy Upper Tribunal Judge Appleyard