



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/04030/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 2 January 2018

**Decision & Reasons
Promulgated
On 20 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

**MS NAIMA NABTI
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Syed-Ali, Representative
For the Respondent: Mr S Kotas, Senior Presenting Officer

DECISION AND REASONS

1. F-tJ Mailer (the Judge) dismissed the appeal of the Appellant, an extended family member, against an adverse decision by the Respondent dated 1 April 2016 under Regulation 8 of the Immigration (European Economic Area) Regulations 2006, on the basis of there being no right of appeal reliant on the decision in Sala (EFMs: Right of Appeal) [2016] UKUT 00411. The judge did not consider the merits of the appeal. F-tJ Cruthers on 14 November 2017 granted permission to appeal the decision.

2. Mr Kotas sought an adjournment of the error of law hearing on the basis that the Court of Appeal decision in MY Khan [2017] EWCA Civ 1755 was stayed and subject to an application to appeal to the Supreme Court. On that basis I agreed to the adjournment.
3. I have further considered the terms of the Court of Appeal Order of 9 November 2017. I conclude the decision of the Court of Appeal is binding on the Upper Tribunal and that part of the Court of Appeal's decision overturning the decision in Sala has not been stayed. The appeal was allowed on the Sala point, (EFM Rights of Appeal) and that decision stands. Accordingly the stay was not a good reason for me to adjourn the hearing. I therefore found there was an error of law, there being no purpose in having a further hearing on the error of law; which is in the Respondent's favour. The Appellant's position is protected and the merits of the claim will be dealt with by a judge of the First-tier Tribunal (IAC) in due course.
4. Accordingly, I find the Judge made an error of law. There was no finding made on whether the Appellant had adduced evidence that the EEA family member was exercising Treaty Rights and making regular insurance contributions or that they were currently (in the sense of economically) active in the UK.
5. For the avoidance of doubt the Order of 9 November 2017 in MY Khan should be read as:-
 - “5. The Respondent's application for a stay of paragraphs 3 and 4 [pending the determination of a renewed application for permission to appeal and, if permission is granted, the determination of the appeal] is granted.” (My parentheses.)
6. In the circumstances the correct course is as follows, and I decide:
 - (a) The error of law issue in the appeal should not be adjourned;

- (b) The Original Tribunal's decision cannot stand; and
- (c) The appeal is to be decided in accordance with the law in the First-tier Tribunal (IAC);
- (d) Any costs issues shall be for the First-tier Tribunal (IAC).

7. No anonymity order was sought.

Decision

The appeal is allowed to the extent that the matter is to be determined in accordance with the Law in the First-tier Tribunal (IAC).

Signed

Date 25 January 2018

Deputy Upper Tribunal Judge Davey