



**Upper Tribunal  
(Immigration and Asylum Chamber)  
EA/04531/2016**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 6 February 2018**

**Decision &  
Promulgated  
On 27 April 2018**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT**

**Between**

**MS SIVASUTHARNA SIVARAJAH  
(ANONYMITY ORDER NOT MADE)**

Appellants

**and**

**ENTRY CLEARANCE OFFICER - CHENNAI**

Respondent

**Representation:**

For the Appellants: Miss C Physsas of Counsel

For the Respondent: Mr C Avery, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Sri Lanka born on 24<sup>th</sup> of August 1989. She appeals against a decision of Judge of the First-tier Tribunal Turquet sitting at Hatton Cross on 29<sup>th</sup> of June 2017 which was to dismiss the Appellant's appeal against a decision of the Respondent dated 15<sup>th</sup> of March 2016. That decision was to refuse to grant the Appellant a family permit to join her aunt a German citizen exercising treaty rights in this country.
2. The applications were refused by the Respondent pursuant to Regulations 7 (family members) and 8 (extended family members) of the 2006 EEA

Regulations. The Respondent indicated that he was not satisfied that the Appellant and her EEA Sponsor were related as claimed. The Respondent was particularly concerned about two birth certificates supplied by the Appellant in support of her application.

3. On appeal the Judge held that there was no right of appeal against the Respondent's decision following the Upper Tribunal authority of **Sala [2016] UKUT 411**. That decision held that where an applicant was making an application for a residence card under Regulation 8 of the EEA Regulations 2006 as an extended family member the Regulations did not give a right of appeal because there was no entitlement to a residence card by an applicant under Regulation 8, it was a discretionary provision.
4. Subsequently that decision was overturned by the Court of Appeal in the case of **Khan [2017] EWCA Civ 1755**. The Court of Appeal found that on their true construction the 2006 Regulations did provide for a right of appeal for those claiming under Regulation 8. Although the judgement in **Khan** was handed down on 9<sup>th</sup> of November 2017 some five months after the First-tier Tribunal hearing in this case because the decision was to find that the 2006 Regulations had always provided for a right of appeal the First-tier decision in this case was retrospectively invalidated.
5. Following the dismissal of her appeal for want of jurisdiction the Appellant had appealed that dismissal and permission to appeal was granted by Judge of the First-tier Tribunal Foudy on 20<sup>th</sup> of December 2017 on the basis of the clarification of the meaning of the 2006 Regulations in **Khan**. The Respondent replied to the grant pursuant to Rule 24 arguing that there should be a stay on proceedings because she is appealing **Khan** to the Supreme Court. I disagree that there should be a stay. The Court of Appeal did not stay the effect of their decision.
6. When the matter came before me to determine whether there was a material error of law in the determination, I indicated that I considered there was. There are two points to be made. Because of the decision in **Khan** the Judge's decision could not stand and neither party disputed that. The second point is that the Appellant's application was considered by the Respondent under Regulation 7 as well as 8 and it was never in doubt that a right of appeal attached to a refusal under Regulation 7. Regulation 7 however is confined for these purposes to direct descendants whereas the Appellant claims the relationship of aunt and niece. The Appellant's grounds of appeal against the Respondent's decision did not raise Regulation 7.
7. Both parties agreed that the correct course of action was to remit this appeal back to the First-tier Tribunal with no findings preserved for the matter to be re-determined. I therefore set aside the decision of the First-tier Tribunal on the grounds of material error of law and I remit the case back to the First-tier Tribunal to be reheard with no findings preserved. I do not consider that any specific directions are required but the Appellant and her advisers may wish to consider what evidence she wishes to adduce to support the existence of the claimed relationship and any

dependency (the grounds refer to financial dependency). Such evidence should be filed and served at least 14 days before the First-tier rehearing.

**Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I remit the appeal back to the First-tier Tribunal to be reheard by any Judge other than Judge Turquet.

Appellant's appeal allowed to the extent stated

I make no anonymity order as there is no public policy reason for so doing.

Signed this 6th of February 2018

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Judge Woodcraft  
Deputy Upper Tribunal Judge

**TO THE RESPONDENT**  
**FEE AWARD**

I set aside the decision not to make a fee award in this case. That issue will also have to be re-determined by the First-tier.

Signed this 6th of February 2018

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Judge Woodcraft  
Deputy Upper Tribunal Judge