



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/00815/2018

THE IMMIGRATION ACTS

Heard at Field House
On 12 September 2018

Decision & Reasons Promulgated
On 20 September 2018

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

USMAN ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Khan instructed via Direct Access
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Pakistan. He appealed to a judge of the First-tier Tribunal against the respondent's decision of 27 April 2017 refusing to grant him a residence card. The judge dismissed the appeal on the basis that he lacked jurisdiction. This was because there was no right of appeal under the Immigration (European Economic

Area) Regulations 2016, which came into force on 1 February 2017, in the case of a person seeking a residence card as an extended family member.

2. The judge noted the case law under the 2006 Regulations under which it had been held in Sala [2016] UKUT 411 that there was no right of appeal, but this decision was overturned in Khan [2017] EWCA Civ 1755. That pertained to the 2006 Regulations only. The judge was clear that there was no right of appeal in the circumstances given the wording of the 2016 Regulations and, although a reference had been made to the CJEU in Banger [2017] UKUT 125 (IAC), there had as yet been no decision in that case.
3. The appellant sought and was granted permission to appeal on the basis that the grounds were arguable in light of the judgment in Khan.
4. In his submissions Mr Khan argued that it was unclear from the decision letter whether it was made under the 2006 or the 2016 Regulations as there was no reference to either set of Regulations. There was a reference in the decision to Sala which would have been unnecessary if the decision was under the 2016 Regulations, as it was a 2006 Regulations case. He made the point that the appellant had had two previous applications and refusals and that in effect it was unfair that he had been refused because of the decision in Sala which had subsequently been proved in Khan to be wrong and he had therefore lost the opportunity to put his case before a judge. He also argued that there was an inconsistency between Regulation 36(4) and Regulation 2 in the definition of "EEA decision".
5. In his submissions Mr Melvin relied on and developed points made in his Rule 24 response. The matter had been considered under the Regulations in place at the time of the application. They precluded a right of appeal under Regulation 8 as was set out in Regulation 2. Previous decisions could have been challenged by way of judicial review and that had not been done and the appellant had made numerous other applications. No points relating to unfairness had been raised in the grounds. The Rules did change periodically in the process of applications being made. There was no error of law.
6. By way of reply Mr Khan argued that the decision did not explicitly refer to the 2016 Regulations. There had been an application for judicial review but the appellant had abandoned it pending the outcome of this case and so preferred an appeal on the merits. He had been prejudiced unfairly by the changes in the law.
7. I reserved my determination.
8. The decision in this case, as Mr Melvin pointed out, was made after the 2016 Regulations came into force, and, though there is a reference to Sala in the decision, that is a wholly irrelevant matter, and does not in my view in any sense lead to a proper inference that the decision was made under the 2006 Regulations. It could not have been, because those Regulations were no longer in force.

9. As regards Regulation 36(4), concerning appeal rights, there is no indication that the matters referred to at Regulation 36(4)(b) were produced in this case. It is clear from Regulation 2 that an extended family member does not have a right of appeal under the 2016 Regulations.
10. Though it is unfortunate the appellant was in effect caught by the decision in Sala, there could have been challenges by way of judicial review to those earlier decisions and it seems as though there was one challenge originally that was abandoned. The law does change, and though it is unfortunate that the appellant has never had an appeal before the First-tier Tribunal, that can in no sense go to impugn the decision in this case. The judge was clearly right to conclude that he did not have jurisdiction to hear an appeal in light of the removal of the appeal right in such a case in the 2016 Regulations, which govern this case. Accordingly, the challenge to the judge's decision is refused and his decision refusing a residence permit is upheld.
11. No anonymity direction is made.



Signed

Date 19 September 2018

Upper Tribunal Judge Allen