Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: EA/02200/2015**

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A/02202/2015

THE IMMIGRATION ACTS

Heard at Field House	**Determination & Reasons Promulgated**
On 17th July 2017	**On 8th August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

AFAM CHIDI EZEAMULUNANMA (1)
IFEOMA ANIUNOH EZEAMULUNANMA (2)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Al-Rashid (Counsel)
For the Respondent: Mr T Wilding (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of resident First-tier Tribunal Judge Zucker, promulgated on 27th January 2017, following a determination, made without a hearing, at Taylor House on 19th December 2016, whereby Judge Zucker took the view that he lacked jurisdiction to determine the appeal in the light of the guidance given in **Sala (EFMs: Right of Appeal) [2016] UKUT 00411**, because the application by the

Appellants, for residence cards as confirmation of the right to reside in the UK as the extended family member of a person exercising "treaty rights", was made by two cousins.

Grounds of Application

2. The grounds of application state that the principal Appellant is the extended family member of an EU citizen exercising treaty rights in the UK, and he had made an application for a residence card, for himself and his dependent wife and two children and this was refused on account of there being insufficient evidence of dependency or membership of a household of a qualified person. After he had lodged his appeal, the hearing date was fixed, but shortly before the date of the hearing he was informed by the resident judge at the First-tier Tribunal of the case of **Sala [2016] UKUT 411**, so that he proceeded to determine the appeal "on the papers". The grounds acknowledge that the Appellant was invited "to provide any reasons why the Tribunal should not proceed as proposed", but since the Tribunal was not inviting submissions on the "substantive law", the Appellant saw no reason to provide any objections to why the Tribunal should not follow the "procedure" that it had proposed.

3. Second, nevertheless, **Sala** was not binding. It was a reported, but not a Starred decision. The Practice Directions do not provide for determinations that are merely reported to be treated as authoritative in any matter. In fact, the Guidance states at paragraph 10 that, "in the absence of a starred case the common law doctrine of judicial precedent shall not apply and the decisions of the AIT and one Constitution of the Chamber do not as a matter of law bind later Constitutions".

4. Third, that the decision in **Sala** was in any event wrong. This is because it was wrong for the Tribunal in that case to hold that Regulation 2(1)(b) of the EEA Regulations do not cover the situation where the EFM appeals against the refusal to issue a residence card under Regulation 17(4), for the reason only that an exercise of discretion is involved. This is because under Regulation 17(4) and Regulation 17(5) a person who claims to be an EFM, and who satisfies the national conditions, is entitled to a residence card.

5. Fourth, contrary to what the Upper Tribunal had decided in that case at paragraphs 22 and 23, the construction given above in the grounds just cited, are consistent with the Citizens Directive 2004/38. Chapter VI, which applies to Union citizens, and their family members, includes other beneficiaries as defined by Article 3(2)(a) and (b) of the Directive.

6. Fifth, the Appellant, by virtue of not having a right of appeal, was denied a remedy and this was inconsistent with Article 47 of the charter, which provides for a fair and effective remedy.

7. Finally, the position with respect to jurisdiction is not acte clair and a reference has been sought to the CJU. The appeal in this case ought to be linked with the appeal in **Banger [2017] UKUT 125** in which the

president has made a reference to the CJU and asked the following relevant question:

> "Is a rule of national law which precludes an appeal to a court or Tribunal against a decision of the executive refusing to issue a residence card to a person claiming to be an extended family member compatible with the Directive?"

Until such time that an authoritative decision is given, it was appropriate for the appeal in this case to be allowed.

Submissions

8. At the hearing before Mr Al-Rashid, appearing as Counsel on behalf of the Appellants made an application for an adjournment on the grounds that the position was clearly not acte clair because the CJEU was presently considering a application referred to it by the president of the Tribunal in **Banger**, and until such time that an authoritative decision is given, this matter should be stood out. Second, this matter should also be stood out because the Supreme Court only in March 2017 in the case of **SM (Algeria)** had also considered a situation such as this case, but had adjourned to another day. At this stage, Mr Wilding, appearing as Senior Home Office Presenting Officer for the Secretary of State, intervened to explain that in **SM (Algeria)** the "**Sala** point" had not been argued, but now that it was a live issue, we were awaiting, in case that this should so happen, for the Supreme Court to reconvene again to hear arguments on the "**Sala** point". Third, submitted Mr Al-Rashid, the Court of Appeal in **NA (Pakistan)** only last week adjourned a hearing on the same point because of a late intervention by a interested party, but that case now was scheduled to be heard in September this year. For all these three reasons, it was, submitted Mr Al-Rashid, expeditious and correct for there to be a adjournment.

9. For his part, Mr Wilding, whilst accepting that there was some force in the submissions made today for the grant of an adjournment, submitted that it remained open to the Appellant at any stage, including after a authoritative decision had been handed down, to remake a application on this matter.

10. Having considered the position, and applying the overriding objective, I have concluded that it would not be appropriate to adjourn, and that I should proceed on the basis of a reported decision, which remained relevant for consideration by this Tribunal.

11. In his submissions before me, Mr Al-Rashid submitted that he could do no better than to simply rely upon the Grounds of Appeal. For his part, Mr Wilding submitted that good reasons needed to be shown for why **Sala** should not be followed. None were adduced. Second, this is a case where resident Judge Zucker had expressly set out the directions that he had given to the Appellants' representatives, expressly drawing attention to his intention to follow the case of **Sala**, and at paragraph 2(3) it is stated

that, "if you wish to provide reasons why the Tribunal should not proceed as proposed, you must provide written notification no later than 4pm on the fifth working day after the date of these directions". None were given. The judge ended with a sentence that, "to date there has been no response from the Appellants or the representatives. In the circumstances the appeal is dismissed for want of jurisdiction" (see paragraph 3). That was an approach that could not be criticised, submitted Mr Wilding.

12. In reply, Mr Al-Rashid submitted that, as his Grounds of Appeal made clear, given that resident Judge Zucker was simply inviting submissions on the procedure that he intended to follow, rather than the "substance" of the reliability of the case of **Sala** in such a situation, it was considered to be unnecessary to make any further written submissions.

No Error of Law

13. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA) 2007 such that I should set aside the decision. I come to this conclusion notwithstanding Mr Al-Rashid's precise and able submissions before me. As he openly accepted himself, no written notification was given by the fifth working day of the date of the directions issued by the First-tier Tribunal, or at any time thereafter. It was open, in my judgment, for the "**Sala** point" to be taken at that stage, and any argument with respect to the Tribunal still retaining jurisdiction in cases of this sort, to be made then. The reference by the president in **Banger** to the CJEU was not a point taken below, which could have been by way of a written notification to resident Judge Zucker. The case of **Sala** is a reported decision, albeit not a starred decision, and it remains of persuasive authority given the fact that the arguments with respect to extended family members were comprehensively addressed in that case. It remains open to the Appellants in this case to make a further application, should the position change with respect to the state of the law. As things stand at the moment, and with respect to whether the Tribunal below had engaged in a material error of law, I am bound to come to the conclusion that it did not.

14. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 8th August 2017