



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/01762/2015

THE IMMIGRATION ACTS

Heard at Field House
On 5th March 2018

Decision & Reasons Promulgated
On 6th April 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MR. BLERIM DAKU
(NO ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Kerr, Counsel, instructed by Karis Solicitors Limited.

For the respondent: Mr Avery, Home Office Presenting Officer.

DETERMINATION AND REASONS

Introduction

1. The appellant is a national of Albania. On 9th September 2015 he applied for a residence card as confirmation of his right to reside in the United Kingdom further to European Treaty provisions.
2. The application was on the basis of his relationship with Mrs Ioana Tudor, a Romanian national.

3. His application was refused on 12 October 2015. As they were not married it was considered on the basis he was claiming to be in the extended family member category of the 2006 regulations. In order to maintain parity with domestic regulations the respondent expected him to demonstrate they had been living together in a durable relationship evidenced by two years cohabitation. The respondent concluded he had failed to provide sufficient evidence to demonstrate this.
4. The appellant and Mrs Ioana Tudor married on 23 October 2015. On 1 December 2015 he had made a fresh application, this time on the basis he was a family member rather than extended family member because of his marriage. That application was also refused.
5. His appeal against the original decision of 12 October 2015 was listed on 26 October 2016 and adjourned so as to give him an opportunity to vary his grounds of appeal to include his new status. At the resumed hearing on 30 March 2017 before First-tier Tribunal Judge L Rahman the grounds of appeal had not been amended. This left only the original decision of 12 October 2015 based upon him being an extended family member rather than an immediate family member.
6. In a decision promulgated on 21 April 2017 the appeal was dismissed. The judge found that in line with the Upper Tribunal decision of Sala (EFM's: right of appeal) [2016] UKUT 00411 there was no appealable decision insofar as it related to him being an extended family member.
7. Permission to appeal to the Upper Tribunal has been granted in light of the Court of Appeal decision of Khan -v- SSHD [2017] EWCA Civ 1755 which held that the decision in Sala was wrong.
8. At hearing, I was advised that the appellant had been detained and in October 2017 left the country voluntarily. Mr S. Kerr, Counsel, advised that his instructions were to proceed.

Conclusions

9. First-tier Tribunal Judge L Rahman materially erred in law as it is now understood. This is because of the Court of Appeal decision of Khan -v- SSHD [2017] EWCA Civ 1755 which held that the decision in Sala was wrong. The Supreme Court in SM (Algeria) - v- ECO [2018] UKSC 9 has reaffirmed Khan -v- SSHD.
10. Given the factual issues which will have to be decided a remittal is called for.

Decision

The decision of First-tier Tribunal Judge L Rahman materially errs in law and is set aside. There are no material facts to preserve. The matter is remitted for a de novo hearing before the First tier Tribunal.

Francis J Farrelly

Deputy Upper Tribunal Judge

30th March 2018

Directions.

1. Relist for a de novo hearing in the First-tier Tribunal excluding First-tier Tribunal Judge L Rahman.
2. The appellant's representatives are to confirm with the First tier Tribunal Office that the appeal is being pursued given the appellant has left the country.
3. If the appeal is being pursued they should advise if the grounds of appeal have been amended to include his status as husband.
4. They are to advise if an interpreter is required. It may be if the appellant and his wife are giving evidence Albanian and Romanian interpreters will be required but is for the representatives to advise.
5. The appellant's representatives are to prepare an appeal bundle demonstrating the necessary exercise of Treaty rights and documentation to confirm the appellant's marriage and evidence of the ongoing relationship. Paternity of any children of the union should be demonstrated.
6. It is anticipated the hearing should last 1 - 1.30 hours.

Francis J Farrelly

Deputy Upper Tribunal Judge 30th March 2018