Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/06206/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 January 2018	**On 24 January 2018**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

ENTRY CLEARANCE OFFICER

Appellant

and

AZEEZAT GBEMISOLA BADMUS

Respondent

Representation:

For the Appellant: Mr. P. Duffy, Home Office Presenting Officer

For the Respondent: Ms F. Obu, Fitzpatrick & Co. Solicitors

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent, who was born on 27 September 1992, is a national of Nigeria. On 15 March 2016, she applied for a family permit as the extended family member of her aunt, Iyabo Bello, who is an Irish citizen exercising a Treaty right in the United Kingdom.

2. Her application was refused and she appealed on 19 May 2016. First-tier Tribunal Judge Parker allowed her appeal in a decision, promulgated on 1 August 2017.

3. The Appellant appealed against this decision on 8 August 2017 and First-tier Tribunal Judge Holmes granted her permission to appeal on 18 August 2017.

ERROR OF LAW HEARING

4. Both the Respondent's solicitor and the Home Office Presenting Officer applied for an adjournment of the error of law hearing.

5. In particular, the Home Office Presenting Officer requested an adjournment until a decision was reached on the Secretary of State for the Home Department's renewed application for permission to the Supreme Court in the case of *MK v Secretary of State for the Home Department* [2017] EWCA Civ 1755 and also until a judgment was handed down by the Supreme Court in the case of *SM (Algeria)*, which had been heard on 29 November 2017 and in which submissions had been made in relation to the issues raised in *Sala*.

6. The Home Office Presenting Officer showed me a copy of the order made by the Court of Appeal in *MK* on his laptop. However, I noted that in this order paragraphs 3 and 4 stayed the decision that in *MK*'s case the decision by the Upper Tribunal would be set aside and the appeal remitted to the First-tier Tribunal and also stayed the costs order made in favour of the Appellant. However, it did not stay paragraph 1 of the order, which stated that the appeal was allowed or paragraph 2 of the order, which said that permission to appeal to the Supreme Court was refused. Therefore, in my view the substance of the decision reached by the Court of Appeal stands, which is that *Sala* was wrongly decided. Therefore, I am bound by the decision in *MK* and it is not necessary to grant an adjournment.

7. The Home Office Presenting Officer also made oral submissions in relation to the other issues in dispute and the Respondent's solicitor relied upon written submissions and some brief oral

submissions. I have referred to the content of these submissions, where relevant, in my decision below.

ERROR OF LAW DECISION

8. In his decision, after a hearing on 20 July 2017, the First-tier Tribunal Judge found that he had the jurisdiction to hear the Appellant's appeal despite the Upper Tribunal's decision in *Sala (EFMs: Right of Appeal)* [2016] UKUT 00411 (IAC). He found that the Appellant fell within an exception referred to in paragraph 82, which stated that:

> "There is a further example. An individual may be issued with a 'family permit' under reg. 12(2) as an EFM who is accompanying or joining an EEA national in the UK. Suppose a family permit is issued on the basis of a 'durable relationship' with that EEA national. On arrival in the UK, the individual is refused admission because the Immigration Officer concludes (perhaps on receipt of further evidence) that the relationship is not 'durable'. The individual is "treated" as a "family member" of the EEA national once he is issued with the family permit (see reg. 7(3)). Provided that he produces a valid passport; is accompanying or joining the EEA national; and the EEA national has a right to reside in the UK, he "must be admitted" to the UK (see reg. 11(2) read with reg. 19(2)(a)). The individual may appeal against that EEA decision to refuse him admission as it "concerns… a person's entitlement to be admitted to the United Kingdom" (see reg. 2(1), point (a)). Even assuming he continues to be "treated" as a "family member" despite it being said he does not meet the required condition for being an EFM under reg. 8(4), as we noted above reg. 26(2A) would apply even if reg. 26(3) (the limitation on appeal by a "family member") also applies. As we noted above, the two provisions are not mutually exclusive. For the purposes of reg. 26(2A), the individual is someone who "claims to be in a durable relationship". That position is *a fortiori* if he is no longer "treated" as a family member because he is not considered to satisfy the EFM requirement of being in a 'durable relationship'.

9. In my view, properly read *Sala* did not exclude the Respondent as she had not already been issued with a family permit and it was not a case of her being refused admission to the United Kingdom. Therefore, this part of First-tier Tribunal Judge Parker's decision was wrongly decided.

10. However, *Sala* has now been overturned by *MK v Secretary of State for the Home Department* [2017] EWCA Civ 1755 and extended family members are entitled to a right of appeal to the First-tier Tribunal and, therefore, the error made by First-tier Tribunal Judge Parker in his interpretation of the decision in *Sala* is now immaterial.

11. First-tier Tribunal Judge Parker had also proceeded to consider the substance of the appeal and, in particular, whether the Respondent was dependent upon her sponsor for the purposes of the Immigration (European Economic Area) Regulations.

12. The Home Office Presenting Officer submitted that the reasoning contained in paragraph 30 of the First-tier Tribunal Judge's decision was inadequate and did not enable the Appellant to understand the basis upon which the Respondent's appeal had been allowed. However, in paragraphs 18 to 23 of his decision the First-tier Tribunal Judge reminded himself of the leading cases relating to this issue and in paragraph 30 the First-tier Tribunal Judge referred back to these cases.

13. One of these cases was *Moneke (EEA – OFMs) Nigeria* [2011] UKUT 00341 (IAC), where it was found that "financial dependency should be interpreted as meaning that a person needs financial support from the EEA national…in order to meet his/her essential needs – not to have a certain level of income". In the current case, the bank statements of the Respondent and her sponsor, a letter from Mrs Adeyemi and a letter from Niyi Adekunle indicated that her sponsor was sending her money on a regular basis and that the sponsor was paying for the Respondent's college education. Mrs Adeyemi also refers to the sponsor paying for the Respondent's upkeep.

14. The Respondent had also indicated in her interview with the Entry Clearance Officer that her sponsor was responsible for her upkeep, school and well-being. The term "upkeep" can be equated with food and lodgings. In addition, she said in reply to question 8 that her sponsor took over responsibility for her in 2011 as she had more funds and that poverty prevented her parents from doing so. This latter assertion was not challenged by the Appellant and, therefore, it was not necessary for the First-tier Tribunal to require the Respondent to provide further details of her parent's financial situation. In paragraph 28 of the decision the First-tier Tribunal also found that the account given by the Respondent's sponsor was very credible and the Appellant has not sought to undermine this finding.

15. The First-tier Tribunal Judge had reminded himself in paragraph 5 of his decision that the standard of proof was one of a balance of probabilities and the evidence read as a whole indicates that the Respondent is dependent on the sponsor as defined in *Moneke.*

16. I accept that in *ECO Manilla v Lim* [2015] EWCA Civ 1383 it was found that financial support which was merely used to stop an Appellant eating into her capital did not amount to

paying for essential living needs. But in the current case, the Respondent said in her interview that she was living separately from her parents and there is no indication that she could afford to attend college without the support of her sponsor. It was also not asserted that education and proving financial support to pay for a person's upkeep did not amount to meeting essential needs.

17. In paragraph 30 the First-tier Tribunal Judge agreed with counsel for the Respondent's contentions that there was sufficient evidence of dependency. The Home Office Presenting Officer submitted that such reasoning was not sufficient. However, this statement must be read with the First-tier Tribunal Judge's own analysis in paragraphs 28, 29 and 31of his decision.

18. The Home Office Presenting Officer also sought to rely on the case of *Reyes (EEA Regs: dependency)* [2013] UKUT 00314 (IAC). However, it found that "whether a person qualifies as a dependent under the Regulations is to be determined at the date of decision on the basis of evidence produced to the respondent or, on appeal, the date of hearing on the basis of evidence produced to the tribunal". There is nothing to suggest that First-tier Tribunal Judge Parker did not follow this approach.

19. As a consequence, I find that First-tier Tribunal Judge Parker did not err in law in his decision.

DECISION

(1) The Appellant's appeal is dismissed.

(2) The decision of First-tier Tribunal Judge Parker is upheld.

Nadine Finch

Signed Date 22 January 2018
Upper Tribunal Judge Finch