



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/07628/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Rolls Building, London

**Decision & Reasons
Promulgated**

On 13 February 2018

On 25 April 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

**MOHAMMED FARZAN MOHAMMED FUWARD
(ANONYMITY ORDER NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Heybroek, instructed by Kothla & Co, Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision and reasons statement of FtT Judge Owens that was promulgated on 20 September 2017. Judge Owens dismissed the appeal in the First-tier Tribunal for want of jurisdiction. Judge Owens followed the Upper Tribunal's decision in *Sala (EFMs: Right of Appeal)* [2016] UKUT 411.
2. Ms Heybroek requested that Judge Owen's decision be set aside because *Sala* had been found to be not good law (see *Khan v SSHD* [2017] EWCA Civ 424). Ms Heybroek pointed me to the respondent's rule 24

response in which the issue was conceded and the Upper Tribunal was invited to remit the appeal to the First-tier Tribunal for a fresh hearing.

3. Mr Melvin informed me that he was instructed to withdraw the rule 24 response and to seek an adjournment to await the outcome of the Supreme Court in the pending case of *SM (Algeria) v ECO* (no citation available). He suggested that the Supreme court was looking at the same issue and it was reasonable to await the outcome before deciding how to deal with this appeal.
4. I decided that there was no need to adjourn the appeal. There was no explanation why the application to adjourn had not been made prior to the hearing, the Supreme Court having reserved judgment in *SM (Algeria)* some time ago. I also indicated that for similar reasons (even though not raised by Mr Melvin), there would be no reason to await the Court of Justice's decision in *Banger v SSHD (case no c-89/17)* which is pending. Ms Heybroek indicated that the Advocate General's opinion was expected in March 2018, so final judgment is some time off. To adjourn would be to delay the appeal unjustifiably. At the very least, the parties are entitled to have findings of fact made which may resolve the concerns raised.
5. Mr Melvin accepted my decision and indicated he could not argue there was no error of law in Judge Owens' decision. He did not object to me remitting the appeal to the First-tier Tribunal for a fresh hearing. The First-tier Tribunal will be required to make findings of fact on the question of whether the appellant satisfies regulation 8 (extended family members) of the 2006 EEA Regulations.
6. I announced my decision at the hearing and this decision and reasons statement merely confirms my decision and gives my reasons.

Decision

The appeal to the Upper Tribunal succeeds.

FtT Judge Owens' decision contains an error on a point of law and is set aside.

The appeal is remitted to the First-tier Tribunal for a fresh decision.

Signed

Date

13 February 2018

Judge McCarthy
Deputy Judge of the Upper Tribunal

Postscript - NB: This is not part of my decision and reasons

By coincidence (and I say that because neither representative informed me that the Supreme Court was about to hand down its judgment), the Supreme Court handed down its judgment in *SM (Algeria) v ECO UK Visa Section* [2018]

UKSC 8 the day after the hearing. The Supreme Court upheld the Court of Appeal's judgment in *Khan* and overruled *Sala*.