Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/03932/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 January 2018	**On 29 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

ZORAWARSINGH INDERJITSINGH KAKKAD
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson, Counsel
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. In this case it is the appellant who appeals with the permission of the First-tier Tribunal against a decision of the First-tier Tribunal dismissing the appellant's appeal for want of jurisdiction.

2. The appellant had applied for a residence card as acknowledgment of his right of residence as the 'extended family member' of his partner, Ms Anete Zute, a Latvian national ("the sponsor"). The respondent was not satisfied the appellant and Ms Zute were in a 'durable relationship' or that Ms Zute was still employed. The appellant appealed under Regulation 26 of the Immigration (European Economic Area)

Regulations 2006 ("the EEA Regulations") on the ground he met the requirements for the grant of a residence card.

3. In a short decision, promulgated on 19 April 2017, Judge of the First-tier Tribunal Cameron dismissed the appeal, applying the law as it was then understood to be in *Sala (EFMs: right of appeal)* [2016] UKUT 00411 (IAC). That case held as follows:

> *"There is no statutory right of appeal against the decision of the Secretary of State not to grant a Residence Card to a person claiming to be an Extended Family Member."*

4. By the time the application for permission to appeal was considered, the Court of Appeal had overturned the decision in *Sala*, which was wrongly decided (see *Muhammad Yasir Khan v SSHD & Anr* [2017] EWCA Civ 1755).

5. In the circumstances, it is perfectly clear that Judge Cameron's decision was erroneous in law and must be set aside.

6. The parties were notified through directions that, in the event an error of law was found, it was likely the Upper Tribunal would go on to re-make the decision itself. This appeared the appropriate course to take in this case.

7. The appellant and the sponsor attended the hearing and were prepared to give evidence. However, Ms Isherwood indicated she had no questions for them so it was not necessary to call them. Their witness statements could stand as their unchallenged evidence.

8. The burden of proof is on the appellant with regard to any assertions of fact which he makes. The standard of proof is the civil standard of a balance of probabilities. I may consider evidence about any matter which I think relevant to the substance of the decision, including evidence which concerns a matter arising after the date of decision.

9. Directive 2004/38/EC regulates the rights of free movement of European Union citizens and their family members. For the purposes of this appeal its provisions were transposed into domestic law by the EEA Regulations. The EEA Regulations read as follows:

> **"8.— "Extended family member"**
> (1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).
> …
>
> (5) A person satisfied the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.

> **17. Issue of residence card**
> …
> (4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if-
>
> (a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and
>
> (b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.
>
> (5) Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses shall give reasons justifying the refusal unless this is contrary to the interests of national security."

10. This appeal turns on the issues of whether the appellant and the sponsor are in a 'durable relationship' and whether the sponsor is exercising her Treaty rights in the UK. In contrast to the position of family members, there is no right to a residence card in the case of an extended family member (see, for example, *Ihemedu (OFMs – meaning) Nigeria* [2011] UKUT 00340 (IAC)). The respondent may issue one.

11. On both counts, Ms Isherwood helpfully accepted the evidence supported the appellant's appeal.

12. The phrase 'durable relationship' is not defined in the EEA Regulations or the Citizens Directive. The Immigration Rules impose a requirement on in-country applicants for leave to remain as partners to show they have been living together in a relationship akin to marriage which has subsisted for two years or more (see Appendix FM). No more onerous conditions may be imposed on the extended family members of EEA nationals.

13. The evidence provided by the appellant in this case now includes a birth certificate showing Ms Zute gave birth to a child on 30 January 2017. On the birth certificate it is recorded that the appellant is the father of the child and that he and Ms Zute lived together at [ ]. That is still their address and I have seen a copy of their tenancy agreement. In their statements, the couple state they have lived together since February 2013 and this evidence was not challenged at the hearing. I accept they have known each other since then, although it appears they previously said they had lived together since September 2015. That length of cohabitation plus the fact of the child means that I find as fact the appellant and Ms Zute are in a durable relationship.

14. As far as the sponsor's employment is concerned, the respondent was concerned that she appeared to have left her job at [ ] the

day before enquiries were made and there was no evidence of further employment. However, I note that the respondent issued Ms Zute a permanent residence card on 20 November 2017, which Ms Isherwood acknowledged showed that she had established she had been exercising her Treaty rights for five years. That information appears to have been derived from an information request to HMRC showing her earnings, tax and NI contributions since 2010.

15. I note the sponsor remains in employment and she has submitted recent pay slips. She states in her statement that she works as an assistant manager at a pizza restaurant in [ ]. Her evidence on this point is also unchallenged. I find Ms Zute is exercising her rights under the Treaty through this employment.

16. It follows the appellant satisfies the requirements of Regulation 8(5). It is a matter for the Secretary of State whether to issue a residence card under Regulation 17(4).

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error of law and his decision dismissing the appeal is set aside.

The following decision is substituted:

The appeal is allowed to the extent the appellant has established he meets the requirements of Regulation 8(5) of the EEA Regulations.

No anonymity direction is made.

Signed Date 9 January 2018

Deputy Upper Tribunal Judge Froom