



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/05041/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 9 February 2018

Decision & Reasons Promulgated  
On 13 February 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

AGHAEKOKHIAN BLESSING ASEMOTA  
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr B Lams, Counsel, instructed by the Legal Resource Partnership  
For the respondent: Mr T Wilding, a Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Decision and reasons**

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against refusal of a residence permit as the extended family member of an EEA national exercising Treaty rights in the United Kingdom, pursuant to Regulation 8(2) of the Immigration (European Economic Area) Regulations 2006 (as amended). The appellant is a citizen of Nigeria.

2. The First-tier Tribunal rejected the appellant's appeal on 18 October 2017 for want of jurisdiction, applying the decision of the Upper Tribunal in *Sala* (EFMs: right of appeal) Albania [2016] UKUT 411 (IAC).
3. On 9 November 2017, in *Khan v Secretary of State for the Home Department & Anor* [2017] EWCA Civ 1755, the Court of Appeal held that *Sala* was wrongly decided and that a decision to refuse admission or a residence card to an extended family member is an 'EEA decision' within the meaning of the Immigration (European Economic Area) Regulations 2006 (as amended) and therefore attracts a right of appeal.
4. On 20 November 2017, Designated First-tier Tribunal Judge McCarthy granted permission to appeal on that basis.

### Upper Tribunal hearing

5. At the hearing today, Mr Wilding accepted that the decision would have to be remade, on the law as it stands. He asked, however, that before remitting the appeal to the First-tier Tribunal, the Tribunal should await the outcome of *SM (Algeria) (Appellant) v Entry Clearance Officer, UK Visa Section* (Respondent) (Case ID UKSC 2015/0243), due to be handed down on 14 February 2018. Mr Wilding told the Tribunal today that the *Sala/Khan* issue had arisen during the hearing of *SM (Algeria)* in November 2017, and may be the subject of further guidance from the Supreme Court.
6. The issue is also before the Court of Justice of the European Union by way of a reference from this Tribunal in *Banger* (unmarried partner of British national) [2017] UKUT 125 (IAC), in which the questions referred for a preliminary ruling under Article 267 TFEU were as follows:
  - (1) *Do the principles contained in the decision in Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department (Case C-370/90) [1992] operate so as to require a Member State to issue or, alternatively, facilitate the provision of a residence authorisation to the non-Union unmarried partner of a EU citizen who, having exercised his Treaty right of freedom of movement to work in a second Member State, returns with such partner to the Member State of his nationality?*
  - (2) *Alternatively, is there a requirement to issue or, alternatively, facilitate the provision of such residence authorisation by virtue of European Parliament and Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ("the Directive")?*
  - (3) *Where a decision to refuse a residence authorisation is not founded on an extensive examination of the personal circumstances of the Applicant and is not justified by adequate or sufficient reasons is such decision unlawful as being in breach of Article 3(2) of the Citizens Directive?*
  - (4) *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?*
7. I refused Mr Wilding's application. The *Sala/Khan* issue may not finally be resolved until the conclusion of the Court of Justice of the European Union hearing, but as at today, the Upper Tribunal is bound by the decision of the Court of Appeal that there is a right of appeal to the First-tier Tribunal for extended family members. On that

basis the appellant is entitled to have his appeal allowed and remitted to the First-tier Tribunal for a full hearing there.

8. If there should be a change in the authoritative position by reason of a decision of the Supreme Court and/or the Court of Justice of the European Union, that can be dealt with by the First-tier Tribunal when it rehears this appeal.

## DECISION

9. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. The decision in this appeal will be remade in the First-tier Tribunal on a date to be fixed.

Date: 9 February 2018

Signed

*Judith AJC Gleeson*

Upper Tribunal Judge Gleeson