



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/12481/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 12 January 2018**

**Decision & Reasons Promulgated
On 15 January 2018**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

VIANNY MARGARITA ZABALA

Appellant

and

ENTRY CLEARANCE OFFICER, NEW YORK

Respondent

Representation:

For the Appellant: Not legally represented

For the Respondent: Mr. L. Tarlow, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant, who was born on 21 April 1979, is a national of the Dominican Republic and not Dominica. On 1 September 2016 she applied for a family permit as the family member of her sister, Jimenez Zabala, who is a Spanish citizen, living in the United Kingdom.

2. Her application was refused on 21 September 2016 on the basis that she had not submitted sufficient evidence to establish that she was wholly or mainly dependent upon her sister or that her dependency was one of necessity, as opposed to choice. She appealed and in a decision, promulgated on 4 May 2017, First-tier Tribunal Judge Kaler concluded that the decision did not attract a right of appeal and that, therefore, she had no jurisdiction to hear the appeal following the decision in *Sala (EFMs: Right of Appeal)* [2016] UKUT 00411.
3. The Appellant appealed against this decision and on 20 November 2017 First-tier Tribunal Judge Brunnen granted her permission to appeal in the light of the Court of Appeal's decision in *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 1755.

ERROR OF LAW HEARING

4. The Home Office Presenting Officer sought a stay pending decisions in the Supreme Court in the cases of *Khan* and *SM (Algeria)*. I refused his application on the basis that the decision in *Khan* was presently binding on the Upper Tribunal. The HOPO then accepted that the appeal should be remitted to the First-tier Tribunal.

ERROR OF LAW DECISION

5. In her grounds of appeal, the Appellant asserted that she had applied for a visa, as opposed to a residence card. However, her application for entry clearance was clearly made in the category of a family member of an EEA National and she paid a fee for an application in this category. The confusion may have occurred because she said in her application form, in answer to question 82, that she wanted to visit her sister. In answer to question 137, she also said that she wanted to come to the United Kingdom for a short visit.
6. However, the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") do not provide for an extended family member to "visit" an EEA national in the United Kingdom or provide them with a right of admission under regulation 11 of the EEA Regulations. Therefore, she needed to apply for a family permit and this was what she had applied for.

7. It was on this basis that First-tier Tribunal Judge Kaler found that she had no jurisdiction. However, *Sala* is no longer good law following the Court of Appeal's decision in *Khan*.
8. As a consequence, I find that First-tier Tribunal Judge Kaler did err in law when finding that she had no jurisdiction to hear the Appellant's appeal.

DECISION

- (1) The Appellant's appeal is allowed.
- (2) The appeal is remitted to the First-tier Tribunal for a *de novo* hearing before a First-tier Tribunal Judge other than First-tier Tribunal Judge Kaler.

Nadine Finch

Signed

Date 12 January 2018

Upper Tribunal Judge Finch