Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/04518/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 8th April 2019	**On 16th April 2019**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

PRIYANKA SHARMA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr S Vokes, instructed by Dalsun Solicitors Ltd
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION

1. The First-tier Tribunal judge found in her decision promulgated on 12th October 2018 that the 2016 Regulations did not define an EEA decision as one which included the refusal to issue a family permit to an extended family member ([3] of the decision) and thus concluded that there was no appeal and no jurisdiction to hear the appeal under the Immigration (European Economic Area) Regulations 2016.

2. The appellant appealed that decision on the basis that the restriction imposed by regulation 2 of the extended family members

(i) was ultra vires the Directive EC/2004/38

(ii) denied the appellant an effective remedy contrary to C-89/17 **Banger v United Kingdom** (July 2018)
(iii) misunderstood the correct interpretation of extended family member rights which was to be found in the Immigration (European Economic Area) Regulations 2006.

Consequently, the refusal of jurisdiction was contrary to European law and not sustainable.

3. Permission to appeal was granted on 19th November 2018.

4. At the hearing before me, Mr Vokes argued that that the judge may have thought that was the correct interpretation of the Immigration (European Economic Area) Regulations 2016 at the time, but it was now accepted that the omission of an appeal right for extended family members was an incorrect interpretation of Directive 2004/38/EC and indeed the 2016 Regulations had now been amended.

5. Mr Tufan noted that the amending regulations would not have retrospective effect.

6. In conclusion I agree that the amended regulations would not have retrospective effect, but on 12th July 2018 the CJEU gave a ruling on the interpretation of the 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, Secretary of State for the Home Department v Banger (Citizenship of the European Union - Right of Union citizens to move and reside freely within the territory of the European Union - Judgment) [2018] EUECJ C-89/17 (12 July 2018).

7. With respect to the 2006 Regulations **Khan v SSHD** [2017] EWCA Civ 1755 confirmed the First-tier Tribunal (IAC) had jurisdiction to hear an appeal from a refusal by the Secretary of State for the Home Department to exercise her discretion to grant a Residence Card to a person claiming to be an extended family member**.** **Khan,** however, was decided in relation to the 2006 EEA Regulations only, but prior to the CJEU ruling. In this instance, the decision refusing the appellant a residence card as an extended family member of a qualifying EEA national was made on 9th February 2017 under the 2016 Regulations which specifically excluded a right of appeal for extended family members.

8. As a consequence of the CJEU **Banger** ruling, the Secretary of State amended the 2016 Regulations. The amendments to the legislative framework came into force on 28th March 2019 and were a direct result of the CJEU judgment. Regulation 36 of the 2016 EEA regulations, entitled 'Appeal Rights' now includes a reference at regulation 36(6) to extended family members. These amended provisions overall reflect the judgment of the CJEU and grant a right

of appeal to extended family members to the First-tier Tribunal from relevant refusal decisions.

9. The EEA (EU Exit) Regulations 2019 amended the legislation but not retrospectively. The explanatory note confirms the amendments are 'to give effect to the case of **C-89/17 Banger** and amend the legislation, inter alia, to

'***introduce*** *a right of appeal against a decision to refuse extended family members residence documentation under regulations 12(4)'.*

10. One of the questions referred to the CJEU in **Banger** was

'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'

11. At [52] the Court held

'In the light of the foregoing considerations, the answer to the fourth question is that Article 3(2) of Directive 2004/38 must be interpreted as meaning that the third-country nationals envisaged in that provision must have available to them a redress procedure in order to challenge a decision to refuse a residence authorisation taken against them, following which the national court must be able to ascertain whether the refusal decision is based on a sufficiently solid factual basis and whether the procedural safeguards were complied with. Those safeguards include the obligation for the competent national authorities to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence'

12. Owing to the nature of the wording of the CJEU response, I conclude a statutory appeal is envisaged.

13. Although Mr Tufan did not expressly concede the position he acknowledged that the CJEU ruling would be capable of having direct effect in these circumstances.

14. There are three principal routes through which effect is given to EU law in member states. First direct enactment through legislation by domestic laws, secondly the duty to interpret general legislation to conform with EU obligations and thirdly the doctrine of direct effect, where citizens can rely on EU law as being directly applicable albeit that law is not specifically enacted. In accordance with EU jurisprudence UK courts should apply the 'teleological approach' in the interpretation of EU law, that is the courts should interpret EU legislative provisions in the light of the purpose, values, legal, social and economic goals these provisions aim to achieve. There is also the doctrine of direct effect such that where an obligation is sufficiently clear, precise, and unconditional it is capable of direct enforcement under the 'vertical direct effect'. Individuals who have free movement rights or other rights under EU

law which the UK has failed to implement may invoke the measure with direct applicability.

15. As set out in **Dieter Kraus v Land Baden-Württemberg** [1993] EUECJ C-19/92 and with respect to Articles 48 and 52 of the EEC Treaty (as they then were).

'31. Furthermore, Member States are required, in conformity with Article 5 of the Treaty [now article 5 CFEU], to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty and to abstain from any measures which could jeopardize the attainment of the objectives of the Treaty'.

16. I consider that the CJEU ruling has direct effect and the fact that the 2006 regulations interpreted the right of appeal as extending to extended family members and the response to the ruling by way of amendments, lead me to conclude that the proper interpretation of the Directive allows the First-tier Tribunal to hear an appeal from a refusal by the Secretary of State for the Home Department to exercise her discretion to grant a residence card. The reference to *'sufficiently solid factual basis'* in the CJEU decision makes reference in my view to a full merits appeal.

17. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Helen Rimington

Upper Tribunal Judge Dated 8th April 2019