



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/03462/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 11 January 2018

Decision & Reasons Promulgated  
On 23 January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

MUHAMMAD RAFI  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr. S. Ahmed, Counsel, instructed by 12 Bridge Solicitors

For the Respondent: Mr. P. Duffy, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Fitzgibbon QC, promulgated on 7 April 2017, in which he found that there was no jurisdiction for the First-tier Tribunal to hear the Appellant's appeal against the Respondent's decision to refuse his application under the EEA Regulations for a residence card as an extended family member.
2. Permission to appeal was granted as the Judge had applied the case of Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC), which has since been overturned by the

Court of Appeal. There was therefore an arguable error of law.

3. I heard submissions from both representatives following which I announced that the decision involved the making of a material error of law.

### **Submissions**

4. Mr. Duffy submitted that the Respondent had been granted a stay in the case of Khan [2017] EWCA Civ 1755. He provided a copy of an order from the Court of Appeal dated 9 November 2017 refusing permission to appeal to the Court of Appeal, but staying its directions pending the determination of a renewed permission to appeal. Mr. Duffy submitted that the Appellant's case should be stayed until the Supreme Court decision in Khan.
5. Mr. Ahmed submitted that the stay prevented the First-tier Tribunal from making findings, but that an appropriate way forward would be to find an error of law in accordance with the case of Khan and remit the appeal to the First-tier Tribunal. In that way, the Appellant would be one step further, and if the Respondent was not granted permission to appeal to the Supreme Court, the appeal could proceed to be heard in the First-tier Tribunal.

### **Error of law**

6. Lord Justice Longmore, agreeing with the decision of Lord Justice Irwin in the case of Khan stated as follows, [48] to [50]:

"It is a cornerstone of the rule of law that discretionary powers conferred on Ministers of the Crown are not to be used arbitrarily and that, if an exercise of power is exercised otherwise than in accordance with the correct legal principles, it will be quashed by the courts. A litigant who is the subject of such a decision has an entitlement to an adjudication to that effect; at the very least, a decision by the Secretary of State not to issue a residence card is a decision which "concerns ... a Judgment Approved by the court for handing down. Khan v SSHD person's entitlement to be issued with ... a ... residence card" even if it is a decision taken in pursuance of a discretion conferred on the Secretary of State.

As Lord Halsbury LC famously said in Sharpe v Wakefield Justices [1891] A.C. 173, 179:-

"... and "discretion" means when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not according to private opinion ...; according to law, and not humour..." If "that something" is a decision which is not "according to law" a claimant has an entitlement to relief or, at the very least, that decision is a decision that concerns an entitlement to the object sought to be obtained - here a residence card.

As such, the Secretary of State's decision to refuse Mr Khan a residence card, is, in my view, an EEA decision and can therefore be appealed in the ordinary way to the First Tier Tribunal."

7. I find that, following the case of Khan, which overturned the case of Sala, jurisdiction lies with the First-tier Tribunal to hear the Appellant's appeal against the Respondent's decision to refuse to grant a residence card as the extended family member of an EEA national. Therefore there is a valid appeal.

### **Decision**

8. The decision of the First-tier Tribunal involves the making of a material error of law, and I set the decision aside.
9. The appeal is remitted to the First-tier Tribunal to be reheard.
10. Following the order of the Court of Appeal staying the remittal of Khan to the First-tier Tribunal, this remittal will also be stayed pending the Respondent's renewed application for permission to appeal to the Supreme Court.
11. No anonymity direction is made.

Signed

Date 19 January 2018

Deputy Upper Tribunal Judge Chamberlain

## Application for a Costs Order

1. Mr. Ahmed stated that he wished to apply for “wasted costs”. He submitted that the Appellant had been successful. The Tribunal had concurred with the position of the Court of Appeal. A fuller Rule 24 response may have enlightened the Appellant as to the Respondent’s position. Counsel’s costs of £400 plus VAT for attendance at the hearing today should be awarded.
2. Mr. Duffy responded that a wasted costs order could only be made against the Presenting Officer in the case of unreasonable, vexatious or harassing conduct. The conduct of the Presenting Officer had been none of these and a costs order was not appropriate. He referred to the case of Cancino (costs – First-tier Tribunal – new powers) [2015] UKFTT 00059 (IAC).
3. I have carefully considered Mr. Ahmed’s application, together with the case of Cancino (costs – First-tier Tribunal – new powers). I find that is inappropriate to make an order for costs. The conduct of the Presenting Officer was not unreasonable. The matter is clearly not settled given that the Respondent has made a renewed application to appeal against the decision of the Court of Appeal in Khan. The Presenting Officer drew the Tribunal’s attention to the order of the Court of Appeal in Khan and did not object to the approach proposed by Mr. Ahmed. In the circumstances, I make no order for costs.

Signed

Date 19 January 2018

Deputy Upper Tribunal Judge Chamberlain