



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/02807/2018

THE IMMIGRATION ACTS

Heard at Birmingham
On 16th September 2019

Decision & Reasons Promulgated
On 19th September 2019

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MR ONKAR SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Onkar Singh, In person

For the Respondent: Mr C Howells, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India. He appeals against the decision of First-tier Tribunal (“FtT”) Judge Clarke promulgated on 22nd August 2018, dismissing his appeal against a decision to refuse to issue an EEA Residence Card as the extended family member of an EEA national exercising treaty rights in the UK in accordance with the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”), for want of jurisdiction.

2. The appellant was assisted at the hearing of his appeal before me, by an interpreter who confirmed that he had spoken to the appellant and they were able to communicate properly in the Punjabi language.
3. The appellant had claimed a right to reside in the UK as the extended family member of an EEA national. His application was refused by the respondent on 19th March 2018 because the applicant had failed to provide adequate evidence that his EEA sponsor is residing in the UK in accordance with the 2016 Regulations.
4. The FfT Judge found that the 2016 Regulations do not provide for a right of appeal against the decision made by the respondent to refuse a residence permit to an extended family member pursuant to Regulation 8 of the 2016 Regulations. Permission to appeal was granted by FfT Judge Gibb on 4th October 2018. The matter comes before me to consider whether or not the decision of FfT Judge Clarke involved the making of a material error of law, and if the decision is set aside, to re-make the decision.

Discussion

5. At the hearing before me, I explained to the appellant that although I understand that he disagrees with the decision of the respondent, I must first consider whether there is a material error of law in the decision of the FfT Judge. The appellant accepted that the 2016 Regulations have been amended since the decision of the respondent, such that any application now made would give rise to a right of appeal. He accepted that the hearing of his appeal before the Upper Tribunal was adjourned by Upper Tribunal Judge Allen on 12th July 2019 so that the appellant can make a further application to the respondent. It appears that despite the passage of time since the adjournment, the applicant has not made a further application. The appellant candidly accepted that he cannot identify any error of law in the decision of the FfT Judge but submitted that he disagrees with the respondent's underlying decision.

6. Regulation 36(1) of the 2016 Regulations provides that “*The subject of an EEA decision may appeal against that decision under these Regulations*”. An “EEA decision” was defined in Regulation 2 of the 2016 Regulations as in force as at the date of the hearing of the appeal, and the date upon which the decision was promulgated, as follows:

“*EEA decision*” means a decision under these Regulations that concerns –

- (a) a person's entitlement to be admitted to the United Kingdom;
- (b) a person's entitlement to be issued with or have renewed, or not to have revoked, a registration certificate, residence card, derivative residence card, document certifying permanent residence or permanent residence card (but does not include a decision that an application for the above documentation is invalid);
- (c) a person's removal from the United Kingdom; or
- (d) the cancellation, under regulation 25, of a person's right to reside in the United Kingdom,

but does not include a decision to refuse to issue a document under regulation 12(4) (issue of an EEA family permit to an extended family member), 17(5) (issue of a registration certificate to an extended family member) or 18(4) (issue of a residence card to an extended family member), a decision to reject an application under regulation 26(4) (misuse of a right to reside: material change of circumstances), or any decisions under regulation 33 (human rights considerations and interim orders to suspend removal) or 41 (temporary admission to submit case in person);

7. It was not until 28th March 2019, that the exclusion of an appeal against a decision to refuse to issue a document under regulations 12(4), 17(5) or 18(4) to an extended family member, was revoked by the Immigration (European Economic Area Nationals) (EU Exit) Regulations 2019/468 (*Part 3 reg.3(2)*). As at the date of the hearing before the *FtT*, and the date upon which the decision was promulgated, the appellant was not “the subject of an EEA decision”, and quite properly, as set out at paragraph [11] of the Judge’s decision, there was no right of appeal for extended family members.
8. The decision of the Judge reflected the law set out in the 2016 Regulations. I accept that we now have the benefit of a decision of the Court of Justice of the European Union in SSHD 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). This makes clear that member

states have an obligation to facilitate the residence of extended family members and to provide an accessible right of redress to challenge a disappointing decision. As I have already set out, the respondent has recognised that and has amended the 2016 Regulations so that the appellant would now have a right of appeal. That change does not create a right of appeal in a case such as this where the decision complained of was before the change in the Regulations.

9. As Mr Howells submits, it remains open to the appellant to make a further application that will be decided upon its own merits, and if refused, will give rise to a right of appeal.

Decision:

10. The appeal is dismissed.
11. The decision of the First-tier Tribunal did not contain a material error of law and the decision of FtT Judge Clarke shall stand.
12. No anonymity direction was made by the FtT.

Signed

Date

16th September 2019

Upper Tribunal Judge Mandalia