



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

Appeal Number: EA/01562/2019

**THE IMMIGRATION ACTS**

**Heard at Birmingham  
On 28<sup>th</sup> January 2020**

**Decision & Reasons  
Promulgated  
On 31<sup>st</sup> January 2020**

**Before**

**UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**ELIS COKAJ  
(NO ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr I Hussain, Syeds Law Office Solicitors  
For the Respondent: Mr A McVeety, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a national of Albania. On 7<sup>th</sup> February 2019 he applied for a residence card as an extended family member of an EEA

national exercising treaty rights in the UK. His application was refused for reasons set out in a decision by the respondent dated 21<sup>st</sup> March 2019. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Law ("the judge") for reasons set out in a decision promulgated on 18<sup>th</sup> June 2019.

2. The respondent did not accept the appellant is an extended family member of the EEA national. The appellant is the brother of a non-EEA national, who is the spouse of an EEA national. The respondent refused the application because the respondent considered that an EEA extended family member can no longer rely on their relationship with an EEA national's spouse, in order to meet the requirements of Regulation 8 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations").
3. The First-tier Tribunal was invited to determine whether it had jurisdiction to hear the appeal as a preliminary issue. It was common ground that those who are accepted to be 'extended family members' have a statutory right of appeal. The judge concluded the appellant has not produced the documents referred to in Regulation 8(7) of the 2016 Regulations, and is not therefore, 'a relative of an EEA national' for the purposes of Regulation 8(2). The judge concluded that as the appellant has not established he is an 'extended family member' he has no right of appeal and the availability of judicial review in appropriate cases, is not an inadequate remedy.
4. The appellant claims the judge erred in law in reaching the conclusion that there was no valid appeal before the First-tier Tribunal. The appellant refers to the decision 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), which 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.

5. Permission to appeal was granted by First-tier Tribunal Judge Omotosho on 24<sup>th</sup> July 2019. The judge noted the Home Office had identified a problem with the amended 2016 Regulations in that when providing for a right of appeal to 'extended family members', Regulation 36(4) read literally, makes it difficult for most 'extended family members' to be able to exercise their right of appeal. As the CJEU judgment in Banger has direct effect, until such time as the Regulations were amended the respondent would accept that Regulation 36 should be read down, so as to make it compatible with EU Law.
6. Having had an opportunity to consider the matter, Mr McVeety accepts the decision of the judge that there is no valid appeal before the First-tier Tribunal is erroneous and should be set aside.

### Discussion

7. Mr McVeety, rightly in my judgement, concedes there is an error of law in the decision of First-tier Tribunal Judge Law. On 28th March 2019, after the respondent's decision, 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)).
8. The respondent has recognised that Banger 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. The respondent has amended the 2016 Regulations so that the appellant has a right of appeal. In any event, the respondent accepts Regulation 36(4) should be read down,

so as to make it compatible with EU Law such that the respondent's decision gave rise to a right of appeal.

9. As to disposal, I am urged by the parties to remit the matter for hearing before the First-tier Tribunal. In circumstances where the appellant has been denied the opportunity of having the merits of his appeal considered by First-tier Tribunal because the Tribunal judge was of the view that there was no valid appeal before the Tribunal, in my judgement, the appropriate course is for the matter to be remitted for hearing before the First-tier Tribunal. Furthermore, having considered paragraph 7.2 of the Senior President's Practice Statement of 25<sup>th</sup> September 2012, in my judgment, the nature and extent of any judicial fact-finding necessary will be extensive.
10. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

### **Notice of Decision**

11. The appeal is allowed. The decision of FtT Judge Law promulgated on 18th June 2019 is set aside, and I remit the matter for re-hearing de novo in the First-tier Tribunal.

Signed

Date 28<sup>th</sup> January 2020

Upper Tribunal Judge Mandalia