THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or of any member of her family in connection with these proceedings.

Hilary Term
[2018] UKSC 9
On appeal from: [2015] EWCA Civ 1109

JUDGMENT

SM (Algeria) (Appellant) *v* Entry Clearance Officer, UK Visa Section (Respondent)

before

Lady Hale, President
Lord Kerr
Lord Wilson
Lord Reed
Lord Hughes

JUDGMENT GIVEN ON

14 February 2018

Heard on 23 March and 29 November 2017

Appellant
Ramby de Mello
Tony Muman
Katie Wilkinson
Jessica Smeaton
(Instructed by David Tang & Co)

Respondent
Brian Kennelly QC
Ben Lask

(Instructed by The Government Legal Department)

Intervener (Coram Children's Legal Centre)
Manjit Singh Gill QC
Navtej Singh Ahluwalia
(Instructed by Coram Children's Legal Centre)

Intervener (The AIRE Centre)
Aidan O'Neill QC
David Chirico
Catherine Robinson
(Instructed by Herbert Smith Freehills LLP)

LADY HALE: (with whom Lord Kerr, Lord Wilson, Lord Reed and Lord Hughes agree)

1. This judgment is in two parts. One part considers whether this Court has jurisdiction to hear this appeal. This is a question of United Kingdom law, depending upon the meaning of an "EEA decision" in regulation 2(1) of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) ("the 2006 Regulations") which transposed Parliament and Council 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 ("the Citizens Directive") into UK law. Logically this question should come first. But as we have concluded that we do have jurisdiction, it will be simpler and clearer to explain our reasoning after we have considered the substantive issues in the case. These are questions of European Union law. Briefly, they concern the position under the Directive of a child who is a third country national but has been placed in the legal guardianship of European Union citizens under the Islamic "kefalah" system in her own country.

2. Accordingly, Part 1 of this judgment discusses the substantive issues and refers three questions to the Court of Justice of the European Union. Part 2 discusses the jurisdiction issue.

Part 1: The Substantive Issues

The law

3. It is convenient to set out the applicable provisions of both EU and UK law before turning to the detailed facts and the history of this litigation.

4. Article 1 of the Citizens Directive explains its subject matter thus:

> "This Directive lays down:
>
> > (a) the conditions governing the exercise of the right of free movement and residence within the territory of the member states by Union citizens and their family members;

(b) the right of permanent residence in the territory of the member states for Union citizens and their family members;

(c) the limits placed on the right sets out in (a) and (b) on grounds of public policy, public security or public health."

Article 2 contains definitions, including that of a "family member", who enjoys the right to move with and reside with the Union citizen. This includes:

"(2) 'Family member' means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a member state, if the legislation of the host member state treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host member state;

(c) *the direct descendants who are under the age of 21* or are dependants and those of the spouse or partner as defined in point (b);

…" (Emphasis supplied.)

Article 3 defines who are to be "beneficiaries" of the Directive, and makes in article 3.2 more limited and discretionary provision for those who do not qualify as family members within the meaning of article 2.2:

"1. This Directive shall apply to all Union citizens who move to or reside in a member state other than that of which they are a national, and to their family members as defined in point 2 of article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host member state shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) *any other family members, irrespective of their nationality, not falling under the definition in point 2 of article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen* having the primary right of residence, or where serious health grounds strictly require the personal care of the family members by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host member state shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people." (Emphasis supplied.)

5. Regulation 7 of the 2006 Regulations transposes article 2.2(c) into UK law as follows:

"(1) Subject to paragraph (2), for the purpose of these Regulations the following persons shall be treated as the family members of another person -

…

(b) direct descendants of his, his spouse or his civil partner who are -

(i) under 21; or

(ii) dependants of his, his spouse or his civil partner;"

Regulation 8 makes provision for "extended family members". At the time when this case was heard in the First-tier Tribunal it provided as follows:

> "(1) In these Regulations '*extended family member*' means a person who is not a family member of an EAA national under the regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).
>
> (2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and -
>
> > (a) the person is residing in [a country other than the United Kingdom] in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;
> >
> > (b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or
> >
> > (c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.
>
> (3) A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national his spouse or his civil partner.
>
> (4) A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.

> (5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.
>
> (6) In these Regulations '*relevant EEA national*' means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5).''

We doubt whether this regulation accurately transposed article 3.2 of the Directive in at least two respects. First, it imposed (and still imposes) a requirement that the dependant or member of the household be a "relative" of the EEA national. Second, it required that they both live or have lived in the same country outside the United Kingdom: however, that was rectified in November 2012 by the deletion of the words "in which the EEA national also resides" from regulation 8(2)(a).

6. Under regulation 12(1), an Entry Clearance Officer ("ECO") *must* issue an EEA family permit to a "family member" if certain conditions are met. Under regulation 12(2), an ECO *may* issue an EEA family permit to an "extended family member" if those conditions are met and "(c) in all the circumstances, it appears to the Entry Clearance Officer appropriate to issue the EEA family permit. …"

7. Also relevant and important in this appeal are the requirements of the law of England and Wales (there is separate but largely equivalent legislation in Scotland and Northern Ireland) relating to the adoption of children from abroad. The object is (i) to ensure, so far as possible, that such adoptions are in the best interests of the children concerned and attended by safeguards equivalent to those in UK law; (ii) to protect such children from the risk of exploitation, abuse and trafficking; and (iii) to ensure that the rights of the birth family are protected.

8. By section 83 of the Adoption and Children Act 2002 ("the 2002 Act"), it is an offence to bring a child into the UK for the purpose of adoption here or having been adopted in another country, unless the Adoption with a Foreign Element Regulations 2005 (SI 2005/392) have been complied with. These require, inter alia, an assessment by a UK adoption agency of the suitability of the adopters to adopt. This does not apply to adoptions under the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993) ("the Hague Convention"), implemented in UK law by the Adoption (Intercountry Aspects) Act 1999, because these children are protected by the safeguards in the Convention

itself. In particular, article 4 requires that the state of origin should have determined that the child is adoptable; that an inter-country adoption is in the child's best interests; that the required consents have been given freely and with proper information and counselling; and that consideration has been given to the child's own wishes and opinions, having regard to his age and degree of maturity, and his consent given where required.

9. Section 66(1) of the 2002 Act lists those adoptions which are recognised by the law of England and Wales as conferring the status of adoption on the child. These are (a) an adoption order made in England and Wales, Scotland or Northern Ireland; (b) adoption by an order made in the Channel Islands or Isle of Man; (c) an adoption effected under the law of a Hague Convention country outside the British Islands and certified as having complied with the Convention requirements; (d) an "overseas adoption"; that is an adoption order made in one of the countries listed in (currently) the Adoption (Recognition of Overseas Adoptions) Order 2013 (SI 2013/1801), provided for in section 87 of the 2002 Act; and (e) an adoption recognised by the law of England and Wales and effected under the law of any other country; these will only be recognised if they satisfy the criteria for recognition at common law.

10. For the sake of completeness, it should be mentioned that a child who does not qualify for entry under the Citizens Directive may qualify for entry as an adopted or de facto adopted child under the Immigration Rules. For a convenient account of the four routes available under the Rules as they then stood, see *MN (India) v Entry Clearance Officer (New Delhi)* [2008] EWCA Civ 38; [2010] 2 FLR 87, per Wilson LJ at paras 13-18. However, this judgment is concerned only with entry and residence under the Citizens Directive and the 2006 Regulations.

The facts

11. The appellant, whom I shall call Susana, was born in Algeria on 27 June 2010, so is now seven years old. She is a national of Algeria. Her male guardian, Mr M, is a French national of Algerian origin who has a permanent right of residence in the United Kingdom. Her female guardian, Mrs M, is a French national by birth. They married here in 2001. Finding themselves unable to conceive naturally, in 2009 they travelled to Algeria to be assessed as to their suitability to become guardians under the kefalah system. The First-tier Tribunal judge found that this was "a choice they made having learned that it was easier to obtain custody of a child in Algeria than it would be in the United Kingdom" (para 35).

12. Having been assessed as suitable, in a process described by the judge as "limited", they were informed in June 2010 that Susana had been abandoned after her birth. They applied to become her guardians. There was then a three-month

waiting period, during which under Algerian law the birth parents were able to reclaim the child. On 28 September 2010, the Algerian Ministry of National Solidarity and Family in the province of Tizi Ouzou made a decree placing Susana, then aged three months, under their guardianship. On 22 March 2011, a legal custody deed was issued, having regard to the opinion of the public prosecutor, awarding them legal custody of Susana and transferring parental responsibility to them under Algerian law. The deed requires them:

> "to give an Islamic education to the child put into his custody, keep her fit physically and morally, supplying her needs, looking after her teaching, treating her like natural parents, protect her, defend her before judicial instances, assume civil responsibility for detrimental acts."

The deed also authorises them to get family allowances, subsidies and indemnities duly claimable, to sign all administrative and travel documents, and to travel with Susana outside Algeria. On 3 May 2011, the Court of Tizi Ouzou issued an order that Susana's surname as it appears on her birth certificate be changed to that of Mr and Mrs M.

13. In October 2011, Mr M left Algeria and returned to the United Kingdom to resume his employment here as a chef. Mrs M remained in Algeria with Susana. In January 2012, Susana applied for a visa to visit the United Kingdom, which was refused. In May 2012, she applied for entry clearance as the adopted child of an EEA national under regulation 12(1), or alternatively 12(2) of the 2006 Regulations. The ECO refused this on the basis (i) that as Algeria was not a party to the 1993 Hague Convention on Intercountry Adoption and was not named in the Adoption (Designation of Overseas Adoptions) Order 1973 then in force, the Algerian guardianship was not recognised as an adoption in UK law; and (ii) no application had been made under section 83 of the 2002 Act for intercountry adoption.

14. The First-tier Tribunal dismissed Susana's appeal. The judge held that she did not qualify as either a legal or a de facto adopted child under the Immigration Rules, nor did she fall within the definitions of "family member", "extended family member" or adopted child of an EEA national under the 2006 Regulations. On her appeal, the Upper Tribunal upheld the decision that she was not a "family member" under regulation 7 of the 2006 Regulations. However, it allowed her appeal on the basis that she did fall within the definition of "extended family member" under regulation 8. The case was therefore returned to the Secretary of State for her to exercise the discretion conferred upon her by regulation 12(2)(c).

15. The Court of Appeal allowed the ECO's appeal: [2015] EWCA Civ 1109; [2016] Imm AR 239. The court correctly observed that the real question was not whether Susana fell within the definition of "family member" in regulation 7 or the definition of "extended family member" in regulation 8. Rather, it was whether she was a "direct descendant" within the definition of "family member" in article 2.2(c) of the Citizens Directive; or alternatively whether she fell within "any other family members, …, who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence …" in article 3.2(a). The court held that the Directive permitted Member States to restrict the forms of adoption which they would recognise for the purpose of article 2.2(c). Not having been adopted in a manner recognised by UK law, Susana could not fall within that article; and that being so, those restrictions could not be undermined by recognising that she might fall within article 3.2(a).

16. This Court gave permission to appeal, initially only on the issues relating to article 3.2(a) of the Citizens Directive and regulation 8. However, in the course of the hearing before us on 23 March 2017, it emerged that there might also be issues relating to article 2.2(c) and regulation 7 which this Court should consider. The hearing was therefore adjourned for written submissions relating to those issues, as well as to the issue of jurisdiction which had been mentioned for the first time by the Secretary of State in her written case. After the adjournment, Coram Children's Legal Centre (CCLC) and the Advice on Individual Rights in Europe (AIRE) Centre applied for and were given permission to intervene on both issues. In the light of written submissions from them and from the appellant, the court granted formal permission to appeal in relation to article 2.2(c) on 26 July 2017. Once the Secretary of State's submissions on that issue had been received in October 2017, a further hearing was arranged for 29 November 2017.

Article 3.2(a)

17. This Court has little doubt that Susana would fall within article 3.2(a) if she does not fall within article 2.2(c). The 2006 Regulations have caused confusion by introducing the word "relative" which nowhere appears in article 3.2(a). "Family member" is a wider term than "relative" as it is well capable of including people who are not related by consanguinity or affinity. All that is required is that the person (i) falls within the broad concept of "family member"; (ii) was either a dependant or a member of the household of the Union citizen; and (iii) that dependency or household membership was in the country from which the person has or would come. A child for whom the Union citizen has parental responsibility under the law of the child's country of origin is clearly capable of being regarded as a family member; Susana was both a dependant and a member of the household of Mr and Mrs M; and this was in Algeria, the country from which she would be coming to this country.

18. The obligation of the host member state is to facilitate entry and residence in accordance with its national legislation, to undertake an extensive examination of the personal circumstances, and to justify any denial of entry and residence. UK legislation relating to foreign adoptions is clearly relevant to that examination. A refusal of entry and residence would, in principle, be justified if there were reason to believe that the child was the victim of exploitation, abuse or trafficking, or that the claims of the birth family had not been respected.

19. But the fact that the arrangements did not comply in every respect with the stringent requirements of UK adoption law would not be determinative. The Secretary of State and her officials are required by section 55 of the Borders, Citizenship and Immigration Act 2009 to discharge their functions in relation to immigration, asylum and nationality "having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom". This duty was imposed in the light of the UK's obligation under article 3.1 of the United Nations Convention on the Rights of the Child (1989) that "In all actions concerning children … the best interests of the child shall be a primary consideration". Under article 2.1 the rights set out in the Convention are to be secured to children within the jurisdiction, but the Secretary of State has made it clear that section 55 will also be observed in relation to children applying to enter this jurisdiction. The same obligation arises under article 24.2 of the Charter of Fundamental Rights of the European Union, which applies whenever a member state is implementing EU law.

20. In a case such as this, the need to safeguard and promote children's welfare would obviously encompass the need to protect all children from the dangers of exploitation, abuse and trafficking. But the best interests of the individual child must also be a primary consideration. This would depend upon factors such as whether the child had been abandoned by her birth family; whether if she had not been the subject of a kefalah arrangement she would have continued to be brought up in an institution; whether her guardians had been assessed as suitable by the authorities in her birth country; whether they had gone through all the appropriate legal procedures in that country; their reasons for not going through the appropriate procedures for intercountry adoption here; the cultural and religious background of both the child and her guardians, including whether adoption in the UK sense is compatible with their religious beliefs; how well her guardians are fulfilling their legal obligations towards her; and perhaps above all how well integrated she is into their family and household and how close and beneficial their relationships are with one another.

21. In making that evaluation, the decision-makers, whether in the Home Office or in the appellate system, would also have to bear in mind that the purpose of the Directive is to simplify and strengthen the right of free movement and residence for all Union citizens, freedom of movement being one of the fundamental freedoms of the internal market. Having to live apart from family members or members of the family in the wider sense may be a powerful deterrent to the exercise of that freedom.

Article 2.2(c)

22. However, this Court cannot simply allow the appeal and restore the order of the Upper Tribunal, on the basis that Susana's case should be considered under article 3.2(a), if in reality she falls within the definition of "family member" in article 2.2(c). In that event she enjoys the automatic rights of entry and residence conferred by the Directive. What then does "direct descendant" mean?

23. Obviously, it refers to consanguineous children, grand-children and other blood descendants in the direct line (query whether it also refers to step-descendants). It has also been common ground in this case that it must include those descendants who have been lawfully adopted in accordance with the requirements of the host country. But there is reason to think that it goes further than that.

24. Firstly, there is the *Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC …* (Com (2009) 313 final). Paragraph 2.1.2 is headed "Family members in direct line" and thus apparently refers to article 2.2(c). It says this:

> "Without prejudice to issues related to recognition of decisions of national authorities, the notion of **direct relatives in the descending and ascending lines** extends to adoptive relationships or minors in custody of a permanent legal guardian. Foster children and foster parents who have temporary custody may have rights under the Directive, depending upon the strength of the ties in the particular case. There is no restriction as to the degree of relatedness. National authorities may request evidence of the claimed family relationship." (Original emphasis.)

On the face of it, this would clearly include a child such as Susana, who is in the permanent legal guardianship of Mr and Mrs M.

25. Secondly, as Advocate General Bot reminded us in his opinion in *Secretary of State for the Home Department v Rahman* (Case C-83/11) [2013] QB 249, at point 39:

> "… according to clearly established case law, the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the

> member states for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union: see *Ziolkowski v Land Berlin* (Joined Cases C-424/10 and C-425/10) [2012] Imm AR 421, para 32 and the case law cited. Accordingly, if the wording of a provision of Directive 2004/38 does not give any guidance as to how the terms used in that provision are to be understood and does not contain any reference to national laws as regards the meaning of those terms either, those terms must be regarded, for the purpose of the application of that Directive, as designating an autonomous concept of EU law which must be interpreted in a uniform manner throughout the member states, by taking into consideration, inter alia, the context in which the terms occur and the purposes of the rules of which they form part: *Ziolkowski's* case, paras 33 and 34 and the case law cited."

There is nothing in article 2.2(c) to suggest that the term "direct descendant" should be interpreted in accordance with the national law of the host member state. This is in contrast with article 2.2(b), which expressly relates the concept of registered partnership to the laws of the member state where it was contracted and to the treatment of such a partnership in the laws of the host member state. It would appear, therefore, that "direct descendant" is an autonomous term in EU law which should be given a uniform interpretation throughout the Union.

26. Thirdly, that view is supported by the recent opinion of Advocate General Wathelet in *Coman v Inspectoratul General pentru Imigrări* (Case C-673/16) (ECLI EU:C:2018:2, as yet unreported), point 32: that the word "spouse" in article 2(1)(a) must be given an autonomous meaning and applies to a third country national of the same sex as the citizen of the European Union to whom he or she is married.

27. Fourthly, such a uniform interpretation would accord with the purpose of the Directive. Again, as Advocate-General Bot reminded us in *Rahman's* case, at point 36, albeit in the context of article 3.2:

> "… the right to family reunification is understood as the corollary of the right of free movement for the Union citizen, based on the principle that the latter may be dissuaded from moving from one member state to another if he cannot be accompanied by members of his family. Family reunification thus enjoys indirect protection by reason of the potential impairment of the effectiveness of Union citizenship."

If some member states recognise "kefalah" children as direct descendants but others do not, this clearly places barriers to free movement for those European Union citizens who have such children. It also discriminates against those who, for religious or cultural reasons, are unable to accept the concept of adoption as it is understood in the UK and some other European countries, that is, as the complete transfer of a child from one family and lineage to another. On the other hand, the fact that the term "direct descendant" may have an autonomous meaning does not necessarily entail that it should have a broad meaning.

28. We therefore cannot consider it acte clair that a child in Susana's position is *not* to be regarded as a direct descendant of her guardians for the purpose of article 2.2(c). At the same time, we are concerned that such an interpretation could, in some cases, create opportunities for exploitation, abuse and trafficking in children, which it was the object of the Hague Convention to prevent and deter. We are also concerned that an automatic right of entry for "kefalah" children might lead to some of them being placed in homes which domestically would have been rejected as unsuitable.

29. Article 1(c) of the Citizens Directive recognises that limits may be set on the rights of free movement and residence "on grounds of public policy, public security or public health". But these limits are restricted by the later substantive provisions. The relevant articles appear to us to be article 27 and article 35.

30. Article 27 is subject to the procedural safeguards in articles 30 and 31. So far as immediately relevant, it provides:

> "1. Subject to the provisions of this Chapter, member states may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.
>
> 2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.
>
> The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

> Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."

This would only provide adequate protection for children who are or might be the victims of exploitation, abuse or trafficking, or otherwise placed in unsuitable homes, if (i) "the individual concerned" were the sponsoring Union citizen rather than the child seeking entry; (ii) such conduct were considered to affect "one of the fundamental interests of society"; and (iii) such conduct, whether in the past or the future, was capable of representing "a genuine, present and sufficiently serious threat" to such an interest.

31. Article 35 provides for "Abuse of rights":

> "Member states may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in articles 30 and 31."

This article does not in terms state that it must be the person seeking entry who has abused his or her rights. It may therefore be wide enough to cater for a Union citizen who abuses the right of family reunification implicit in his freedom of movement to bring in a child who has been, or is at risk of being, the victim of exploitation, abuse or trafficking; but this is not clear.

32. It also appears to us that the answers to the questions posed must be the same whether the child involved is a third country national or a national of another Member State. The relevant provisions do not distinguish between them.

33. Thus, the Court refers the following three questions to the Court of Justice of the European Union for a preliminary ruling:

> (1) Is a child who is in the permanent legal guardianship of a Union citizen or citizens, under "kefalah" or some equivalent arrangement provided for in the law of his or her country of origin, a "direct descendant" within the meaning of article 2.2(c) of Directive 2004/38?

(2) Can other provisions in the Directive, in particular articles 27 and 35, be interpreted so as to deny entry to such children if they are the victims of exploitation, abuse or trafficking or are at risk of such?

(3) Is a member state entitled to inquire, before recognising a child who is not the consanguineous descendant of the EEA national as a direct descendant under article 2.2(c), into whether the procedures for placing the child in the guardianship or custody of that EEA national was such as to give sufficient consideration to the best interests of that child?

As these proceedings concern a young child, whose application for entry clearance was made as long ago as May 2012, we hope that this reference can be dealt with as a matter of urgency.

Part 2: Jurisdiction

34. The Court of Appeal handed down judgment in this case on 4 November 2015 [2015] EWCA Civ 1109; [2016] Imm AR 239. This Court gave permission to appeal on 28 April 2016. At neither stage was it suggested that there was no right of appeal against the ECO's decision and thus that neither the tribunals or the courts had any jurisdiction to hear this case. Nor was the issue raised in the Statement of Facts and Issues agreed between the parties for the purpose of this appeal. However, on 6 June 2016, the Upper Tribunal held, in *Sala v Secretary of State for the Home Department* [2016] UKUT 411; [2017] Imm AR 141, paras 85, 87, that there was no statutory right of appeal against the refusal of a residence card to a person claiming to be an "extended family member" under the 2006 Regulations. This was first drawn to our attention "for information" in the Secretary of State's written case dated 8 March 2017. We took the view, however, that we could not proceed with the issue relating to article 3.2(a) of the Directive and regulation 8 of the 2006 Regulations without determining whether we had jurisdiction to do so. It is a matter of great regret that the point was not drawn to our attention immediately after the *Sala* decision, because it could then have been dealt with as a matter of urgency and the delay in these proceedings avoided.

35. The argument is a simple one. Under regulation 26(1) of the 2006 Regulations:

> "Subject to the following paragraphs of this regulation, a person may appeal under these Regulations against an EEA decision."

Except where an appeal lies to the Special Immigration Appeals Commission (which is not this case), the appeal lies to the First-tier Tribunal (Immigration and Asylum Chamber). The following paragraphs do not exclude decisions relating to extended family members (indeed, one which was added later, paragraph 26(2A), deals with the evidence which must be produced by a person claiming to be in a durable relationship for the purpose of regulation 8(5)). Everything therefore turns on what is meant by an "EEA decision". This was defined thus in regulation 2(1) at the relevant time:

> "'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 have revoked, a registration certificate, residence card, document certifying permanent residence or permanent residence card; or
> >
> > (c) a person's removal from the United Kingdom; or
> >
> > (d) the cancellation, pursuant to regulation 20A of a person's right to reside in the UK."

36. In *Sala*, the Upper Tribunal decided that, because decisions concerning "extended family members" involve, not only a determination as to whether a person falls within the definition of extended family member, but also the exercise of a discretion whether to admit or grant a residence card to that person, they did not concern that person's "entitlement" to either. The Tribunal acknowledged that the point was not an easy one. It had long been assumed, both by appellants and by the Secretary of State, that there was such an appeal. Both parties maintained that position before the Tribunal: only an amicus appearing at the Tribunal's request argued the contrary. (Indeed, regulation 26 had been amended in 2012 to introduce paragraph 26(2A), which made no sense if extended family members did not have a right of appeal; but that could not change the meaning which the Regulations already bore.) In the Tribunal's view, the "natural and ordinary meaning" of paragraph (b) in the definition of "EEA decision" did not cover the refusal of a residence card (para 48) (which was the issue in that case).

37. Shortly before the second hearing before us, the Court of Appeal handed down judgment in *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 1755, in which the Secretary of State had refused to grant a residence card to the Pakistani nephew of a German national. The arguments were wide-ranging, the Secretary of State now contending that *Sala* was correct. Nevertheless, the principal point at issue was whether the decision in question was one which "concerns … an entitlement" to enter and be granted a residence card (para 42). In *Sala*, the Upper Tribunal had proceeded on the basis that this meant an existing entitlement (*Khan*, para 43). Both the appellant and the Secretary of State had argued then that there was a two stage process: first the factual decision whether the appellant fell within the definition of an extended family member; and second the decision whether it was appropriate to grant entry and a residence card; once granted, this would result in an entitlement to enter and reside; hence the decision "concerns" that entitlement because it "is relevant to or important to", "relates to" or "is about" the entitlement to a residence card (see para 24). Irwin LJ held that "a decision which 'concerns' an entitlement appears to me naturally to include a decision whether to grant such an entitlement" (para 45). Longmore LJ, agreeing, added that, even where there was a discretion, it had to be exercised in accordance with the correct legal principles: a litigant was entitled to a decision exercised in that way (para 48). Sir Terence Etherton MR agreed with both judgments. The decision in *Sala* was therefore overruled.

38. That now being the interpretation of the 2006 Regulations as they stood at the date when this appeal was launched, it is for the Secretary of State to persuade us that the Court of Appeal was wrong to reach the conclusion that it did. That she has been unable to do. On the contrary, in our view the Court of Appeal was clearly correct and there is no need for us to rehearse the very wide-ranging arguments put before them. Despite the breadth of the discretion in article 3.2 cases, there is nevertheless a duty to facilitate entry, to make full enquiries and to justify refusal. There will therefore be cases in which a refusal cannot be justified. Such a person will be entitled to a family permit and thereafter to be treated as a "family member". As Lord Wilson pointed out in the course of argument, jurisdiction cannot depend upon fine judgments as to the proportionality of refusal. It also makes no practical sense in a case such as this, which turns on whether the appellant has a present entitlement under article 2.2(c) or a potential entitlement under article 3.2(a): on the Secretary of State's present case and in the light of our conclusions on article 3.2(a) above, Susana would have a right of appeal to the tribunal in relation to her claims under article 2.2(c), but would have to bring judicial review proceedings in relation to her claim under article 3.2(a).

39. We are satisfied, therefore, that the Court of Appeal's decision in *Khan* was correct and that *Sala* should be overruled.

40. For completeness, it should be recorded that on 20 February 2017, in *Secretary of State for the Home Department v Banger* ([2017] UKUT 125, unreported), a differently constituted Upper Tribunal referred a number of questions concerning the claim of the unmarried partner of a British national to the Court of Justice of the European Union. Among those questions, in the light of *Sala*, was this:

> "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 [Citizens] Directive?"

Despite the decision in *Khan*, that question is not moot, as the 2006 Regulations have since been replaced by the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052). These largely reproduce the 2006 Regulations, as amended, but decisions to refuse to issue an EEA family permit, a registration certificate or a residence card to an extended family member have been expressly excluded from the definition of an "EEA decision" in regulation 2(1).

41. We understand that the oral hearing in *Banger* took place in January 2018. The issue is whether the procedural safeguards laid down in articles 15, 20 and 21 of the Directive require a full merits appeal to a court or tribunal or whether they can be satisfied by the UK's procedure for judicial review of administrative action: is that an effective remedy for this purpose? Given the conclusion we have reached in this case, it would be inappropriate for us to comment further on this issue. We shall await with interest the outcome of the reference in *Banger*.