



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

Appeal Number: EA/05184/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 20 February 2018**

**Decision & Reasons Promulgated  
On 23 February 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN**

**Between**

**MAMATAJ NAHAR  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr. M. Shahid, Shah Jalal Solicitors

For the Respondent: Mr. D. Clarke, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge S. Aziz, promulgated on 18 October 2017, in which he found that the Appellant had no right of appeal against the Respondent's decision to

refuse her application for a residence card under the EEA Regulations as an extended family member.

2. Permission to appeal was granted in view of the guidance in Khan [2017] EWCA Civ 1755.

### **The hearing**

3. The Appellant attended the hearing together with her husband who was a dependant on her application. Mr. Clarke accepted that, following the case of Khan, the decision could not stand and the appeal should be remitted to the First-tier Tribunal to be reheard.

### **Error of law**

4. The Judge in the First-tier Tribunal applied the case of Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC). Subsequent to that case, the case of Khan has held that there is a right of appeal in cases such as the Appellant's. 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."

5. I find that, following the case of Khan, 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**

6. The decision of the First-tier Tribunal involves the making of a material error of law, and I set the decision aside.
7. The appeal is remitted to the First-tier Tribunal to be reheard.
8. No anonymity direction is made.

Signed

Date 21 February 2018

Deputy Upper Tribunal Judge Chamberlain

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