Neutral Citation Number: [2017] EWCA Civ 1755

Case No: C9/2016/4413

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
Deputy Upper Tribunal Judge Parkes
Reference No IA/02180/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/11/2017

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE LONGMORE
and
LORD JUSTICE IRWIN

- -

Between :

MUHAMMAD YASIR KHAN	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
- and -	
THE AIRE CENTRE	**Intervener**

- -
- -

Ramby de Mello and Rajiv Sharma (instructed by **Stella Maris Solicitors**) for the **Appellant**
Brian Kennelly QC and Ben Lask (instructed by **Government Legal Department**) for the **Respondent**
David Chirico and Catherine Robinson (instructed by **Herbert Smith Freehills**) for the **Intervener**

Hearing dates: 12 October 2017

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Approved Judgment

Lord Justice Irwin :

Issue: *Sala (EFMs: Right of Appeal)* [2016] UKUT 0411 (1AC)

1. The issue in this case derives from an earlier case: was *Sala* wrongly decided? Is there jurisdiction for the First-tier Tribunal to hear an appeal from a refusal by the Secretary of State for the Home Department to exercise her discretion to grant a Residence Card to a person claiming to be an Extended Family Member? At the conclusion of the argument we indicated our view that *Sala* was wrongly decided. We now give our reasons.

The Relevant EU and UK Legislation

2. The relevant legislation is annexed to this judgment, for convenience.

Procedural History

3. The Appellant is a Pakistani national. He applied for a residence permit as an "Extended Family Member" ["EFM"] of his uncle, a German national. On 19 December 2014 the Respondent refused to grant a residence card under Regulation 17(4) of the 2006 Regulations because she did not accept he was an EFM within the meaning of Regulation 8(2). The Appellant appealed to the First-tier Tribunal ("FtT"] who allowed his appeal on 21 October 2015.

4. On 12 October 2016, the Upper Tribunal ["UT"] ruled that the FtT lacked jurisdiction to hear the appeal following the decision in *Sala*. They concluded any challenge to the refusal to issue a residence card must be by way of judicial review. The Appellant appeals by leave of Underhill LJ.

5. The Intervener [The Centre for Advice on Individual Rights in Europe: "the AIRE Centre"] was granted permission to intervene by Hickinbottom LJ on 7 July 2017.

The Grounds of Appeal

6. The Appellant advances three Grounds as follows:

   i) The UT should have permitted the parties to make submissions as to the decision in *Sala*, and the existence of the jurisdiction, before reaching its determination on the issue.

   ii) That in any event, *Sala* was wrongly decided, and whether as a matter of domestic statutory construction, or as a matter of EU law, the Appellant had a right of appeal to the FtT and UT.

   iii) That if *Sala* was correctly decided, and the 2006 Regulations cannot be construed so as to afford the Appellant a right of appeal to the Tribunals, the Regulations should be struck down as incompatible with EU law. To that end, the Appellant would ask the Court of Appeal to reconstitute as a Divisional Court and determine this issue.

7. The Appellant was granted leave to appeal on Grounds 1 and 2, but not Ground 3.

8. I agree with the Respondent that the critical ground, and the starting point for our consideration, must be Ground 2.

Ground 2: Does the FtT (and thus the UT) have jurisdiction to hear an appeal?

9. It is appropriate to begin by analysing the decision in *Sala*.

10. For approximately ten years before the decision in *Sala*, all parties considered, and proceeded on the basis that, there was a right of appeal to the FtT (and onward) when an EFM was refused residence. Such an appeal was pursued in *Sala* before the FtT with no submissions to the contrary from either side. When the matter came before the UT, the Tribunal raised the jurisdiction issue of their own motion. Both parties argued for the existence of the appellate jurisdiction. The UT adjourned the matter, as a preliminary issue, and appointed an *amicus curiae*. Counsel attended the adjourned hearing as an *amicus*, and presented argument against the existence of the supposed jurisdiction, although making some concessions as to some of the parties' arguments. Both the Appellant and the Secretary of State maintained that the Tribunal had jurisdiction.

11. However, the UT ruled against the parties. The essence of their reasoning was as follows. There is an important distinction in the 2006 Regulations between a "family member" and an "extended family member" of a relevant EEA national, which leads to different procedural routes of challenge. A "family member" within Regulation 7 "must" be issued with a residence card, once specified documents are produced: see Regulation 17. That is to say, a qualifying family member (as defined) who presents the relevant documents of identity, and proves family membership, has an entitlement to residence.

12. However, an extended family member acquires no automatic entitlement to residence, even if the stipulated conditions are fulfilled. Regulation 8 sets out the different ways in which an individual may demonstrate that they qualify as an EFM. For present purposes those differences are immaterial. Here, Regulation 17(A) stipulates that the Secretary of State "may issue a residence card" to an EFM, if the relevant EEA national fulfils the relevant criteria (Regulation 17(A)(a)) and, by Regulation 17(A)(b)):

> "in all the circumstances it appears to the Secretary of State appropriate to issue the residence card."

13. Thus the critical distinction is between an entitlement to residence on the part of a qualifying family member, and a discretion to grant residence in favour of a qualifying extended family member.

14. The Upper Tribunal in *Sala* (and the Respondent before us now agrees) considered that the difference in the provisions of the 2006 Regulations flows from differences in Directive 2004/38/EC, which the Regulations implement. Recitals 5 and 6 are set out in Annex 1 to this judgment. The UT in *Sala* noted that Recital 5 stipulates that the right of Union citizens to free movement must be granted to their family members. However, in respect of those who are not included in the definition of family members and do not enjoy an automatic right of entry and residence, the question

must be "examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence should be granted".

15. The UT also noted the provisions of Article 3 of the Directive, that a Member State "shall, in accordance with its national legislation, facilitate entry and residence" for qualifying EFMs and that to that end "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".

16. The UT also noted that, once an EFM had been issued with an EEA family permit (by the exercise of discretion) then by Regulation 7(3), that person "shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy" the relevant conditions. In other words, once the successful EFM has been granted residence, he or she acquires the rights of a family member, provided the threshold conditions persist.

17. The UT then made the following observations:

> "26. It will be clear from this analysis that for EFMs recognition of their rights of admission and residence is conditional upon the relevant document, whether family permit, registration certificate or residence card, being issued under the EEA Regulations 2006 (see, *Aladeselu and others v SSHD [2013] EWCA Civ 144* at [52]). This, of course, contrasts with the position of "family members" who derive their rights of admission and residence directly from EU law and the relevant documentation is merely evidence of that right. This is important. The EEA Regulations 2006 see the rights of family members and EFMs in different ways. The rights of family members derive from the Citizens Directive, those of EFMs from national law apart from the procedural right to have their applications determined following extensive examination of their personal circumstances. Family members have rights independent of being issued with a residence card. EFMs' rights, if any, derive from the exercise of the Secretary of State's discretion to issue (and allow them to keep) a residence card; their substantive rights arise only after the card is issued."

18. On those premises, the UT in *Sala* moved to consider the provisions concerning appeals.

19. The UT began by considering Regulation 26(1) which sets out a general right of appeal:

> "26(1) subject to the following paragraphs of this regulation, a person may appeal under these regulations against *an EEA decision* [emphasis added]."

20. An EEA decision is defined in Regulation 2(1). The terms are set out in Annex 2 to this judgment. The critical words are:

> "EEA decision means a decision that concerns –
>
> (a) a person's entitlement to be admitted to the United Kingdom;
>
> (b) a person's entitlement to be issued with … a … residence card …"

21. The UT also cited the specific Regulations for appeals dealing with one basis on which a person may qualify as an EFM. Regulation 26(2A) (again cited in Annex 2) bears on the factual basis of the claim in *Sala*:

> "2A. If a person claims to be in a durable relationship with an EEA national he may not appeal under these Regulations unless he produces [the relevant documents and evidence]."

The UT noted that Regulation 26(2A) was inserted by amendment in late 2012. This became significant in their reasoning, since they found that an amendment could not properly be the basis for clarification or interpretation of the Regulations as originally enacted.

22. The UT turned finally to Regulation 26(3). Here the provision they found significant is that:

> "26(3) If a person … claims to be *the family member or relative* [emphasis added] of an EEA national he may not appeal under these Regulations unless he produces:
>
> (a) …
>
> (b) proof that he is the *family member or relative* [emphasis added] of an EEA national."

The UT remarked that this provision was part of the original wording of the 2006 Regulations, and therefore available for construction of the Regulations overall.

23. The central point in the reasoning of the UT was that an EEA decision – the trigger for an appeal – concerns "a person's entitlement to be admitted" or "a person's entitlement to be issued with a residence card": see Regulation 2(1). In the case of an EFM, because the person acquires no automatic "entitlement" to admission or to a residence card (see Regulations 8 and 17 above), since a discretion on the part of the Secretary of State is retained even if the qualifying or threshold conditions are met, the UT concluded that it follows that an exercise of discretion adverse to the applicant EFM is not an "EEA decision" as defined. The wording in Regulation 26(2A) is of no assistance for the reason indicated.

24. The argument advanced by both parties before the Upper Tribunal was that a decision in respect of an EFM consisted of two stages: step 1 is a "factual" stage requiring the individual to establish that he is an EFM of a qualified person or an EEA national with permanent right of residence; step 2 is the exercise of discretion by the Secretary of State. Where the decision is favourable to the Claimant, an entitlement to a residence card then arises. Where the exercise of discretion is unfavourable, the

decision nevertheless "concerns" the entitlement of the Claimant to entry and residence. The decision "concerns" that entitlement because it "is relevant to or important to", "relates to" or "is about" the entitlement to the residence card. A shorter way of putting this argument might be that the Secretary of State's decision "concerns" an entitlement to a residence card, because the Secretary of State decides whether an entitlement will come into existence. Ms Broadfoot, as *amicus curiae*, in her written submissions to the UT, "accepted that there was a logic to that submission": see the Determination, paragraph 42.

25. The UT nevertheless rejected those arguments. They concluded that no entitlement arose until after the Secretary of State's decision (which was obviously correct) and therefore the decision did not "concern" an entitlement. The central passages are as follows:

> "46. We begin with the language used in reg 2(1) of the EEA Regulations 2006. In our judgment, there is a fundamental difference between the two situations contemplated for the issue of a residence card. In the former, the individual has a right to the residence card once the qualifying criteria are established: that is properly said to be an "entitlement". In the latter, the individual does not have a right to that card but is reliant upon a favourable exercise of discretion before a card will be issued. It does not seem to us that it assists, as Mr O'Callaghan urged upon us, to describe the individual's position when discretion is exercised in his favour as amounting to an "entitlement" to that card. The plain fact is that the exercise of discretion 'sits between' the basis upon which he or she qualifies as an EFM and the outcome of whether or not the residence card is to be issued. If this latter situation can properly be described as an "entitlement" to the residence card, it would merge into one category situations where choice exists (a discretion) and those where a duty or obligation arises. Only in the latter case can it be said that the individual seeking the benefit of the decision-making process has a right to that benefit or outcome. There is a clear jurisprudential distinction, well recognised in public law generally, between the exercise of discretion and the carrying out of a duty. That distinction is, in our judgment, reflected in the provisions dealing with the issue of residence cards under the EEA Regulations 2006. As the case law makes clear, the only right or entitlement that an EFM has in the decision-making process is that the discretion whether to issue a residence card is exercised lawfully and in accordance with the Citizens Directive (Rahman at [21]-[25]).
>
> 47. It does not, in our judgment, assist to rely upon the definition in reg 2(1) that the decision "concerns" the "entitlement" of a residence card. The decision-making process leading to the ultimate outcome does not entail a "right" or an "entitlement" to the card and any decision made cannot "concern" an "entitlement" to the residence card when the

> decision-making process does not entail such an entitlement. Likewise, there is no basis for interpreting the definition so as to expand its natural meaning to cover "potential entitlement". Regulations 2(1) says what it says.
>
> 48. In our judgment, the natural and ordinary meaning of the definition of an EEA decision in reg 2(1), point (b) with which we are concerned in this appeal does not include a decision to refuse a residence card to an EFM under reg 17(4) or, by parity, to refuse a registration certificate to an EEA national EFM under reg 16(5). The consequence of that would be that the decision in the present case was not an 'EEA decision' and the appellant has no right of appeal. The question then is whether there is anything in the context or other material demonstrating that the natural and ordinary meaning was not intended."

26. The UT went on to consider whether there were other provisions which would compel a reading of the key wording in Regulation 2(1) other than the reading which they had found to be the "rational and ordinary meaning", and found there was none. They therefore concluded against the existence of an appellate jurisdiction on the basis of what they held to be the natural meaning of the relevant phrase. There was no lack of remedy, since the Appellant could challenge the decision of the Secretary of State by way of Judicial Review.

The Arguments Before Us

27. All are agreed that these Regulations are formidably obscure and badly drafted. Each side submitted that the natural and ordinary meaning of the phrase "concerns … an entitlement" was as suited the outcome sought: the Appellant for an appeal, and the Secretary of State (now) against an appeal. In my view, this is the decisive issue in the case. I return to it below. However, each side made complex submissions concerning other aspects of the Regulations. I turn to these points as briefly as possible.

28. Mr de Mello for the Appellant began by comparing Regulation 21 with Regulation 12(5). By Regulation 21(1), a "relevant decision" is an EEA decision taken on grounds of public policy, public security or public health. An EEA decision is, as we have seen, defined under Regulation 2(1), as 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 … a … residence card…" Under Regulation 12(2), an entry clearance officer may issue an EEA family permit to an EFM of an EEA national who fulfils the relevant criteria, but under Regulation 12(5) such a permit "shall not be issued under this Regulation" if the applicant is not entitled to be admitted or falls to be excluded under Regulations 19(1A), 19(1AB) or 19(1B). Those last three provisions concern public policy, public security or public health. Regulation 19(1B) connects with Regulation 21, since 19(1B) specifies that the Secretary of State may prohibit a person from entering on those grounds "in accordance with Regulation 21", but that power justifies exclusion of "an EEA national or the family member of an EEA national", not an EFM. Under Regulation 17(4) the Secretary of State may issue a residence card to an EFM not falling within Regulation 7(3) (i.e. an EFM who has already been issued with an EEA family

permit, a registration certificate, or a residence card). Against that background, Mr Kennelly points to Regulation 17(8) which makes it explicit that refusals of a residence card, in respect of EFMs, are subject to Regulations 20(1) and 20(1A), without reference to Regulation 21. He says the structure of the Regulation means that Regulation 21 is not material for this category of decision.

29. I found these arguments difficult to follow. It appears to me that Regulations 20 and 21 are complementary, the first setting out grounds upon which the Secretary of State may refuse an application (see Regulation 20(6)) and the second introducing limiting factors. The limiting factors apply to an EEA decision. However, it need not follow that every decision refused under Regulation 20 must be an EEA decision by reference to the language in Regulation 21. An application may be refused under Regulation 20(1) but not be limited by Regulation 21, if it was not otherwise an EEA decision. Mr Kennelly argued, as I have already observed, that an exercise of discretion on grounds of public policy or national security in relation to an EFM, does not of itself create an appeal route by means of Regulation 21, and refusal to issue (on revocation or refusal to renew) a residence card on such grounds falls under Regulation 20. However, neither is this inconsistent with the interpretation advanced by the Appellant. In the end, I reject these arguments as unclear in their effect and I remain sceptical that this particular passage of close textual analysis takes us anywhere.

30. In his written submissions, Mr de Mello submitted that the EU principle of equivalence meant that the refusal of a claim under Article 3(2) of the Citizens Directive or a claim under Regulation 12(2), taken together with Regulation 8 of the EEA Regulations 2006, must be characterised as similar or identical, and that, since the Appellant's Article 8 rights are engaged "because the grounds of appeal *could have* (emphasis added) included a claim under Article 8 ECHR" (or Article 7 of the Charter of Fundamental Rights), the routes of appeal and remedies for an EFM must be the same. Judicial review would not amount to effective judicial redress.

31. Mr de Mello did not seek to amplify this argument orally. In my view it could not succeed, for three reasons. The principle of equivalence bites where rights and remedies for breaches of EU law are inadequate or inferior to those arising in respect of breaches of domestic law. However, there is no basis for that proposition here. Many fact-specific questions of domestic law are decided, and the remedy provided, by means of judicial review: there is no basis for a claim that such a remedy is unequal as between the two systems of law. Secondly, judicial review is flexible enough to allow for the establishment of fact by the Court, as a matter of primary enquiry, to be followed by a consideration of the discretion exercised by a Minister: a model which might be thought satisfactory for the two-stage test here. Such a judicial review would not be limited (or not necessarily so) to a traditional *Wednesbury* review. Thirdly, the two different routes of redress which would emerge if the Respondent succeeded (one for a family member and a different route for an EFM) do not erect a contrast between the level of remedy for infringement of domestic and European law, but between two different categories of individual as defined by European law, further fully imported into English law. That is not a breach of the principle of equivalence.

32. Mr de Mello's next argument is founded in Section 109 of the 2002 Act. The relevant passage is in Annex 2. The section empowers the making of regulations to provide

for "an appeal against an immigration decision taken in respect of a person who has or claims to have *a right* under any of the Community Treaties". The power was exercised by the promulgation of the 2006 Regulations. The definition of "immigration decision" in Section 109 would be satisfied by the decision in this case. Mr de Mello argues that the legislative intention laid down in the 2002 Act means that the power must have been intended to be exercised so as to grant a right of appeal, rather than challenge by way of judicial review, to someone in the position of the Appellant.

33. In my view, this argument fails on a number of points. Firstly, the 2002 Act is too unspecific in its wording to have the effect for which Mr de Mello argues. Moreover, if the legislation were closely interpreted as defining the meaning of the Regulation, the outcome would be against Mr de Mello, in my view. The phrase "has or claims to have a right" differs from the phrase in the Regulations "concerns … an entitlement", and the former phrase would point more to an existing right, whether established or claimed, rather than an entitlement which might flow from the relevant decision. In my view Mr Kennelly's position here is to be preferred.

34. A better argument for the Appellant arises from the overall provisions in the Directive, and finds an echo in Regulations 17 and 20. An EFM is characterised under Article 3 as a "beneficiary" of the Directive, and under Article 3.2, "the host member shall, in accordance with its national legislation, facilitate entry and residence for" EFMs. Article 3 goes on to specify that there must be "an extensive examination of the personal circumstances" and the host member state must "justify any denial of entry or residence" to an EFM. Those are not neutral formulations. They are clearly intended to confer on the EFM an advantage in terms of entry and residence over those without such connection with an EEA national. Hence the discretion of the Secretary of State is not unfettered.

35. Mr de Mello appeared to argue that the Secretary of State had no discretion under Regulation 17(A), once the person established that he or she was an EFM. I reject that. However, Mr Kennelly did accept that the discretion had to be exercised within the constraints laid down in the legislation, and with the provisions of the Directive in mind. In my view this is reinforced by Article 8 ECHR, and by Article 7 of the Fundamental Charter which is in substance identical. In short, the Directive confers a clear advantage upon an EFM of an EEA national, as against others. EU law favours family integrity, and the exercise of discretion must be exercised in the prescribed way with that advantage, and with Article 7 and the EU principle of proportionality, in mind.

36. This is reinforced by the decision of this Court in *Secretary of State for the Home Department v Rahman and Others* [2013] QB 249. In that case, the Upper Tribunal made a reference to the CJEU in relation to the rights of "other family members" of a resident EEA national, and the Court considered the provisions of Article 3(2) of the Directive. The precise questions arising in that case are not material, but Advocate General Bot in his opinion to the Court recognised that the margin of discretion for the Member State was limited, and must not "have the effect of unjustifiably impeding the exercise by the Union citizen of his right of free movement and residence" (AG, paragraph 69) and must be subject to the right to respect private and family life under Article 7 of the Charter (AG, paragraph 70). In giving their answers to the specific questions referred to them, the Grand Chamber recognised that the

Member State had a wide discretion as to implementation, but stated that the "host Member State must ensure that its legislation contains criteria which are consistent with the normal meaning of the term 'facilitate'" (Judgment, paragraphs 24 and 26).

37. A difficulty for the Secretary of State arises from the "General Interpretation" provisions in Regulation 2, the relevant parts of which are reproduced in Annex 2 to this judgment. At the time these Regulations came into force (30 April 2006), an earlier version of Section 82 of the 2002 Act was in force: again, the relevant text is in Annex 2. Under this version of the section, an "immigration decision" includes "refusal of leave to enter the United Kingdom", a formulation which would capture a refusal of admission or a residence card to an EFM. This would give rise to a right of statutory appeal, subject to any applicable exclusion or exception. Against that statutory background, an "EEA decision" within the Regulations was defined (as we have seen) as one that "concerns" entitlement to be admitted or to be granted residence in the United Kingdom, subject to exceptions, as they appear in the Regulations. Significantly, an application for entry and residence by an EFM is not one of the stipulated exceptions. Thus, focussing on the text of this Regulation, a decision such as this would fall within the definition of an "EEA decision", which would bring such a decision within paragraph 1 of Schedule 1 to the Regulation, creating a right of "appeal under these Regulations to the First-tier Tribunal as if it were an appeal against an immigration decision under Section 82(1)" of the 2002 Act.

38. Mr Kennelly concedes that, if his analysis is correct, such a decision should have been excluded under Regulation 2 from the definition of "EEA decision". This was, he says, an error in drafting the Regulation.

39. Schedule 1 paragraph 1 to the Regulations has gone through more than one evolution. At the date of the decision in this case, the wording was as set down in Annex 2 to this judgment, and thus provided that:

> "1. The following provisions of … the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against an immigration decision under Section 82(1) of that Act: … Section 84(1), except paragraphs (a) and (f)."

It follows that Section 84(1)(d) has "effect … as if it [was] an appeal against an immigration decision under section 82(1) of" the 2002 Act.

40. Section 84(1) of the 2002 Act reads in its relevant part:

> "84(1) An appeal under Section 82(1) against an immigration decision must be brought on one or more of the following grounds –
>
> …
>
> (d) that the appellant is … a member of the family of an EEA national and the decision breaches the appellant's rights under the community Treaties in respect of entry to or residence in the United Kingdom."

41. The Appellant argues that the critical phrase here is "a member of the family". As we have seen, both "family member" and "extended family member" carry specific meanings in the context of this legislation. The employment of the term "a member of the family" of an EEA national means the draftsman has avoided the term of art "family member" and adopted a wider phrase, capable of including an EFM as well. This gives real support to the Appellant's contention.

42. Against that backdrop, I return to the principal point at issue, the meaning of the language in the Regulation: is the decision under consideration one which "concerns … an entitlement" to enter and to be granted a residence card.

43. As I have said, the essence of the decision by the Upper Tribunal was that this means an *existing* entitlement. They concluded that the decision by the Respondent in relation to a family member is whether that entitlement exists. The decision in relation to an EFM is whether, by the exercise of discretion (presumably, whether circumscribed or not) such entitlement should come into being. In their thinking, that distinction was decisive. The Secretary of State now adopts that position.

44. It was intriguing that neither counsel spent any length of time on this critical issue, since it depends on the interpretation of ordinary language. No authority was advanced as to the meaning of this phrase.

45. In my view, not only does the context favour the Appellant's interpretation (for the reasons set out above) but that is the more natural meaning of the words. An "entitlement" is subtly different from a "right". The natural meaning of the latter is something inherent and existing. The natural meaning of an "entitlement" is a benefit which is obtained or granted. Moreover, a decision which "concerns" an entitlement appears to me naturally to include a decision whether to grant such an entitlement. That is precisely what the Secretary of State must do in such a case as this.

46. Although it forms no part of my reasoning in reaching this conclusion, it appears to me that an appeal before a Tribunal is a preferable procedure in this context to judicial review. I have already indicated that the tool of judicial review has proved to be flexible, capable of being shaped to different levels of intensity and intrusive enquiry, depending on the matter in hand. However, the hearing of an appeal before a tribunal is probably somewhat better as a procedure for the intensive review of the facts required by Article 3(2) of the Directive and required on the part of the Secretary of State by Regulation 17(5).

47. For the reasons given, I agree that the appeal should be allowed on Ground 2. It is not necessary therefore to rule on the other Grounds.

Lord Justice Longmore:

48. I agree. 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

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.

49. 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.

50. 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.

The Master of the Rolls:

51. I agree with both judgments.

ANNEX 1: EU PROVISIONS

Directive 2004/38/EC of 29 April 2004

Preamble

5. The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

6. In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

Article 2: Definitions

For the purposes of this Directive:

…

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);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

…

Article 3: Beneficiaries

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 member 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.

Article 15: Procedural Safeguards

1. The procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.

2. Expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State.

3. The host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies.

Article 30: Notification of Decisions

1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.

Article 31: Procedural Safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

- where the expulsion decision is based on a previous judicial decision; or
- where the persons concerned have had previous access to judicial review; or
- where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Article 7 - Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 47 - Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 51 - Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Article 52 - Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

ANNEX 2: UNITED KINGDOM STATUTE AND REGULATIONS

Nationality, Immigration and Asylum Act 2002

As at 30 April 2006, the date the 2006 Regulations came into force:

82. Right of appeal to the Tribunal

(1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal

(2) In this Part "immigration decision" means –

(a) refusal of leave to enter the United Kingdom

...

(4) The right of appeal under subsection (1) is subject to the exceptions and limitations specified in this Part.

As at 19 December 2014, the date of the decision:

82. Right of appeal to the Tribunal

(1) A person ("P") may appeal to the Tribunal where –

(a) the Secretary of State has decided to refuse a protection claim made by P,

(b) the Secretary of State has decided to refuse a human rights claim made by P, or

…

(2) For the purposes of this Part –

(a) a "*protection claim*" is a claim made by a person ("P") that removal of P from the United Kingdom –

(i) would breach the United Kingdom's obligations under the Refugee convention, or

(ii) would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

…

(e) "*refugee*" has the same meaning as in the Refugee Convention.

(3) The right of appeal under subsection 1(1) is subject to the exceptions and limitations specified in this Part.

As at 30 April 2006, the date the 2006 Regulations came into force:

84. Grounds of Appeal

(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds—

(a) that the decision is not in accordance with immigration rules;

(b) that the decision is unlawful by virtue of section 19B of the Race Relations Act 1976 (c. 74) (discrimination by public authorities) or Article 20A of the Race Relations (Northern Ireland) Order 1997];

(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;

(d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;

(e) that the decision is otherwise not in accordance with the law;

(f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules;

(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.

(2) In subsection (1)(d) *"EEA national"* means a national of a State which is a contracting party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (as it has effect from time to time).

109. European Union and European Economic Area

(1) Regulations may provide for, or make provisions about, an appeal against an immigration decision taken in respect of a person who has or claims to have a right under any of the Community Treaties.

…

(3) In subsection (1) "*immigration decision*" means a decision about –

(a) a person's entitlement to enter or remain in the United Kingdom, or

(b) removal of a person from the United Kingdom.

Immigration (European Economic Area) Regulations 2006/1003

2. General Interpretation

(1) In these Regulations—

…

"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;

(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 United Kingdom;

but does not include decisions under regulations 24AA (human rights considerations and interim orders to suspend removal) or 29AA (temporary admission in order to submit case in person)

7. Family Member

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

(a) his spouse or his civil partner;

(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;

(c) dependent direct relatives in his ascending line or that of his spouse or his civil partner;

(d) a person who is to be treated as the family member of that other person under paragraph (3).

…

(3) Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.

8. "Extended family member"

(1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under 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 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).

17. Issue of residence card

(1) The Secretary of State must issue a residence card to a person who is not an EEA national and is the family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15 on application and production of—

(a) a valid passport; and

(b) proof that the applicant is such a family member.

(2) The Secretary of State must issue a residence card to a person who is not an EEA national but who is a family member who has retained the right of residence on application and production of—

(a) a valid passport; and

(b) proof that the applicant is a family member who has retained the right of residence.

(3) On receipt of an application under paragraph (1) or (2) and the documents that are required to accompany the application the Secretary of State shall immediately issue the applicant with a certificate of application for the residence card and the residence card shall be issued no later than six months after the date on which the application and documents are received.

(4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if—

(a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and

(b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.

(5) Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

(6) A residence card issued under this regulation may take the form of a stamp in the applicant's passport and shall be entitled "Residence card of a family member of an EEA national" and be valid for—

(a) five years from the date of issue; or

(b) in the case of a residence card issued to the family member or extended family member of a qualified person, the envisaged period of residence in the United Kingdom of the qualified person,

whichever is the shorter.

(6A) A residence card issued under this regulation shall be entitled "Residence card of a family member of an EEA national" or "Residence card of a family member who has retained the right of residence", as the case may be.

(8) But this regulation is subject to regulations 20(1) and (1A).

20. Refusal to issue or renew and revocation of residence documentation

(1) The Secretary of State may refuse to issue, revoke or refuse to renew a registration certificate, a residence card, a document certifying permanent residence or a permanent residence card if the refusal or revocation is justified on grounds of public policy, public security or public health or on grounds of abuse of rights in accordance with regulation 21B(2).

(1A) A decision under regulation 19(3) or 24(4) to remove a person from the United Kingdom, or a decision under regulation 23A to revoke a person's admission to the United Kingdom, will (save during any period in which a right of residence is deemed to continue as a result of regulation 15B(2)) invalidate a registration certificate, residence card, document certifying permanent residence or permanent residence card held by that person or an application made by that person for such a certificate, card or document.

(2) The Secretary of State may revoke a registration certificate or a residence card or refuse to renew a residence card if the holder of the certificate or card has ceased to have, or never had, a right to reside under these Regulations.

(3) The Secretary of State may revoke a document certifying permanent residence or a permanent residence card or refuse to renew a permanent residence card if the holder of the certificate or card has ceased to have, or never had, a right of permanent residence under regulation 15.

(4) An immigration officer may, at the time of a person's arrival in the United Kingdom—

(a) revoke that person's residence card if he is not at that time the family member of a qualified person or of an EEA national who has a right of permanent residence under regulation 15, a family member who has retained the right of residence or a person with a right of permanent residence under regulation 15;

(b) revoke that person's permanent residence card if he is not at that time a person with a right of permanent residence under regulation 15.

(5) An entry clearance officer or immigration officer may at any time revoke a person's EEA family permit if—

(a) the revocation is justified on grounds of public policy, public security or public health; or

(b) the person is not at that time the family member of an EEA national with the right to reside in the United Kingdom under these Regulations or is not accompanying that national or joining him in the United Kingdom.

(6) Any action taken under this regulation on grounds of public policy, public security or public health shall be in accordance with regulation 21.

21. Decisions taken on public policy, public security and public health grounds

(1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is necessary in his best interests, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010 shall not constitute grounds for the decision; and

(b) if the person concerned is in the United Kingdom, diseases occurring after the three month period beginning on the date on which he arrived in the United Kingdom shall not constitute grounds for the decision.

26. Appeal rights

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

(2) If a person claims to be an EEA national, he may not appeal under these Regulations unless he produces a valid national identity card or passport issued by an EEA State.

(2A) If a person claims to be in a durable relationship with an EEA national he may not appeal under these Regulations unless he produces –

(a) a passport; and

(b) either –

(i) an EEA family permit; or

(ii) sufficient evidence to satisfy the Secretary of State that he is in a relationship with that EEA national.

"(3) If a person … claims to be the family member or relative of an EEA national he may not appeal under these Regulations unless he produces:

(a) an EEA family permit; or

(b) other proof that he is the family member or relative of an EEA national."

Schedule 1 – Appeals to the First-tier Tribunal

1. The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against an immigration decision under section 82(1) of that Act:

section 84(1), except paragraphs (a) and (f);
sections 85 to 87;
section 105 and any regulations made under that section;
section 106 and any rules made under that section.