Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03205/2018

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 28 May 2019	**On 12 June 2019**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

RANA AZHAR HUSSAIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Hussain, Solicitor from Syeds Law Office Solicitors
For the Respondent: Mrs H Aboni Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by a citizen of Pakistan against the decision of the First-tier Tribunal dismissing his appeal against the decision of the Secretary of State to refuse him a residence card as the extended family member of an European Economic Area national.
2. The application was made on 7 March 2017 and refused on 25 July 2017. The respondent thought that the appellant's circumstances did not entitle him to appeal the decision.
3. The appellant was not satisfied with that. Although he had already issued proceedings for judicial review he wrote in person to the First-tier Tribunal on 6

July 2018 asking if the First-tier Tribunal had jurisdiction to receive an appeal. It answered that in the affirmative and the appeal was subsequently listed for hearing when the First-tier Tribunal decided that it did not have jurisdiction.

4. I do not see any conflict between those two decisions. It is perfectly obvious when read properly that the first decision of the Upper Tribunal relating to jurisdiction was that the inquiry about permission was in time. The decision that there was jurisdiction was not purporting to be a ruling that the decision to be challenged was within the scope of appealable decisions. In the decision promulgated on 24 October 2018, leading to a decision promulgated on 30 October 2018, the First-tier Tribunal decided it did not have jurisdiction to determine the appeal because the Rules did not make provision for such a decision.

5. That decision reflected the law set out in the 2016 Regulations and in the ordinary course of events would be difficult to challenge. However we now have the benefit of a decision of the Court of Justice of the European Union in **SSHD v Banger (Citizenship of the European Union – Right of Union citizens to move and reside freely within the territory of the European Union – Judgment) [2018] EUECJ C-89/17** (12 July 2018). This makes clear that member states have an obligation to facilitate the residence of extended family members and to provide an accessible right of redress to challenge a disappointing decision. For practical purposes this means an appeal. The Secretary of State has recognised that and has amended the 2016 Procedure Rules so that they give a right of appeal for decisions made after a date in (I think) March 2019. That change does not create a right of appeal in a case such as this where the decision complained of was before the change in the Regulations. In many such cases an appellant in the position of this appellant will be content for a fresh decision which the Secretary of State is likely to be willing to make. Such a decision could be expected to set out correctly the rights of appeal. Failure to do that may mean that a purported decision has no legal effect because, by not identifying rights of appeal, it did not comply with the notices' Regulations. However the Secretary of State has an obligation to permit an appeal whether or not that is set out in the Rules and it seems to me clear that an appellant can insist on an appeal against a decision that he is entitled to appeal even though he has been told wrongly that there is no right of appeal. That is precisely what this appellant has done. The decision of the First-tier Tribunal was wrong and took no account of the decision of the Court of Justice of the European Union in Banger. There is jurisdiction to entertain an appeal and I find the First-tier Tribunal has erred in law.

6. Mr Hussain urged me to make a decision on the papers if I reached this conclusion. I understand why he wants that. This case has been going on a long time. If it is a meritorious case then appellants want certainty and finality. They do not want more delay and expense. However the hearing before the First-tier Tribunal was not attended by the Secretary of State. In the ordinary course of events I have almost no sympathy for litigants who know about a hearing but choose not to attend but it is a little different when the only issue understood to arise was one of jurisdiction. The Secretary of State's resources are limited and although I do not commend the decision not to attend, in my

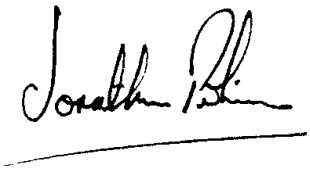
judgment it would be wrong to say the Secretary of State did not oppose the appellant's case. He clearly did which is why he wrote the letter that he did.

7. This case has to be heard again and in the circumstances it will be quicker and easier to hear it again in the First-tier Tribunal. This is a still more attractive course because there has been no decision on the merits. I find the First-tier Tribunal erred. I set aside the decision there is no jurisdiction. I order the case be determined again in the First-tier Tribunal.

Decision

8. The appeal is allowed. The First-tier Tribunal erred in law. I set aside its decision and I direct that the appeal be heard again in the First-tier Tribunal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 10 June 2019