



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

Appeal Number: IA/25866/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 19 December 2018**

**Decision & Reasons  
Promulgated  
On 5 February 2019**

**Before**

**THE HON. MR JUSTICE LANE, PRESIDENT  
UPPER TRIBUNAL JUDGE PLIMMER**

**Between**

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

**MALIK WAQAS ARSHAD**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr R. Makol of OTS Solicitors

For the Respondent: Mr P. Deller, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant, a citizen of Pakistan born in June 1989, appealed to the First-tier Tribunal against the decision of the respondent, taken on 26 March 2015, to refuse the appellant a residence card as an extended family member of his maternal uncle, a citizen of Spain, resident in the United Kingdom.

2. The respondent's reasons for refusal stated that, in order to qualify for a residence card as an extended family member, the appellant was required to produce evidence that he was related as claimed to the EEA national sponsor. The respondent considered that the appellant had not provided evidence in the form either of a valid national passport or ID card in respect of the sponsor. The letter of refusal stated that information held by the UK Border Agency indicated that an ID card for Mr Mohammad Naeem Bibi had been reported as lost or stolen to the relevant authorities in Spain. The respondent also considered that the appellant had not provided evidence of dependency on Mr Bibi, immediately prior to entering the United Kingdom as required by the 2006 Regulations.
3. The appeal was heard by the First-tier Tribunal at Hatton Cross on 25 July 2016. Both the appellant and the sponsor appeared before the First-tier Tribunal judge and gave evidence, based on their witness statements. The appellant's witness statement, dated 25 July 2016, stated that prior to his arrival in the United Kingdom, he was reliant upon his sponsor uncle. The appellant's dependency had begun when the appellant had lived in his uncle's household in Pakistan but had continued after the uncle had left for Europe. Since the uncle moved to the United Kingdom in 2013, the appellant had lived with him and received his financial help. The appellant produced documentary evidence to confirm that the appellant and the uncle were living in the same house, as well as evidence of financial support.
4. So far as the identity card issue was concerned, the appellant said that his uncle had lost his wallet in Barcelona and had panicked. The uncle had made a police report and, due to his state of mind at the time, he informed the police that everything which had been in his wallet, including his identification card, had been lost. In fact, the identification card had been sent to the respondent, in connection with the appellant's application.
5. The witness statement of Mr Bibi dated 25 July 2016, confirmed what the appellant had said.
6. The decision of the First-tier Tribunal does not contain any finding that the judge was concerned about any aspect of this evidence. Indeed, the decision contains no findings of fact. This is because, after the date of the hearing but before promulgation of the decision, the Upper Tribunal gave its decision in the case of Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC), which held that there was no right of appeal against the decision of the respondent not to grant a residence card to a person claiming to be an extended family member.
7. For that reason, the First-tier Tribunal's decision was that there was no statutory right of appeal.
8. On 9 November 2017, the Court of Appeal gave judgment in Kahn v Secretary of State for the Home Department [2017] [EWCA Civ 1755].

The Court of Appeal held that Sala had been wrongly decided and that a right of appeal did, in fact, exist under the 2006 Regulations.

9. Five days after the handing down of the judgment in Kahn, the appellant filed an application with the First-tier Tribunal for permission to appeal to the Upper Tribunal. The grounds relied upon Kahn.
10. On 4 January 2018, the First-tier Tribunal refused permission to appeal. The First-tier Tribunal noted that the grounds were over a year out of time. The First-tier Tribunal judge who refused permission considered that an application could have been made earlier, on the basis that Sala was wrongly decided. Although the judge noted that there was “some merit in the grounds” (as indeed there was, following Kahn) “given the lengthy delay in applying for permission to appeal, the appropriate course of action is to make a fresh application... for leave to remain (sic).”
11. Permission to appeal, was, however, granted by the Upper Tribunal on the 28 February 2018. The basis upon which the Upper Tribunal considered it appropriate to grant permission need not concern us. What matters is that permission was granted. Accordingly, pursuant to section 12 of the Tribunals, Courts and Enforcement Act 2017, the task of the Upper Tribunal is to decide whether there was an error of law in the decision of the First-tier Tribunal, such that its decision should be set aside.
12. In the light of Kahn, it is plain that the First-tier Tribunal’s decision, based on Sala, was wrong in law. A right of appeal existed.
13. Accordingly, at the hearing on 19 December 2018, the Upper Tribunal stated that the decision of the First-tier Tribunal was set aside. The Upper Tribunal then proceeded to re-make the decision in the appeal. It heard oral evidence from the appellant, who adopted his witness statement. The appellant said that he was still residing in his uncle’s house and was dependent upon him. There was no cross examination of the appellant.
14. The Upper Tribunal, finds, on the balance of probabilities, that the factual position is as stated by the appellant and as supported by the evidence of the sponsor uncle. We accept the appellant’s dependency began when he lived in his uncle’s household in Pakistan and continued when his uncle moved to Europe. This has continued in the UK as the appellant has lived with and been supported by his uncle here. We also accept that there is an innocent explanation for claiming that the identification card was lost when it was with the respondent. As a result, the reasons why the respondent refused the application were wrong. The respondent must now decide, on the basis of our decision, whether to grant a residence card to the appellant, compatibly with the 2006 Regulations and the Citizens Directive, upon which they are based.

15. In the course of his submissions, Mr Deller raised the question of whether, in fact, the 2006 Regulations can be said to apply to the present appeal. Paragraph 3 of Schedule 4 to the Immigration (European Economic Area) Regulations 2016 provides that, notwithstanding the revocation of the 2006 Regulations, those Regulations continue to apply in respect of an appeal under the 2006 Regulations “which is pending (within the meaning of regulation 25(2) of the 2006 Regulations) on 31<sup>st</sup> January 2017” (paragraph 3 (1)(a)).
16. Regulation 25(2) of the 2006 Regulations provided that “an appeal is to be treated as pending during the period when notice of appeal is given and ending when the appeal is finally determined, withdrawn or abandoned”.
17. Regulation 25(3) of the 2006 Regulations provided that an appeal “is not to be treated as finally determined while a further appeal may be brought; and if such a further appeal is brought, the original appeal is not to be treated as finally determined until the further appeal is determined, withdrawn or abandoned”.
18. Having raised this issue, Mr Deller did not pursue it with any vigour. He was, in our view, correct not to do so. The effect of the Upper Tribunal’s grant of permission to appeal means that, in the circumstances of the present case, the appeal to the First-tier Tribunal does not fall to be treated as finally determined but, instead, is pending. As a result, the 2006 Regulations continue to govern the position and a right of appeal under them therefore lies.
19. We do not consider that the circumstances of the present appeal, including the grant of permission by the Upper Tribunal, make the present case a suitable one for making any observations on the circumstances in which, following a binding decision of the kind found in Kahn, cases decided by reference to the law as it was thought to be at the time may be the subject of out of time applications for permission to appeal.

### **Decision**

20. The decision of the First-tier Tribunal contains an error on a point of law. The Upper Tribunal sets aside the First-tier Tribunal’s decision and re-makes the decision by allowing the appeal.



Signed

The Hon. Mr Justice Lane

President of the Upper Tribunal  
Immigration and Asylum Chamber

21 January 2019