

Mr Justice Peter Lane
Upper Tribunal (Immigration & Asylum Chamber)
IA Field House
15-25 Breems Buildings
London
EC4A 1DZ

19 June 2019

Dear Mr Justice Lane,

I am writing on behalf of the Secretary of State for the Home Department ('SSHD') further to the introduction of the Immigration (European Economic Area Nationals) (EU Exit) Regulations 2019 ('the 2019 Regulations').

As you are aware, under the Immigration (European Economic Area) Regulations 2006, extended family members who were refused documentation previously had a right of appeal. Following the determination of the Upper Tribunal in the case of Sala [2016] UKUT 411 (IAC), however, the right of appeal was removed.

This matter was then brought before the Court of Justice of the European Union and, following the ruling in the case of Banger (Case C-89/17), the UK re-introduced a right of appeal for those extended family members of European Economic Area (EEA) nationals against whom decisions to refuse EU residence documentation have been taken. The responsibility for implementing this ruling fell to the SSHD.

The 2019 Regulations, which came into force on 29 March 2019 and amended the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations') classified such decisions as 'EEA decisions', bringing them into scope of regulation 36(1) of the 2016 Regulations and allowing for a right of appeal.

However, the 2019 Regulations neglected to remove the requirements within regulation 36(4), which provide that, in order to exercise a right of appeal, any extended family member (other than a durable partner extended family member covered by regulation 36(3)) must produce a valid passport and either an EEA family permit, a qualifying EEA state residence card or proof that the criteria in regulation 7 are met (which are the criteria that an individual who claims to be a *direct* family

member of an EEA national must meet), or that they meet the criteria to retain a right of residence under regulation 10.

In practice, the requirements of regulation 36(4) mean that extended family members can only exercise a right of appeal against the decision to refuse to issue residence documentation if they are actually family members or they already hold valid residence documentation. Such restrictions render access to a right of appeal difficult in certain cases and this runs contrary to the SSHD's intention and the directly effective ruling of the CJEU in *Banger*.

The SSHD's preferred solution to this issue is to amend the 2016 Regulations, and amend the requirements of regulation 36(4), by statutory instrument, using powers in section 2(2) of the European Communities Act 1972 and section 109 of the Nationality, Immigration and Asylum Act 2002. However, given the present political uncertainties, it is difficult to confidently predict when we will be able to lay the necessary statutory instrument.

With that in mind, and until the 2016 Regulations are amended, the SSHD is conscious that the First-tier Tribunal (to which an appeal against an adverse decision taken under the 2016 Regulations lies) might, on a strict reading of regulation 36, refuse to hear appeals from extended family members.

The SSHD therefore respectfully requests that the Tribunal treats this letter as both an acknowledgement of the issue within the 2016 Regulations and as an invitation to read down the restrictive provisions of regulation 36(4), on the basis that the CJEU's ruling in *Banger* is directly effective on the UK and requires that extended family members are given access to judicial redress from a court with the ability to ascertain whether any refusal decision is based on a sufficiently solid factual basis and whether the procedural safeguards were complied with.

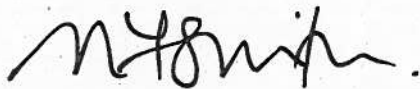
If you are minded to adopt this interpretation, the Home Office will ensure all refusal letters sent to extended family members, where the SSHD refuses to issue that extended family member with documentation, will include a section confirming that the applicant has a right of appeal against that decision. The letters will also confirm that the SSHD will not make any procedural arguments under the Regulations if the recipient exercises their right of appeal.

In the interests of transparency and fairness, the SSHD will publish this letter on the Home Office's Gov.UK portal and invites the Tribunal to consider publication in parallel.

As stated above, the SSHD intends to amend the 2016 Regulations as soon as practicable, and thanks the Tribunal in advance for its cooperation.

This letter has been copied to Judge Michael Clements, President of the First-tier Tribunal.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'N Smith', with a small dot at the end.

Nicola Smith
Deputy Director
European Migration and Citizens' Rights Unit