Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03272/2017

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 27 February 2018	**On 1 March 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

NASIR [K]
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Timson instructed by Maya Solicitors
For the Respondent: Mr A McVeety Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Ennals who, in a decision promulgated on 7 August 2017, dismissed the appeal on all grounds and confirmed the deportation order made against the appellant.
2. The appellant sought permission to appeal asserting the Judge failed to consider and determine whether Exception 3 of section 33(4) UK Borders Act 2007 assisted him. Permission to appeal was initially

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refused by another judge the First-tier Tribunal but granted on a renewed application by the Upper Tribunal on 9 October 2017.

<u>Error of law</u>

3. The appellant, a citizen of Pakistan, was born on [ ] 1977. The Judge noted the appellants claim to be in a relationship with his partner, a Slovakian national, and his submission that his removal from the United Kingdom by way of deportation breaches his rights under EU law. At [30] the Judge finds *"….. It seems to me that the question of whether the appellant is in a durable relationship with Ms [G] is adequately dealt with in the respondent's consideration of a possible claim under Art 8 ECHR. The respondent specifically rejected the claim based on there being a genuine and subsisting relationship with Ms [G]."*
4. At [32] the Judge finds *"I also accept from the evidence before me that the appellant is in a relationship with his son [A], born in [ ] 2014. I accept that he lives with his partner and child as a family, and they would intend to continue to do so once the second child is born. None of the evidence before suggests anything other than a family relationship with two parents and a small child".*
5. It is not disputed before me that the Judge has found that the appellant is in a durable relationship with his EEA national partner.
6. The Judge arguably erred in finding that the EEA aspects of the case could be determined within the article 8 ECHR considerations as it is necessary to consider EEA aspects first for, if engaged, the deportation powers under EEA law are different from domestic provisions.
7. Of more significance is the fact it was found the appellant is in a relationship with the EEA national yet did no further in relation to this aspect than to consider the matter under article 8 ECHR.
8. The Judge refusing permission referred to the decision of the Upper Tribunal in Rose (Automatic deportation - Exception 3) Jamaica [2011] UKUT 276 (IAC) in which the Tribunal held that the personal scope of the safeguards against expulsion which Article 27 of 2004/38/EC (the "Citizens Directive") affords to "family members" does not include "other family members" hence Exception 3 to section 32(4) and (5) of the UK Borders Act 2007 cannot be invoked by 'other family members'. Had this been all the Tribunal decided in *Rose* that may be the end of the matter but it was not. The Tribunal also found that a person who had been found to be an extended family member under the Regulations needs to be considered by the Secretary of State as a person in respect of whom the discretion to issue a residence card under regulation 17 may be exercised. The result of the exercise of that discretion may be that regulations 20-21 applied to the appellant's removal, and the decision would not be lawful without regard to them.
9. In this appeal, it is not disputed that consideration has not been given to the exercise of discretion on whether to grant the appellant a

residence card as an extended family member of the EEA national; as the Judge proceeded to determine the matter rather than refer the case. Until this exercise has been completed the assessment of the criteria going to deportation or removal cannot be completed and it cannot be ascertained whether the appellant’s removal is lawful.

10. As discussed with, and agreed by, the advocates the most appropriate way forward is to find the Judge erred in law. Having found the appellant is an extended family member of the EEA national, on the basis of his relationship with the EEA national and the child, the Judge failed to remit the appeal to the Secretary of State to enable the decision maker to consider how to exercise discretion in relation to the issue of the Residence Card. I set the decision aside. I substitute a decision allowing the appeal to the limited extent the appeal is remitted to the Secretary of State to enable consideration of the exercise of discretion and for an assessment of the criteria going to deportation dependent upon the outcome of whether a residence card is to be granted or not. The claimant's entitlement to a residence card should be decided before a proper decision can be made about if or how he is to be deported. It is trite law that a person entitled to reside in the United Kingdom as the dependant of an EEA national cannot be the subject of automatic deportation (see section 33(3) of the 2007 Act).

Decision

11. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Immigration Judge. I remit the appeal to the Secretary of State for the reason set out above.**

Anonymity.

12. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Signed……………………………………………….
Upper Tribunal Hanson

Dated the 27 February 2018