



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/02018/2013

**THE IMMIGRATION ACTS**

Heard at North Shields  
on 3<sup>rd</sup> March 2014

Determination Promulgated

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MAHAMAD AHMAD RASUL  
(Anonymity direction not made)

Respondent

**Representation:**

For the Appellant: Mrs Rackstraw - Senior Home Office Presenting Officer.

For the Respondent: Mrs Weatherall instructed by Miles Hutchinson & Lithgow.

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State against a determination of a panel of the First-tier Tribunal composed of First-tier Tribunal Judge Fisher and Mr A E Armitage (hereinafter referred to as 'the Panel'), promulgated on 9<sup>th</sup> December 2013, in which they allow Mr Rasul's appeal against an order for his deportation from the United Kingdom made pursuant to section 32 (5) of the UK Borders

Act 2007 to the limited extent that the matter remains outstanding before the Secretary of State to decide whether Mr Rasul falls within exception one of section 33 of the UK Borders Act in light of their conclusion that he is an extended family member of an EEA national exercising Treaty rights in the United Kingdom.

## **Background**

2. Mr Rasul is a citizen of Iraq who has provided various dates of birth such as 25<sup>th</sup> January 1977 and 25<sup>th</sup> January 1982. He claims to have arrived in the United Kingdom on 26<sup>th</sup> August 2003 and applied for asylum two days later although fingerprint checks revealed that he had, in fact, claimed asylum in Germany on 25<sup>th</sup> March 2003 in a different name. His asylum claim was certified on third country grounds and removal directions set to Germany although he absconded.
3. Mr Raul was next encountered on 9<sup>th</sup> June 2009 when he was arrested in a factory in Northallerton on suspicion of fraud. He had worked since October 2004 using a false identity of an individual who had left the United Kingdom in that year using a travel document issued by the Home Office after he was granted exceptional leave to remain. Mr Rasul admitted that he purchased that persons documents, including a National Insurance number, for £700 and used the exceptional leave to remain letter in order to obtain indefinite leave to remain in this person's identity.
4. On 26<sup>th</sup> August 2009 Mr Rasul married a citizen of Latvia in an Islamic ceremony in the UK in which he claims he used his own correct identity. On 4<sup>th</sup> September 2009 he was convicted at Teesside Crown Court for offences of deception, for which he was sentenced to 12 months imprisonment on each count to run concurrently, and notified of his liability for deportation. He claims to have a fear of returning to Iraq and that he has established family life in the United Kingdom. On 8<sup>th</sup> February 2011 he lodged an application for a certificate of approval for marriage which was rejected because there was no evidence to prove that his partner was free to marry. The deportation order was signed on 17<sup>th</sup> September 2013.
5. The Panel set out the evidence they received and considered in some detail before arriving at their findings from paragraph 22 of the determination. In relation to his claim to face a real risk of persecution if returned to Iraq the Panel conclude that as a result of discrepancies and inconsistencies in his evidence, highlighted in paragraph 23 and 24 of the determination, they were not satisfied that Mr Raul's account was reasonably likely to be true as a result of which they dismissed it in its entirety. The Panel did not accept that his removal pursuant to the deportation order would breach the U.K.'s obligations under the Refugee Convention or Articles 2 or 3 ECHR [25].

6. In relation to the assertion that he fell within an exemption contained in the UK Borders Act 2007 based upon his relationship with an EEA national, it was accepted his partner is an EEA national but it was not accepted that she is a qualified person under the 2006 Regulations because she is not a jobseeker, a worker, a self-employed person, a self-sufficient person, or a student [26].
7. In her witness statement the partner stated that she cares for her son as a result of which it was found she has a derived right of residence as her son's carer [26]. Mr Rasul and his partner are not married and so he does not fall within the definition of a family member and it was not accepted by the Secretary of State that they are in a relationship akin to marriage.
8. The Panel accepted the evidence that Mr Rasul and his partner have been cohabiting since 2008 and that she was expecting his child in January 2014. They concluded that the parties are in a durable relationship under Regulation 8 (5) of the 2006 Regulations, although having considered the decision of the Upper Tribunal in Rose (automatic deportation - exception 3) Jamaica [2011] UKUT 00276 they noted that the same issue arose in this appeal in relation to whether a person in respect of whom a discretion to issue a residence card under regulation 17 (4) may be exercised can be found to be so entitled at the appeal stage and accepted it cannot and that the case must be remitted to the Secretary of State for her to consider whether she wished to exercise such a discretion in Mr Rasul's favour. The Panel found that as consideration had not been given to the exercise of any such discretion the assessment of the criteria relevant to deportation or removal cannot be completed and that it must be found, therefore, that the decision is not in accordance with the law. Accordingly the Panel concluded, following the decision in Rose, that they must allow the appeal to the extent that the matter remains outstanding for the Secretary of State to decide whether Mr Rasul falls within exception one in the light of their conclusion that he is an extended family member [27].
9. The Panel did not finalise their conclusions in relation to the family and private life considerations stating that a favourable exercise of discretion under Regulation 17 (4) would enable Mr Rasul to benefit from exception one in section 33 of the UK Borders Act and so any further consideration would be premature at this stage [28].

### **Error of law**

10. Regulation 17 (4) provides:
  - (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.
11. The Secretary of State's challenge is based upon the requirement for the EEA national to be a qualified person or a person with a permanent right of residence under Regulation 15 which it is stated is a condition that has not been satisfied by Mr Rasul's partner.
12. The Panel find that the partner is not a qualified person and that she only has a derived right of residence as the carer of her son. She does not have a permanent right of residence and on the face of it cannot satisfy the relevant condition contained in Regulation 17 (4) (a).
13. Whether an individual who has a derived right of residence is able to acquire a right to permanent residence is dealt with in Regulation 15 (1A) which states :  
  
[(1A) Residence in the United Kingdom as a result of a derivative right of residence does not constitute residence for the purpose of this regulation.
14. The argument that Mr Rasul's partner has a permanent right of residence as the need to care for her child is a permanent state of affairs, does not mean that she is entitled to a right of permanent residence under regulation 15 which denotes a legal rather than a practical status.
15. Regulation 15A, which relates to Derivative rights of residence, states:
  - (1) A person ("P") who is not [an exempt person] <sup>2</sup> and who satisfies the criteria in paragraph (2), (3), (4) [, (4A)] <sup>3</sup> or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.
16. The Regulation confers no further right beyond that which is derived from the qualifying situation/criteria.
17. Regulation 15 (1A) is to be found in the version of the Regulations that came into force as from the 1<sup>st</sup> January 2014, before the date of the hearing, but the principle can be seen to be in force in earlier decisions in European cases law. In Bee and another (permanent/derived rights of residence) [2013] UKUT 83 (IAC) (Blake J) the Tribunal held that a non-EU citizen, who is residing in the United Kingdom by reason of a derived right of residence (eg as the primary carer of an EU citizen child), cannot thereby acquire a permanent right of residence in this country.

18. In Alarape and Tijani v SSHD (case C- 529/11) CJEU (Second Chamber) 8<sup>th</sup> May 2013 it was held there were two ways for family members of a Union Citizen who were not nationals of a Member State to acquire a right of permanent residence under the Citizens Directive. First, under Article 16(2) of the Citizens Directive, family members acquired the right of permanent residence if they legally resided for a period of five years with a Union Citizen who was legally resident for a continuous period of five years. Secondly, Articles 12(2), 13(2) and 18 of the Citizens Directive together defined the right of permanent residence for family members where residence was retained in the event of death or divorce. Legal residence for a set period of time was again a requirement. Legal residence meant a period of residence which complied with the conditions laid down in Article 7(1) of the Citizens Directive itself: *Ziolkowski and Szeja v Land Berlin* (Cases C-424/10 and C-425/10) applied. A period of residence which complied with the law of a Member State but did not satisfy the conditions in Article 7(1) of the Citizens Directive was not regarded as legal residence. It followed that for the purposes of acquiring a right of permanent residence for family members of a Union citizen who were not nationals of a Member State, only the periods of residence which satisfied the conditions in the Citizens Directive were to be taken into consideration. Periods of residence solely on the basis of Article 12 of the Regulations were not considered (*paras 33 - 40 and 48*).
19. Regulation 15 (1A) therefore reflects the law to be found in the Citizens Directive and reflects an applicable principle in force at the date of the hearing before the Panel.
20. I find that in allowing the appeal for the stated reasons the Panel has made a material error of law. I set the determination aside although the findings in relation to the inability of Mr Rasul to succeed and any of the protection provisions together with his immigration and history of criminal behaviour shall be preserved findings.

## Discussion

21. In re-making the decision I find that Mr Rasul is unable to succeed under the EEA Regulations as he has not established that he is entitled to any right of residence under EEA law and/or any of the provisions of the 2006 Regulations as amended. I dismiss this head of claim and find that he has not substantiated his claim to be entitled to benefit from exemption one of the UK Borders Act 2007.
22. As the Panel did not consider Mr Rasul's human rights claim based on family and/or private life it was agreed that the appropriate disposal of this appeal is to remit the matter to the Panel for them to consider this element, in relation to which the following directions shall apply:

- i. The appeal shall be remitted to the First-tier Tribunal sitting at North Shields to enable the original Panel of Judge Fisher and Mr A E Armitage to complete their deliberation of the outstanding issue. Time estimate 2 hours.
- ii. The scope of the hearing shall be limited to considering the family and private life elements of the claim which must be conducted in accordance with the guidance to be found in the cases of MF (Nigeria) [2013] EWCA Civ 1192, the High Court in Nagre [2013] EWHC 720 (Admin) and by the Upper Tribunal in Gulshan [2013] UKUT 640, as confirmed by Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC). These judgments have made it clear that the question of proportionality must be looked at in the context of the Immigration Rules with no need to go on to a specific assessment under Article 8 if it is clear from the facts that there are no particular compelling or exceptional circumstances requiring that course to be taken. This approach has been further confirmed by the Court of Appeal in the more recent case of Haleemundeen v SSHD [2014] EWCA Civ 558.
- iii. The hearing is to be listed taking into account the availability of the Panel and Miss Weatherall for Mr Rasul. Mrs. Rackstraw is to be consulted to ensure she is able to allocate a suitably experienced presenting officer to the hearing.
- iv. No later than 14 days before the hearing Mr Rasul must file a consolidated, indexed and paginated bundle containing all the evidence upon which he intends to rely. Witness statements shall stand as the evidence in chief of the maker. A skeleton argument must also be enclosed. Evidence not filed within this time scale will not be admitted without leave for which an application must be made in writing and accompanied by a detailed statement from the solicitor with conduct of the case confirming the reasons for the failure, where responsibility for the same lies, the nature of the evidence it is sought to adduce, the relevance of that evidence to the issues in the appeal and evidence of any prejudice to either party if that evidence is or is not admitted.
- v. No later than 14 days from receipt of this document Mr Rasul's solicitors must contact the listing officer at North Shields to confirm whether an interpreter is required and, if so, in what language(s).

**Decision**

23. **The First-tier Tribunal Panel materially erred in law. I set aside the decision of the original Judge. I dismiss the appeal under the EEA Regulations. The outstanding human rights claim shall be remitted to the original Panel in accordance with the above directions.**

Anonymity.

24. 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.

Signed.....  
Upper Tribunal Judge Hanson

Dated the 28<sup>th</sup> May 2014