



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

Appeal Number: DA 01171 2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 20 March 2014**

**Determination**

**Promulgated**

**On 25 April 2014**

**Before**

**THE HON MR JUSTICE JEREMY BAKER  
(Sitting as a Judge of the Upper Tribunal)  
UPPER TRIBUNAL JUDGE PERKINS**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**VEYSEL KEKEC**

Respondent

**Representation:**

For the Appellant: Mr P Nath, Home Office Presenting Officer

For the Respondent: Ms E Daykin, Counsel, instructed by Kilic & Kilic

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing an appeal by a citizen of Turkey (hereinafter “the claimant”) against his being made subject to automatic deportation under Section 32(5) of the UK Borders Act 2007.
2. It was accepted before by Ms Daykin, in a concession that was no more than proper and professional, that the decision of the First-tier Tribunal was not adequate. In particular, it paid no regard to established jurisprudence dealing with the proper approach to take in Section 32(5) cases. For example it made no reference to the decisions in Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC) or R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin) or, more importantly, the principles of law established and explained in those cases.

3. However there was more to be said. Ms Daykin pointed out something of considerable importance. The First-tier Tribunal accepted that the claimant was in a durable relationship with an EEA national exercising treaty rights. Ms Daykin submitted that, having found that the claimant was in such a relationship, the Tribunal should have found that the deportation decision complained was made under the wrong provisions. If the Secretary of State intended to deport the claimant then the decision should have been made as a decision against a person who was or may have been the family member of an EEA national exercising treaty rights. We say “may have been” because Ms Daykin properly drew our attention to the decision of this Tribunal in Rose (Automatic deportation exception 3) (Jamaica) [2011] UKUT 00276 (IAC) which said at paragraph 3 of the head note:

“However a person who has been found to be an OFM/extended family member under the Immigration (European Economic Area) Regulations 2006 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.”


4. We agree with Ms Daykin’s submission.
5. The point is that 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 cannot be the subject of automatic deportation (see section 33(3) of the 2007 Act).
6. With the agreement of both parties, it is our decision that the decision of the First-tier Tribunal is set aside because it was wrong in law but the only proper decision in this case is that the Secretary of State’s decision was itself wrong in law because it was made without first deciding if the appellant was entitled to a certificate of residence. On this occasion we have some sympathy for the Secretary of State because the difficulty was not something that was raised before her but that is irrelevant, it was raised before the First-tier Tribunal and had to be decided.
7. It follows therefore that we substitute the decision made by the First-tier Tribunal with a decision allowing the appeal to the extent that the Secretary of State’s decision is not in accordance with the law. The Secretary of State must now decide what she wants to do next and in particular to decide if the appellant is entitled to a certificate of residence and, if he is, if he is still to be deported under the appropriate regime.
8. Obviously any consideration on that point will be informed by the First-tier Tribunal’s finding that when it reached its decision that the appellant was in a durable relationship. It does not follow from that that he still is in such a relationship or that he cannot be deported lawfully.
9. No other findings of the First-tier Tribunal are binding or relevant in any way.

**Decision**

The Secretary of State's appeal is allowed.

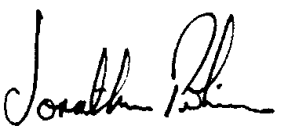
We set aside the decision of the First-tier Tribunal and substitute a decision allowing the claimant's appeal to the First-tier Tribunal because the decision complained of is not in accordance with the law.

Signed  
Jonathan Perkins  
Judge of the Upper Tribunal



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Dated 16 April 2014



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