



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

Appeal Number: PA/02325/2017

**THE IMMIGRATION ACTS**

**Heard at Bradford**

**On 18 April 2018**

**Decision & Reasons  
Promulgated  
On 20 April 2018**

**Before**

**UPPER TRIBUNAL JUDGE LANE**

**Between**

**DAVIE CHAIMA  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Hussain, instructed by Broudie Jackson Canter

For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant, Davie Chaima, was born on 17 December 1976 and is a male citizen of Malawi. He first arrived in the United Kingdom as a student in 2009. He subsequently claimed international protection as a refugee in September 2017. His application was refused by a decision of the Secretary of State dated 23 February 2017. The appellant appealed against that decision of the First-tier Tribunal (Judge Hillis) which, in a decision which was promulgated on 26 October 2017, dismissed the appeal. The appellant now appeals, with permission to the Upper Tribunal.

2. The appellant's claim to the Secretary of State was made on number of bases, including asylum and Article 3 ECHR. I record at the outset that this appeal to the Upper Tribunal is concerned only with the appellant's claim that he is entitled to a residence card as the partner of an EEA national, Joanna Czerwinska. Judge Hillis dealt with all aspects of the appeal including the claim for asylum in respect of Article 3 ECHR. His findings and the dismissal of the appeal on asylum and Article 3 ECHR grounds have not been challenged. There was no appeal to the First-tier Tribunal on Article 8 ECHR grounds. Mr Hussain, who appeared for the appellant before the Upper Tribunal, made it clear that there remained no challenge to the Secretary of State's decision on Article 8 grounds. In this decision, therefore, I will consider only the appeal under the EEA Regulations 2016.
3. The judge accepted that the appellant is in a genuine and subsisting relationship with Ms Czerwinska and their child [27]. That the appellant had been convicted on 22 September 2015 at Bradford Crown Court of having made false representations and possessing identity documents with intent. He was sentenced to fourteen months' imprisonment. He did not appeal against the sentence or conviction. I understand that the appellant used a false passport in order to gain employment. The appellant had been issued with a notice to deport him on 4 November 2015. The deportation had been signed in respect of the appellant on 26 September 2016. This follows service of that order that the appellant had made his claim for protection.
4. I am grateful to Mr Hussain, who appeared for the appellant, for providing me with a copy of his skeleton argument (which had been directed by Judge Plimmer when she granted permission in the Upper Tribunal). Mr Hussain submitted that the findings in respect of the EEA Regulations were important if only because the issue of a residence permit to the appellant as the unmarried partner of Ms Szerwinska would provide protection against his deportation.
5. I considered the submissions made by both parties' representatives very carefully. I have concluded that, although the decision of Judge Hillis contains errors, I have should decline to set aside his decision. My reasons are as follows. First, I accept, as Mr Hussain argues, that the judge wrongly failed to identify Ms Szerwinska as a "qualifying person" for the purpose of the Regulations because he found [52] that she had not been "exercising treaty rights in the United Kingdom for the minimum period of five years and did not have residential status in this country". Regulation 17(5) of the 2016 Regulations provides as follows:  

'(5) The Secretary of State may issue a registration certificate to an extended family member not falling within regulation 7(3) who is an EEA national on application if—

(a) the application is accompanied or joined by a valid national identity card or passport;

- (b) the relevant EEA national is a qualified person or an EEA national with a right of permanent residence under regulation 15; and
- (c) in all the circumstances it appears to the Secretary of State appropriate to issue the registration certificate.'

6. The appellant has not, pursuant to Regulation 7(3), been issued with a registration certificate or EEA family permit. He does, however, satisfy Regulation 17(5)(b) insofar as Ms Czerwinska is a qualified person. She is a Polish national exercising Treaty Rights in the United Kingdom. The judge appears to have read the provisions of sub-paragraph (b) as conjunctive rather than disjunctive; the EEA national is not required to be a qualifying person *and* have a permanent right of residence under Regulation 15.
7. However, I do not find that the judge's error is material. This is because the appellant cannot satisfy sub-paragraph (a); any application made by the appellant has not been accompanied or joined by a valid national identity card or passport. I accept the judge may have erred (as did the author of the refusal letter) by finding that the appellant had not actually made an application. The relevant Home Office guidance document (Processes and Procedures for EEA documentation applications: 21 April 2017) although it postdates the events in this appeal made it clear that a letter rather than a specific form could be used to make an application. The appellant submits (and this was not challenged by Mrs Pettersen for the Secretary of State) that his solicitors had written a letter. However, I am brought back to the observation made above namely that the appellant cannot succeed under Regulation 17(5) because his application in a letter or otherwise was not accompanied by a valid national identity card or passport.
8. The refusal letter [56] although it proceeded on the basis that the appellant had not made an application, did consider whether, if an application had been submitted, a residence permit would be "granted solely in the event of a durable relationship" with Ms Szerwinska. Paragraph 56 of the refusal letter leaves matters hanging in the air:
 

"Even if an EEA residence permit application was submitted it would not be granted solely in the event of a durable relationship was found to exist with an EEA national exercising treaty rights in the UK. The decision will still need to be made as to whether, on balance, it will be appropriate to exercise discretion under Regulation 17(6) to issue a residence card. In determining whether discretion should be exercised, consideration is given to an applicant's immigration history, criminal record and any other factors which might indicate that it would be conducive to the public good to refuse such an application."
9. Having set out the factors which might be considered by the Secretary of State in the exercise of a discretion, the letter then goes on to record that the appellant does not have an EEA residence permit and is not excluded from automatic deportation. Thereafter, the application is considered on Article 8 ECHR grounds. I accept that paragraph 56 is not, therefore, an

unequivocal statement by the Secretary of State that, had the appellant made an application (which I find he did), discretion to issue him with a residence card would not have been exercised in his favour. However, as I have stated above, this is no material because the appellant did not satisfy the requirement for an identity document.

10. The second ground for appeal asserts that the appeal should have been allowed to the extent that the decision was not in accordance with the law in that the Secretary of State had not followed her own IDI:

“You must consider whether the requirements of Regulation 8 (extended family member) of the Immigration (European Economic Area) Regulations 2016 have been met before you go on to stage 3.”

11. Mr Hussain submitted that the Home Office guidance indicated that a senior caseworker should have considered the application and exercised discretion on the part of the Secretary of State. I reject that ground of appeal. First, the appellant did not have the necessary identity document and, secondly, there was no evidence that the refusal letter has been written without the authority of a senior caseworker.
12. I note that the Rule 24 response of the Secretary of State appears to assume, as did Judge Hillis, that the discretion available to the Secretary of State under Regulation 17 had been unequivocally exercised against the appellant. I have set out the relevant paragraph above from which it will be seen that that is not the case. If discretion had been exercised against the appellant, then it is difficult to see, in the light of his criminal offending, that the discretion could be challenged successfully. Further, although the judge has made errors in his assessment of Ms Czerwinska as a “qualified person” and as to whether the appellant had made an application in respect of the EEA Regulations, the appellant could not succeed under Regulation 17 because he could not satisfy Regulation 17(5)(a).
13. In the circumstances, and notwithstanding the errors of the First-tier Tribunal judge, I find that the appellant’s appeal should be dismissed.

### **Notice of Decision**

This appeal is dismissed.

No anonymity direction is made.

Signed

Date 18 APRIL 2018

Upper Tribunal Judge Lane

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 18 APRIL 2018

Upper Tribunal Judge Lane