



IAC-FH-AR-V1

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

Appeal Number: PA/00042/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 5 November 2015**

**Decision & Reasons Promulgated  
On 25 November 2015**

**Before**

**THE HONOURABLE MR JUSTICE COLLINS**

**Between**

**TALENT MACHARIKA  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Miss G Thomas, Counsel, instructed by Irving and Co Solicitors

For the Respondent: Mr T Melvin, Home Office Presenting Officer

**DECISION AND REASONS**

1. We have before us an appeal and a cross-appeal against a decision made by First-tier Tribunal Judge Gibbs promulgated on 23 June in which she was considering an appeal by the appellant against a decision that refused an application for leave to remain on the basis of a protection and human rights claim.
2. The appellant himself is a national of Zimbabwe. He arrived in this country in September 2002 and was granted six months leave to enter. He made an application the following year and was granted leave to remain as a

student. A further application to stay on the same basis was made and granted until May 2005. However, he did not leave nor did he make any fresh application when that expired and he next came to the attention of the Home Office when he was arrested in December 2006 on suspicion of possession of a false instrument, that was an application for a national insurance number and on 2 March 2007 he was convicted of possession of a false instrument and sentenced to nine months' imprisonment.

3. In December 2006 he had been served with an IS151A as an overstayer and on 2 April 2007 following his conviction at the Crown Court he was notified he was liable to deportation and a letter was sent telling him of that, but he made an asylum claim to the Home Office and he also lodged an appeal against the decision to deport him. His application for asylum was rejected and his appeal processes against that decision which included a judicial review claim failed. By March 2009 he was appeal rights exhausted.
4. It seems he was granted permission to work in October 2010. However the decision with which this appeal is concerned is a decision made in March this year which followed a decision in August 2014 which purported to refuse to revoke a deportation order. That apparently was withdrawn a few days after it was made.
5. However the Home Office by the time it made its decision to refuse a protection and human rights claim realised that a deportation order had never been signed and accordingly the decision not to revoke the deportation order was withdrawn for the obvious reason that one cannot revoke something that has never been in place.
6. In the course of being here he has met an Irish national, Miss McSweeney, who is here pursuing her right to work in accordance with the EEA Regulations and it is his case that that is a relationship which not only is still continuing and has continued since 2012, but is a solid relationship which is going to be maintained. That would if accepted entitle him to apply for an EEA residence card in accordance with the Immigration (EEA) Regulations 2006. It is clear that there has never been any formal application for such a residence card submitted by the appellant or on his behalf. Miss Thomas makes the point that the Regulations do not set out any particular manner in which such an application should be made nor is there any form which covers precisely that.
7. Nonetheless it is reasonable to expect that it will be made clear to the Secretary of State that such an application is indeed being made and the nearest we get to it in correspondence certainly prior to the beginning of this year was that it was a matter that might fall to be considered.
8. However we note from a letter of 2 March 2015 from the appellant's solicitor to the criminal case work department in Liverpool which was the department in the Home Office that was dealing with this matter that he said as follows:

“Further to our telephone conversation on 25 February 2015 we understand that the asylum team has taken conduct over deciding our client's representations under the Citizens Directive 2004/38/EC and you have agreed to consider this without requesting a payment of a fee. Please note that the representations were made initially on 22 August 2014. We are drawing your attention to the fact that the representations made in respect of our client's EEA status have yet to be decided and it is now over six months since these representations have been outstanding in this respect.”

And they draw attention to Article 10 of the Directive which requires decisions on residence cards to be made within six months.

9. It is plain from that that they thought that they had made an application albeit it is clear that they had not directly done so.
10. So far as the no fee is concerned, that would appear to relate to the Citizens Directive and it is not entirely clear to us quite what materiality that has. However it is apparent and it was drawn to the attention of the Secretary of State by that letter that there was a belief that an EEA application was before the Secretary of State.
11. But when one looks at the decision letter against which the appeal was brought one sees that it is headed “Decision to refuse a protection and human rights claim”. There is reference to the EEA 2006 Regulations in paragraphs 17 and 18 and it is there said:-

“18. The Secretary of State has considered the merits of any potential application you could make to the Home Office for confirmation of a right to reside under European law. It has been concluded that although it may be accepted that you are currently in a genuine and subsisting relationship with an EEA national as per Regulation 8(5) the serious threat you pose to the fundamental interest to society of the United Kingdom as demonstrated by your criminality and resultant terms of imprisonment would make it necessary for the Secretary of State to invoke Regulation 17(4) and deem it inappropriate to issue you with such confirmation. It is considered that any application for confirmation of a right to reside under European law would fail on this basis.”
12. That is not a decision to refuse a residence card because it has not been considered that such an application had to be determined by the Secretary of State notwithstanding what was drawn to the attention of the Home Office in the letter of 2 March to which we have already referred.
13. The decision letter then went on to consider first the protection claim which it rejected, and then the Article 8 claim, which again it rejected on the basis that neither family life nor private life was sufficiently compelling to permit the appellant to remain in this country. It is clear that he has no right under the Rules as such. One has to look at Article 8 outside the Rules which of course is something which can be done and may in certain circumstances mean that an Article 8 claim succeeds.

14. Paragraph 62 of the decision letter stated that “Your protection and human rights claim has been refused. Therefore the decision to deport you pursuant to Section 5(1) of the Immigration Act 1971 is maintained.” And that refers back, we are told (we have no reason to doubt) to the decision made as long ago as 2007 that deportation would take place. That of course is on the basis essentially of public policy.
15. The right to appeal was then specified and it was stated to be a right of appeal against the decision to refuse the protection and human rights claim and the right arose under Section 82 of the 2002 Act. There is no suggestion that there was a right of appeal or any consideration of appeal under Regulation 26 of the EEA Regulations which would have been the correct route for an appeal had there been a refusal of a residence card. When one goes back to Judge Gibbs’ decision one sees in paragraph 7 that she recognises that that is the basis of the appeal that is before her.
16. In the course of her decision she considered, she said, Regulation 21 in relation to the EEA Regulations. That was not before her and that was not for her to consider in connection with the appeal that was before her. She did however consider that the appellant would not suffer any material ill-treatment were he to be returned to Zimbabwe and she made the point, she called it serious harm, but she made the point that the issue had not been pursued with any vigour by his then representative. I am bound to say we are not in the least surprised at that in the light of the present evidence that exists in relation to the situation in Zimbabwe. But we need not go into that further.
17. However, what Judge Gibbs did not do was to consider in any depth, or indeed really essentially at all, the Article 8 issue which had been set out in some detail in the refusal letter and it is not contended on the Secretary of State's behalf that she did satisfactorily deal with that issue.
18. However what she decided was as follows in paragraphs 22 to 24 of her decision.
  - “22. The appellant should be issued a residence card in accordance with Regulation 17 of the Immigration (European Economic Area) Regulations 2006.
  23. I dismiss the appeal.
  24. The appeal is dismissed on human rights grounds.”
19. It is perhaps fairly obvious that there is something of a discrepancy between 23 and 24 because 23 appears to be general. However since she had not dealt with the human rights grounds in any proper manner she was not entitled to dismiss the appeal on human rights grounds. And so far as the residence card is concerned she had no jurisdiction to require that that be issued because it was a matter for the Secretary of State to make a decision and exercise her discretion, which she would have because of the appellant's past history and she might reject the application. The basis upon which that would be done is not necessarily

precisely the same as the basis upon which an Article 8 claim would fall to be considered, although there is an obvious materiality between the two.

20. In those circumstances it is entirely clear to us that the decision of Judge Gibbs cannot stand and must therefore be set aside.
21. We have then to consider what is the sensible approach that we should adopt in relation to this appeal. As we have indicated in going through the background and the correspondence it is clear that those representing the appellant believed, albeit it was not put as clearly as it should have been, that there was a claim being made for a residence card but it is equally clear that that had not been the view of the Secretary of State and the Secretary of State had not dealt with that matter and decided whether or not to grant a residence card. It seems to us in those circumstances that it would be somewhat futile to send the matter back to the First-tier Tribunal to deal with the appeal on the same basis as Judge Gibbs had to deal with it, namely without direct consideration of the EEA aspect.
22. Since we are clearly of the view that it was drawn to the attention of the Secretary of State that there was an application being made, albeit not in perhaps a particularly formal fashion, for a residence card it seems to us that the sensible course is for us to send this back to the Secretary of State for the Secretary of State to make a decision on the application for a residence card. If of course that is allowed that will be the end of matters. If it is rejected then since there is a decision that deportation will take place an appeal could be made with a combination of Article 26 of the EEA Regulations and Article 8 of the Human Rights Act and all matters which are material to deciding whether the appellant has the right to remain in this country can be properly considered.

### **Notice of Decision**

The appeal is allowed.

No anonymity direction is made.

Signed




Date: 12 November 2015

Mr Justice Collins

### **TO THE RESPONDENT** **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award.

Signed 

Date: 12 November 2015

Mr Justice Collins