

NGONIDZASHE TAMSANQA GOBA
versus
ZIMBABWE REVENUE AUTHORITY
and
COMMISSIONER OF CUSTOMS AND EXCISE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 18 February 2015

Opposed Application

J S Samukange, for the applicant
S P Musithu, for the respondents

HUNGWE J: The applicant is a Zimbabwean citizen who has been resident in Namibia since 1998 when he accompanied his father who was employed by the Namibian government. As such he enjoyed permission to remain in Namibia by virtue of being part of a family. His father's contract of employment terminated on or about 31 December 2010. Temporary residence permits were endorsed in his passport until 31 December 2010. Whenever his father's contract of employment was renewed, the applicant's permit was also extended. After his father's contract of employment expired in 2010, the Namibian government extended the temporary residence permit for his family including the applicant, for the purposes of winding up their affairs. This was done in writing although there was no such endorsement to this effect in their passports. The applicant contends that his temporary residence in Namibia subsisted until his final departure on 3 September 2011. Prior to this final departure applicant returned to Zimbabwe on a visit on 30 January 2011.

In August 2011 the applicant had purchased a motor vehicle from a dealer based in Japan. He paid for it in full on 29 August 2011. Upon his return to Zimbabwe through Kazungula Border post he was admitted into Zimbabwe as a returning resident coming back to resume permanent residence in Zimbabwe. His passport was endorsed as such. As a returning resident, applicant was eligible for an immigrant rebate in respect of his personal effects including one motor vehicle. The applicant's motor vehicle arrived at the Beit Bridge border post on 19 November 2011. The first respondent detained it. The applicant approached

the first respondent's offices to make representations and claim the motor vehicle under the immigrants' rebate scheme. His representations were denied on the pretext that he did not qualify for such rebate as he had finally returned to Zimbabwe on 30 January 2011. His appeal to second respondent against this ruling did not meet with success nor was it responded to. Instead they demanded payment of duty in the sum of US\$ 2 907, 00 or R22 460, 00 over and above storage charges of US\$410, 00 per day.

The respondents on the other hand contend that the applicant was disqualified from claiming a returning resident's rebate since by the time he acquired the motor vehicle in question, on 29 August 2011, he was no longer lawfully resident in Namibia. In dismissing an appeal by the applicant first respondent wrote to the applicant in the following terms:

"Having carefully considered the appeal, I wish to advise that the appeal has not been successful for the following reasons.

Section 105(1) (b) of the Customs and Excise (General) Regulations in SI 154 of 2001 defines 'time of arrival' in relation to an immigrant who has previously resided or has been employed in Zimbabwe and who has been on contract of employment, the first occasion on which he returns to Zimbabwe after the expiry of such contract; or if he has been on an extended absence for any other reason, the first occasion on which he returns to Zimbabwe.

Your client came back to Zimbabwe on 30th of January 2011 because his residence permit in Namibia had expired and therefore was not "legally resident" in Namibia after 30th of January 2011. The Ministry of Home Affairs in Namibia, in a letter dated 4 February 2011 specifically rejected your client's application for an extension of stay and gave him 30 days to wind up and leave the country.

The fact that your client re-entered Namibia on the 22nd of August 2011 on a 'visitor' permit underlines the fact that he was no longer a legal resident of Namibia and his time of arrival he remains a fugitive of January 2011 which was **'the first occasion'** he returned to Zimbabwe after the expiry of the fathers contract of employment which was tied to the appellants resident permit.

After the expiry of the permanent resident permit, your client naturally reverted to his Zimbabwe permanent resident status and this occurred on the 30th of January 2011, when immigration correctly endorsed the "RR" in his passport.

I therefore advise that duty and storage charges remain payable on the vehicle."

Faced with this attitude, applicant has applied to this court for an order in the following terms:

1. That the decision of second respondent rejecting the applicant's claim for immigrants' rebate be and is hereby set aside.
2. That the first respondent be and is hereby ordered to release the applicant's motor vehicle without any conditions.

3. The first respondent pays the costs of suit on an attorney and client scale

In their heads of argument resisting the grant of the order sought, the respondents argue that since the applicant's father's work permit expired on 30 December 2010, this becomes the date on which the applicant's residence permit expired for the purpose of the law. However the respondents accept when the applicant's father was denied a work permit he was given 90 days from 19 April 2011 within which to exclusively wind up his affairs and depart from Namibia. Therefore, according to the respondents, the applicant's father would have been staying in Namibia illegally from 1 August 2011. Consequently, so the argument went, applicant would have similarly been illegally staying in Namibia. On applicant's return to Zimbabwe on 30 January 2011, he was accepted as a "returning resident" hence his lengthy stay in Zimbabwe from that date until he returned to Namibia on 22 August 2011. On that occasion he was accepted as a "visitor" and given until 5 September 2011 to remain in Namibia.

This matter turns on when exactly was the applicant's time of arrival for the purposes of s 105 of the Regulations. Was it 30 January 2011 as submitted by the respondents or 3 September 2011 as submitted by the applicant? If I find that the applicant arrived in Zimbabwe on the first occasion on 30 January 2011, then the issue whether he qualifies for a returning resident's immigration rebate does not arise. It will only arise if the court finds that for the purposes of the Regulations, the applicant arrive in Zimbabwe on 3 September 2011.

The Regulations define time of arrival for the purposes of determining whether a person qualifies for an immigrant's rebate as follows:

"time of arrival" means—

- (a) in relation to an immigrant who has not previously resided or been employed in Zimbabwe, the first occasion on which he enters Zimbabwe, the first occasion on which he enters Zimbabwe after the grant of his employment or residence permit:

Provided that the time of arrival of a person who enters Zimbabwe as a visitor, but remains to take up employment or permanent residence and does not depart from Zimbabwe, shall be deemed to be the first occasion he imports any personal and household effects and other goods in terms of this section within three months from the date of grant of his employment or residence permit;

- (b) in relation to an immigrant who has previously resided or been employed in Zimbabwe and who—

- (i) has been on a course of study, the first occasion on which he returns to Zimbabwe after successfully completing such course of study; or
(ii) has been on contract employment, the first occasion on which he returns to Zimbabwe after the expiry of such contract; or
(iii) has been on an extended absence for any other reason, the first

occasion on which he returns to Zimbabwe:

Provided that the time of arrival of a former resident who enters Zimbabwe as a visitor and does not depart from Zimbabwe shall be deemed to be the first occasion on which he imports any personal and household effects and other goods in terms of this section within three months from the grant of his permanent returning resident status;

- (c) in relation to a former diplomat who remains in Zimbabwe to take up employment or permanent residence, the first occasion he imports any personal and household effects and other goods in terms of this section within three months from the date of grant of his new employment permit or residence permit.

The respondents contend that the applicant was not resident in Namibia by virtue of him undertaking some studies or employment. He was staying with his parents. As such, for the purposes of the Regulations, he was on an extended absence for any other reason contemplated by para (b) (iii) which defines time of arrival. In terms of the said paragraph the “time of arrival” of a person who has been on an extended absence for any other reason is **the first occasion** on which he returns to Zimbabwe. The respondents argue that the applicant came to Zimbabwe at a time when his father’s permit had expired. He came back as a returning resident and was accepted as such by Zimbabwe immigration authorities. He was not accepted into Zimbabwe as a visitor when he came on 30 January 2011. If he had been accepted as a visitor, his passport would have been so endorsed and he would have been allowed up to a maximum of 30 days usually permitted or granted to Zimbabweans permanently resident in other countries. The applicant’s passport does not bear an endorsement to suggest that he was given an extension of stay in Zimbabwe as a visitor.

In my view this is quite a strong argument especially when literally read in the context of the thrust of the regulations. Interpreted strictly, this paragraph places the burden to declare a status on the returning resident. He must, without being warned of the consequences, elect the status under which his papers upon re-entry into Zimbabwe ought to be processed. The returning resident is presumed, by this interpretation, to be aware of the consequences of failure to indicate whether one wishes to be treated as a visitor or as a permanent returning resident who wishes to resume his permanent stay in Zimbabwe. In my view if this was intended, the Regulations would have said so. The fact that there was no endorsement that the applicant was accepted as a visitor does not in my view, imply that he was accepted as a returning resident. If this were so the corollary of this ought to apply: there ought to have been such an endorsement by the immigration authorities to that effect. Even if there was such an endorsement, in my view, the phrase “the first occasion on which he

returns to Zimbabwe” may be interpreted to mean that where a Zimbabwean citizen resident abroad wishes for some reason say vacation, holiday bereavement and so on; once he sets foot into the country but without the intent to settle permanently, then he forfeits his or her entitlement to a returning resident’s rebate when he/she finally returns home. This clearly could not have been the intended object of the Regulations. Zimbabweans resident abroad are aware that when they finally return, they will be entitled to the rebate. This final date of return can only be ascertained from the returning resident himself or herself.

The general expectation is that it is up to the immigration official to ask a returning resident whether he has come back for good or not. If he has, he naturally will indicate this and will be interviewed for the purpose of deciding whether he wishes to exercise the right to an immigrant’s rebate there and then or at some later stage when his household goods arrive in the country.

The respondents also rely on their interpretation of the endorsements in the applicant’s passport by the Namibian immigration authorities in urging this court to find that the applicant was accepted into that country as a visitor on 22 August 2011. I decline that invitation. It is merely an expression of opinion as to what the practice in Namibia is on the issue. There is no basis for this court to accept that indeed that interpretation is correct. No expert opinion evidence regarding this aspect of Namibian law or practice was tendered in support of the averment.

Even if that interpretation were correct, that alone in my view, would not detract from the applicant’s status in Zimbabwe on 3 September 2011 when he was interviewed and accepted as a returning resident. There is no history of such an interview prior to this one. It seems to me that the respondents would have been on firmer ground were they able to point to such an interview where the applicant’s decision to return permanently was established without the applicant claiming a rebate within the period stipulated by the Regulations. The reason for coming to this conclusion is as follows. This court cannot be asked to consider the applicant’s status in a foreign country in an effort to persuade the court to interpret the applicable regulations in Zimbabwe when clearly the permanent residence status was granted to that person and endorsed in his passport as such. The applicant’s passport was endorsed “Acc R/R” upon his return to Zimbabwe on 3 September 2011. Applicant argues that this denotes that the respondents accepted him as a permanent returning resident. It seems to me that it was only then that first respondent inquired of the applicant whether he wished to exercise his right to an immigrant’s rebate since he was returning to Zimbabwe after “an

extended period of absence for any other reason.” The Regulations provide that the time of arrival of a former resident who enters Zimbabwe as a visitor and does not depart from Zimbabwe shall be deemed to be the first occasion on which he imports any personal and household effects and other goods in terms of this section within three months from the grant of his permanent returning resident status. The one interpretation to be given to this provision is that one must have initially entered Zimbabwe as a visitor and then decide to remain there and imports his household effects within three months of having arrived. The other interpretation is that having been interviewed for the purposes of making a determination on whether applicant qualified for an immigrant’s rebate the returning resident must import his goods and household effects within three months in order to benefit from the permanent returning resident status in terms of the Regulations. On his return to Zimbabwe on 3 September 2011, the applicant was interviewed and an endorsement to that effect made, accepting him as a returning resident. The applicant contends that the respondents cannot, after granting him the returning resident status, turn around and claim that he was illegally staying elsewhere so he does not qualify for the rebate. His status in that other jurisdiction in my view, is not relevant for the purpose of determining whether applicant meets the criteria set out in s 105 of the Regulations. I say this because the regulations spell out the criteria. The legality or otherwise of the claimant’s status in some other jurisdiction cannot have been within the contemplation of the framers of the regulations. The Regulations are meant to encourage migration back into Zimbabwe by benefitting those of the immigrants who have previously been resident of this country. To give an interpretation that fettered or oppressed that class for whose benefit the regulations were meant would, in my view, be to frustrate the object, purpose and intention of the legislature. The Regulations have been in force for a considerable period. The right to benefit from the provisions of the Regulations has created, in my view, a substantive legitimate expectation for permanent returning residents to Zimbabwe to enjoy the associated benefits which flow from the Regulations. The authorities administering the regulations must do so rationally, fairly, non-arbitrarily and in an unbiased manner. If a denial of a legitimate expectation in a given case amounts to denial of a right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on well-known grounds of review.

In *R (Bhatt Murphy) v Secretary of State for the Home Department* [2008] EWCA Civ 755 LORD JUSTICE LAWS expressed how, arising from the doctrine of legitimate expectation, an abuse of power may be established:

“A very broad summary of the place of legitimate expectations in public law might be expressed as follows. The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. If it has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation). If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation). If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation). To do otherwise, in any of these instances, would be to act so unfairly as to perpetrate an abuse of power.”

The respondents argue that the first occasion on which the applicant returned ought to be 30th January 2011. This cannot be so for the further reason that the respondents themselves never sought to establish, on that occasion, whether, by his return on the date, the applicant wished to be treated as harbouring an intent to settle permanently or only wished to visit. Had this been the case, then the applicant’s passport would have carried the endorsement one way or the other. In my view it is irrational, and therefore unreasonable, irregular and unfair to deprive the applicant a right which accrued to him as a returning resident in the circumstances of this case.

The applicant seeks a review of the decision of the second respondent dismissing his claim under the immigrant rebate on the grounds of gross irrationality in his assessment of the evidence before him and misdirection at law in the second respondent’s application of s 105 of the Customs and Excise (General) Regulations, SI 154 of 2001.

In *Affretair (Pvt) Ltd v M K Airlines (Pvt) Ltd* 1996 (2) ZLR 15 @p 21-22 it is written:

“The duty of the Courts is not to dismiss the authority and take over its functions, but to ensure, as far as humanly and legally possible, that it carries out its functions fairly and transparently. If we are satisfied it has done that, we cannot interfere just because we do not approve of its conclusion. But at the other end of the scale, if the conclusion is hopelessly wrong, the Courts may say that it could only have been arrived at by reference to improper considerations or by failure to refer to proper considerations. In these cases we reason backwards from the effect to the cause. We say `the result is so bizarre that the process by which it was reached must have been unfair or lacking in transparency”.

So, in the result, the courts will expect from administrative bodies decisions that are:

- “1. Legal, in the sense that they are made within the framework of the law which empowers them to make the decision, and after the application of the appropriate criteria laid down in the statute or statutory instrument;
2. Rational, in the sense that they are not so wrong as to lead to the conclusion that they could only have been reached by a failure to apply the right criteria or by the application, whether deliberately or not, of the wrong criteria.
3. Procedurally proper, in the sense that the appropriate procedures required by the statute have been followed and that the principles of natural justice have been observed.
4. Justifiable, in that the administrative body will give its decision, at least when the decision is challenged, with reasons. The purpose of requiring reasons is that the Court can then more readily determine the propriety and reviewability of the decision.”

(See also *Metsola v Chairman of the PSC & Anor* 1989 (3) ZLR 147; *Patriotic Front-ZAPU v Minister of Justice, Legal & Parliamentary Affairs* 1985 (1) ZLR 305 (SC) at 327-8; 1986 (1) SA 532 (ZS) at 548D).

The decision by the respondents qualifies, in my view, to be described as “so outrageous in its defiance of logic or accepted moral standard that sensible person who had applied his mind to the question to be decided could have arrived at it.” (per LORD DIPLOCK in *Council of Civil Service Unions (CCSU) & Ors v Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 954g). The applicant was an immigrant because he was on an extended absence from Zimbabwe for more than two years. In order to establish whether he was returning permanently or not, the respondents were enjoined to interview him as they did on 3 September 2011. The respondents did not establish such purpose from him on 30 January 2011. They were not obliged to if the applicant did not indicate that he wished to claim a benefit under the regulations. This was the only occasion on which the applicant was granted permanent residence. Accordingly, for the purpose determining “time of arrival” the “first occasion” of his return for the purpose of permanent returning residence status became 3 September 2011.

As to whether by 3 September 2011 the applicant had fully paid for the motor vehicle, I come to the conclusion that the correct position is that he had fully paid for it by 29 August 2011 as reflected by the FNB invoice. He therefore owned the vehicle from 29 August 2011 and consequently was entitled to claim an immigrant’s rebate at the time of arrival on 3 September 2011. I am unable to find that the applicant was an illegal resident of Namibia. There is just no evidence of this besides the bald claim by

the respondents. The respondents' assertion in this regard is illogical and therefore unreasonable and irrational in the sense that no evidence of this claim was tendered in proof of the allegation. In any event, in my respectful view, the applicant's status is as it presented itself on 3 September 2011. There was no legal impediment to his claim for an immigrant's rebate. The refusal to accede to his claim for a rebate in terms of the Regulations, seen in this light, is unreasonable and therefore irrational. Consequently that decision is set aside.

It is ordered as follows;

1. "That the decision of second respondent rejecting the applicant's claim for immigrants' rebate be and is hereby set aside.
2. That the first respondent be and is hereby ordered to release the applicant's motor vehicle without any conditions.
3. The first respondent pays the costs of suit."

Venturas & Samukange, applicant's legal practitioners