



**The Upper Tribunal
(Immigration and Asylum Chamber)
number: IA/32914/2013**

Appeal

THE IMMIGRATION ACTS

Heard at Field House

On March 6, 2015

issued

2015

Determination

On March 9,

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

**MR SYLVESTER NNAETO IYIEGBU
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant

Mr Rene, Counsel, instructed by Dorcas Funmi & Co
Solicitors

Respondent

Ms Everett (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria and at the date the matter was originally heard he was 70 years of age. The appellant entered the United Kingdom as a visitor on April 4, 2013 that enabled him to remain here until June 6, 2014. On June 5, 2013 the respondent received an application from him on Form FLR(O) in which he sought leave to remain for a purpose not covered by other application forms. The respondent considered the application but refused his

application on July 8, 2013 and at the same time took a decision to remove him from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant appealed on August 2, 2013 under section 82(1) of the Nationality, Immigration and Asylum Act 2002. Solicitors acting on his behalf, at this point, raised articles 2, 3 and 8 ECHR on the basis the respondent had failed to consider whether the treatment needed was available in Nigeria and the consequence of the appellant being unable to access treatment in Nigeria. The grounds also contended that the respondent should have exercised her discretion differently under the Immigration Rules.
3. The matter came before Judge of the First-tier Tribunal Brown (hereinafter referred to as the "FtTJ") on October 13, 2014 and in a decision promulgated on November 21, 2014 he dismissed the appeal on human rights grounds and under the Immigration Rules. Ms Magrath of Counsel on that occasion represented the appellant.
4. The appellant lodged grounds of appeal on December 4, 2014 on three grounds. On January 21, 2015 Judge of the First-tier Tribunal Levin gave permission to appeal finding there were arguable grounds that the FtTJ had erred with his approach to article 8 ECHR. He found no merit in the first ground of appeal given that counsel had, in her submissions and skeleton argument, argued for the case to be dealt with outside of the Rules.
5. The matter came before me on the above date and the parties were represented as set out above. The appellant was in attendance with his daughter.

PRELIMINARY ISSUE

6. Mr Rene indicated that he wished to revisit the first ground of appeal that Judge of the First-tier Tribunal Levin had found no merit in. he submitted the FtTJ should have considered the appeal under paragraph 51 HC 395 and that it was an obvious issue that should have been determined. Whilst he accepted neither the solicitors nor counsel had raised this avenue before it was something the FtTJ should have considered and as such there was a material error.
7. Ms Everett opposed the expansion of the grounds and submitted that this was not something that had been argued before the FtTJ. The Court of Appeal had made clear at paragraph [89] in GS (India) [2015] EWCA Civ 40 that the hurdle as set out in Robinson v Secretary of State [1998] QB 929 was a high hurdle. There was no evidence before the FtTJ that he could have met the Rules in any event so this was not the "Robinson" obvious point now being raised. I was invited to reject an expansion of the grounds of appeal.

8. Having considered the submissions of both representatives I am satisfied that this is a new matter that counsel now seeks to raise. The appellant lodged his own application but when his application was refused he instructed solicitors who signed and lodged grounds of appeal on his behalf. On June 16, 2014 the appellant's solicitors lodged a paginated bundle and relevant annexes and asked that these documents be treated as a "necessary part of the appellant's appeal". No additional grounds were raised in this bundle. At the hearing counsel handed to the respondent and Tribunal her skeleton argument and she invited the Tribunal to allow the appeal only under article 8 ECHR.
9. At the hearing counsel confined her grounds of appeal to article 8 ECHR.
10. Following the FtTJ's decision grounds for permission to appeal were lodged and the first ground submitted that the "FtTJ has materially erred by failing to consider the appellant's case under the Immigration rules, in particular Appendix FM and paragraph 276ADE in line with " recent decisions on article 8 .
11. When Mr Rene submitted to me the issue was "Robinson" obvious I raised with him the hypothetical question that if it was so obvious then why had no one, prior to today, raised the issue.
12. At paragraph [89] of GS the Court of Appeal stated

Generally, the UT will not make an error of law by failing to consider a point never put to it. That is not, however, an absolute rule. Sometimes new issues are (in the lamentable *patois* of the cases) "Robinson obvious". The reference is to *Robinson v Secretary of State* [1998] QB 929, in which it was held at paragraph 39 that the appellate authorities "are not required to engage in a search for new points. If there is readily discernible an obvious point of Convention law which favours the applicant although he has not taken it, then the special adjudicator should apply it in his favour, but he should feel under no obligation to prolong the hearing by asking the parties for submissions on points which they have not taken but which could be properly categorised as merely 'arguable' as opposed to 'obvious'... When we refer to an obvious point we mean a point which has a strong prospect of success if it is argued. Nothing less will do."
13. Ms Everett pointed out that paragraph [51] carries a number of requirements and raised the question of whether the appellant could switch from general visitor status to visitor for private medical treatment.
14. It seems the appellant would be able to switch as long as he did so as a person with leave so that would not have been an issue for the FtTJ.

Paragraph 51 HC 395 sets out what requirements need to be met and whilst there are no mandatory requirements there are evidential requirements surrounding his condition, treatment, duration of treatment and availability of funds.

15. As Ms Everett submitted the appellant was not automatically entitled to a grant under paragraph 51 HC 395. I also am satisfied that if this issue was so obvious then it would have been contained in the grounds of appeal as well as the skeleton argument. At the very least Counsel would have raised it.
16. I disagree with Mr Rene and find the matter is not “Robinson obvious”. This argument does not reflect the way the case was put before the FtTJ or the basis on which he was given permission. It was raised in counsel’s skeleton argument for the hearing and only emerged at the hearing before me. The Upper Tribunal is not required to hear arguments that were neither raised nor argued until today. Whilst this is not an article 8 case the Tribunal in MB (Article 8 - near miss) Pakistan [2010] UKUT 282 (IAC) considered matters not mentioned in the grounds or notice of appeal and stated that as the issue had not been properly raised before him, the judge could not be said to have made an error of law.
17. I therefore limit the grounds of appeal to those matters upon which leave has been given.

ERROR OF LAW SUBMISSIONS

18. Mr Rene submitted that the FtTJ erred by failing to have regard to all of the factors raised including the relationship with his daughter and her son and his medical situation. Whilst Section 55 of the Borders, Citizenship and Immigration Act 2009 did not assist the appellant but the FtTJ should have considered the effect of removal on the appellant’s daughter and child. The Court of Appeal had made clear in GS that a medical condition along with others factors can engage article 8. The FtTJ erred when he found the circumstances were neither exceptional nor compelling. He further erred because he accepted there was family life in paragraph [22] of his determination but failed to consider all of the circumstances.
19. Ms Everett submitted the FtTJ considered the medical evidence and did not find anything exceptional about it because he was satisfied the appellant could return to Nigeria and obtain treatment there as he had done prior to his visit. In Singh and Kahlid v SSHD [2015] EWCA Civ 74 the Court of Appeal made clear at paragraph [67] that neither MM (Lebanon) [2014] EWCA Civ 985 nor Ganesabalan [2014] EWHC 2712 (Admin) undermined the point made by Sales J in paragraph [30] of his judgement in Nagre. The FtTJ demonstrated from paragraph [21] of his determination that he had considered all of the evidence in the round and found the appellant had a limited family life with his daughter and grandchild but a stronger family life

with his wife in Nigeria. He may have created a private life here through his medical treatment but there was no challenge to the FtTJ's finding that medical treatment was available in Nigeria and the sponsor was able to pay the same.

20. Mr Rene emphasised that there were no financial implications for the UK government because all medical treatment had been paid for privately and the FtTJ was wrong to find there was nothing exceptional about the appellant's medical condition.
21. I reserved my decision after hearing these submissions.

ERROR OF LAW ASSESSMENT

22. The issue I have to consider is the FtTJ's assessment and approach to article 8. The FtTJ was fully aware that this was a claim outside of the immigration Rules because counsel's skeleton argument indicated as much.
23. The FtTJ approached this appeal in that vein because at paragraphs [21] and [22] he stated-

"I must consider the appeal under the general law in relation to article 8 of the ECHR outside of the Immigration Rules... I accept that over a relatively short period of time the appellant has developed some family life in the UK with his daughter and her family but I take account of the fact that the majority of his family including his wife remain in Nigeria. The appellant has by reason of his illness engaged with UK health services and therefore has some private elements of private life."

24. My view that he considered article 8 is strengthened further because in paragraph [23] of his determination he proceeded to consider the remaining questions posed by Lord Bingham in Razgar [2004] UKHL 00027. He identified in paragraph [23] that the issue before him was "whether any interference with private and/or family life is proportionate to the legitimate aim set out".
25. He then considered the appellant's medical situation and current circumstances and made findings that are unchallenged in paragraph [24].
26. In paragraph [25] he referred to case law placed before him namely GS and EO (India) [2012] UKUT 00397. The recent case of GS (India) [2015] EWCA Civ 40 provides the approach to be taken in medical cases. The Court of Appeal upheld the approach taken by Moses LJ in MM (Zimbabwe) [2012] EWCA Civ 279 where he stated

"The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is

where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under Article 8. That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported."

27. However, this is not a case where there was a lack of medical facilities in Nigeria. The FtTJ found the cost of treatment in Nigeria was similar and as his daughter was prepared to fund the cost of his treatment privately here then she would clearly be able to continue the same arrangement in Nigeria.
28. Accordingly, when the FtTJ found there was nothing exceptional or compelling about his situation I am satisfied that he was dealing with the appellant's medical situation. Whilst his condition was regrettable it was not something that had developed in the United Kingdom but it was a condition he suffered with in Nigeria and had received treatment for.
29. The appellant's daughter acknowledged that her father could apply as a dependant relative but he took a decision to try and remain here outside of the Rules.
30. His whole family live in Nigeria and his wife, of many years, is waiting for him there. His whole life was there and whilst the FtTJ accepted there was family life between him and his daughter that had to be balanced against the family life he has in Nigeria.
31. The FtTJ was aware of all these factors when he refused the appeal and nothing I have heard today persuades me there has been any error.
32. The grandchild's life is in the United Kingdom and his relationship to the appellant must be viewed in that context. The daughter is not financially dependant on her father and provides financial support towards medical bills. She is an adult and their relationship but be considered in that light.
33. I therefore find there is no error in law and the original decision shall stand.

DECISION

34. There was no material error. I uphold the original decision.

35. The First-tier Tribunal did not make an anonymity direction pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and I see no reason to alter that order.

Signed:

Dated:



Deputy Upper Tribunal Judge Alis

**TO THE RESPONDENT
FEE AWARD**

I make no amendment to the order made in the First-tier.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis

