



IAC-AH-KRL-V2

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

Appeal Number: AA/01673/2014

THE IMMIGRATION ACTS

**Heard at Manchester
On 30th September 2014**

**Decision & Reasons Promulgated
On 22nd Oct 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MR ADEDAMOLA USMAN ODUBORISHA
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mohammed, legal representative
For the Respondent: Mr G Harrison, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria, born on 1st March 1978. The Appellant travelled to the UK by plane using his own passport and visit visa. He arrived on 16th June 2013 and claimed asylum on 22nd June 2013. That application was refused by Notice of Refusal dated 19th July 2013. The Appellant made further submissions to the Secretary of State on both 20th September 2013 and 21st February 2014 and those submissions were considered as a fresh application for asylum and/or a fresh human rights claim. That application was refused by the Secretary of State in a detailed reasons for refusal letter dated 25th February 2014.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Lever sitting at Manchester on 14th April 2014. In a determination promulgated on 24th April 2014 the Appellant's claim under the Refugee Convention was certified as unfounded giving no right of appeal and the Appellant was found not to be in need of humanitarian protection. Further the Appellant's appeal under the Human Rights Act was dismissed.
3. The Appellant had appeared in person before the First-tier Tribunal and lodged Grounds of Appeal personally to the Upper Tribunal on 13th May 2014. On 20th June 2014 Judge of the First-tier Tribunal Ievins granted permission to appeal. On granting permission to appeal Judge Ievins noted that the Appellant suffers from kidney failure and is on dialysis three times a week. His application for permission to appeal was late but the Appellant explained this by saying he had been in hospital and that his health was deteriorating. Judge Ievins considered this to be a reasonable explanation and permission to appeal is granted as to the timeliness. So far as the substantive merits were concerned Judge Ievins noted that the Appellant had arrived in the United Kingdom as a visitor and promptly claimed asylum which was on the basis that the Appellant had had problems with criminals in Nigeria. He noted that that application was refused as unfounded but that it was then considered on Article 8 private life grounds within the Immigration Rules and that the Secretary of State found that any interference with the Appellant's right of respect for private life would be in pursuit of a legitimate aim and that his kidney problems did not bring him within the ambit of Article 3.
4. Judge Ievins noted that Judge Lever dealt with the question of certification relatively swiftly and that he had upheld the certificate, but that he had then turned to Articles 3 and 8 and considered that in paragraph 10 the judge had misstated the standard of proof. In relation to Article 3 he pointed out that the burden of proof was upon the Appellant and the standard was not the balance of probabilities but a serious possibility, reasonable likelihood or real risk. Judge Lever had concluded that the Appellant had come to the United Kingdom to obtain treatment for his kidney complaint. Although the Appellant needed dialysis he could receive that in Nigeria albeit at some expense. Judge Ievins considered that whilst it may be that such factual findings did not bring the Appellant within Article 3, in approaching his determination with the wrong standard of proof it was arguable that the judge had erred in law and that in view of the potential consequences to the Appellant, were he to be returned to Nigeria, it was arguable that there should be a further assessment of the Appellant's position in the light of Article 3 and consequently granted permission to appeal in respect of all issues.
5. The Secretary of State responded to the Grounds of Appeal under Rule 24 and in summary the Respondent submitted that the Judge of the First-tier Tribunal directed himself appropriately. It is on that basis this matter appears before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant is legally represented appearing by Mr Mohammed of the International Immigration Advisory Service. The Secretary of State appears by her Home Office Presenting Officer Mr Harrison.

Submissions/Discussions

6. Mr Harrison starts by advising that the file before me does not fully explain the chronology of events and that prior to the appeal before Judge Lever the Appellant had lodged judicial review proceedings and that by consent in June 2014 the removal directions served on the Appellant were cancelled and as a result the judicial review proceedings were withdrawn. Consequently, by consent on that basis, the appeal against the decision of Judge Lever proceeded. Such additions to the chronology, he acknowledges, do not add anything to the information herein and the position remains as set out above.
7. Mr Mohammed addresses me initially by stating that the Appellant only discovered in August 2013, i.e. when he was in the UK that he was suffering from kidney problems. He acknowledges that the Appellant's position is that his requirement for kidney dialysis is addressed within the second Notice of Refusal and that he has advised the authorities that he is unemployed in Nigeria and that it would be extremely costly for him to have dialysis over there and that his financial circumstances make it impossible for him probably to afford dialysis or to even contemplate having a transplant. He states that it was not the Appellant's original intention to seek leave to remain in the UK on the basis of his medical condition and that he originally came to the United Kingdom on a visit visa to see a friend albeit that he acknowledges that thereafter he promptly (some six days after arrival) claimed asylum within the UK.
8. He refers me to paragraph 10 of Judge Lever's determination. That paragraph is the predominant basis upon which Judge Ievins granted permission to appeal. It states:-

In terms of Immigration Rules or human rights the burden lies on the Appellant and the standard of proof is a balance of probability.

He submits that Judge Lever has not addressed the standard of proof and that what the judge seems to have done is to have picked up on findings within the Notice of Refusal. He states that this case is exceptional and that whilst the hurdle is very high it has to be accepted that there are exceptions which reach that high threshold.

9. Mr Harrison submits that the sentence used above by the First-tier Tribunal Judge refers to Article 8 and not to Article 3 and that the judge has considered carefully the evidence that is before him. He points out that the Appellant has previously had representatives albeit he was not represented at the First-tier Tribunal hearing and that he has had the benefit of legal advice and that the judge has considered carefully all that he has been told with regard to the Appellant's health and has considered *N [2005] UKHL 31* and other relevant case law. He submits that he has weighed everything in the balance and has made findings that he was entitled to and that the judge cannot be criticised for his determination. He asked me to find that there is no material error of law of the First-tier Tribunal. Mr Mohammed asked me to find that there is and either to remake the decision or to remit the matter to the First-tier Tribunal.

The Law

10. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

12. The Secretary of State gave extremely detailed consideration to the Appellant's health in his reasons for refusal letter dated 25th February 2014. It was against this background that Judge Lever gave due and proper consideration to the Appellant's claim. It is worth mentioning the Notice of Refusal albeit that this is an appeal from the judge because the judge gave full consideration of the relevant paragraphs which from paragraph 24 to 32 set out in detail the medical evidence lodged on the Appellant's behalf, objective evidence with regard to healthcare systems and kidney dialysis in Nigeria and thereafter gave due consideration to the relevant case law. The Secretary of State found that on the information provided the Secretary of State was satisfied that suitable medical treatment was available in Nigeria and that the Appellant had not provided any evidence that he would be denied medical treatment nor that he would not be able to travel to obtain such treatment and that therefore it was not accepted that the Appellant's removal reached the high threshold of severity to breach Articles 3 and 8 of the European Convention of Human Rights.
13. Judge Lever has fully addressed these issues. Efforts are made by both legal representatives to comment on/explain paragraph 10, Judge Lever's determination, set out above with regard to the burden of proof. It is correct of course that the burden of proof under Article 8 is a balance of probabilities and that the burden of proof under Article 3 is as set out by Judge Ievins, namely a serious possibility, reasonable likelihood or real risk. However whilst paragraph 10 of the

determination may be an error in that it does not specifically set out the correct test, it is not I find material because the judge has gone on to apply the correct test when giving due consideration to the Appellant's appeal as set out within his determination. He has noted at paragraph 12 the Appellant's medical condition and has considered the relevant case law at paragraphs 15 and 16. At paragraph 17 he has given due consideration to the fact the Appellant's medical condition is unquestionably serious and has taken fully into account the letter of 8th April from the hospital. At paragraphs 18 and 19 he has given due consideration to the objective evidence with regard to the availability of medical care in Nigeria and has made findings of fact at paragraph 21 with regard to the treatment that is available. He has acknowledged the difficulties but has gone on to give due and proper consideration to all issues and made findings at paragraphs 22 and 23 that he is entitled to.

14. Mr Mohammed submits that the Appellant's position is exceptional. Judge Lever was of the view that it was not and based on the detailed analysis he has carried out there was no reason for suggesting that he has erred in law in coming to that conclusion. There is no doubt that the Appellant has a very serious medical condition but he is not alone and that there are many people within Nigeria who sadly need dialysis. The judge concluded that he does not meet any legal threshold to show that it would be exceptional and the judge cannot be criticised for the approach that he has adopted towards this case. Judge Lever has considered very carefully all the evidence before him and has made findings of fact he was entitled to, but ultimately, whilst eloquently put, the submissions of Mr Mohammed amount to little more than disagreement with the determination of the First-tier Tribunal Judge. For all the above reasons the First-tier Tribunal Judge did not materially err in law and the Appellant's appeal is dismissed.

Decision

15. The decision of the First-tier Tribunal Judge does not disclose any material error of law and the Appellant's appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.
16. The First-tier Tribunal Judge did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

30th September 2014