Upper Tribunal
(Immigration and Asylum Chamber) HU/11284/2018

THE IMMIGRATION ACTS

Heard at Glasgow
On 18 July 2019

Decision & Reasons Promulgated
On 31 July 2019

Before

UT JUDGE MACLEMAN

Between

BENEDICTA TEMITOPE ADEGOJU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by DMO Olabamiji, Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, having entered the UK as a visitor for private medical treatment, sought to remain because of her medical condition. Her husband and children live in Nigeria.

2. The respondent refused that application under the immigration rules and under articles 3 and 8 of the ECHR for reasons stated in a letter dated 4 May 2018.

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3. The appellant exercised her right to appeal to the FtT on human rights grounds.

4. Her stated grounds were that her need for ongoing medical treatment is the fault of the NHS; in absence of treatment, the threshold in *N v SSHD* [2005] 1 AC 296, untimely death, is met; treatment is not available in Nigeria; and the SSHD should be "directed to exercise discretion in favour of the appellant, given that the corrective treatments she is undergoing is a result of the mistakes of the NHS."

5. FtT Judge Agnew dismissed the appellant's appeal by a decision promulgated on 21 August 2018. The appellant withdrew the ground that the threshold in *N* was met (paragraphs 12 and 16). There was no evidence to support the proposition that her ongoing difficulties were the fault of the NHS. No claim against the NHS was being pursued (paragraphs 19, 20 & 41). The evidence and submissions were unclear on whether the appellant sought to remain in the UK for medical reasons for a further 12 months to complete current treatment, or to meet lifelong needs (paragraphs 28 – 36). There was inadequate evidence to show that the care she required would not be available in Nigeria (paragraphs 38 & 49).

6. The grounds of appeal to the UT are, in summary, as follows:

> "The FtT failed to have due regard to the evidence of the consultant, Head & Neck Maxillofacial … that the duration of treatment in the UK is finite … 12 months … when the FtT stated at paragraph 49, "… if there was a firm commitment to specific treatment likely to make a material difference to the quality of life, and within a limited timescale, that may assist the appellant but such is not the case".
>
> The FtT failed to take account of or misapplied … *Paposhvili v Belgium* (41738/10) … this is material as (i) (paragraphs 136-137 and 175-183 of *Paposhvili* are referred to) and (ii) the findings on availability and affordability of treatment are not adequately supported by the evidence …
>
> The FtT … failed to assess the appellant's article 8 rights outside the immigration rules … the correct question is whether there is a sufficiently strong case to outweigh immigration control – *Agyarko* [2017] 1 WLR 823 at paragraph 57."

7. FtT Judge E M Simpson granted permission on 24 September 2018, observing at paragraph 2 (vi):

> "... though not appearing to have been raised at the hearing, or by the judge in the decision, or permission grounds, by way of *Robinson* order of observation of arguable error, there appeared, as a matter of fairness, absence of regard to a "pause" in the proceedings to await the response of Mr Paley to Mr McMahon and thereby enable the parties to have a final opportunity of response …"

8. Mr Paley and Mr McMahon were two of the medical witnesses. The Judge granting permission appears to have envisaged that their further communication might have clarified the appellant's likely future care needs.

9. Although the permission to appeal at 2 (vi) was based on grounds which had not been pleaded, and the appellant sought to take up the point, no reformulated grounds were tendered. It was stated in *ME (Sri Lanka) v SSHD* [2018] EWCA Civ 1486 that, "It was important in such circumstances that reformulated grounds should be lodged well before a hearing". That applies also in the UT.

10. Notwithstanding the obvious implications of 2 (vi) of the grant of permission, there was before the UT no application for admission of fresh evidence in the event of re-making the decision, as required by directions and by rule 15(2A) of the Tribunal Procedure (UT) Rules 2008.

11. Mr Winter said that the grounds disclosed two errors. The judge had noted the evidence that there might be a finite resolution of the appellant's medical problems, but at paragraph 35, which was key, she overlooked that possibility, and did not factor it into her conclusions. This linked into the second error, identified in the grant of permission, of failing to adjourn for clarification. Finally, he submitted that the decision should be reversed, or alternatively, adjourned for further decision in the UT, giving the appellant the opportunity to present further medical evidence.

12. Having heard also the submissions for the respondent, I reserved my decision.

13. I note firstly that the appellant either abandoned or fell a long way short of establishing any of the grounds which she stated in the FtT.

14. Mr Winter, rightly, did not seek to advance the grounds relying upon *Paposhvili*. To the limited extent to which that authority establishes a lower threshold for a medical case, this case fell significantly short of it.

15. Notwithstanding the sympathetic aspect of the case, including the remark of the FtT at paragraph 35, there was no evidence before the FtT by which the appellant might have had a right to remain in the UK for health purposes, other than through compliance with the immigration rules.

16. There was no reason to think that further medical consultation might disclose evidence reaching the threshold for a medical case.

17. If the appellant had sought an adjournment, it might conceivably have been granted, in an abundance of caution; but it would be very hard to argue that it was procedurally unfair not to grant it, as matters stood at that stage.

18. Several authorities on granting permission on points not in grounds, on "obvious points", and on procedural fairness, are properly produced in the

bundle of authorities for the appellant. They are all against her. In this case there was no duty to adjourn in the absence of an application by the appellant, who was legally represented; no obvious point; no procedural unfairness; and there should not have been a grant of permission.

19. Even if there had been any legal merit in the ground introduced by the judge, the appellant did not offer to show that it had eventual substance, so it could not have altered the outcome.

20. The decision of the First-tier Tribunal stands.

21. No anonymity direction has been requested or made.

23 July 2019
UT Judge Macleman