13 March 2019

PRESS SUMMARY

Robinson (formerly JR (Jamaica)) (Appellant) v Secretary of State for the Home Department (Respondent) [2019] UKSC 11
On appeal from: [2017] EWCA Civ 316

JUSTICES: Lady Hale (President), Lord Wilson, Lady Black, Lord Lloyd-Jones, Lady Arden

BACKGROUND TO THE APPEAL

The appellant is a Jamaican national who arrived in the United Kingdom on 9 October 1998 when he was seven years old. He has several criminal convictions, including two robberies that triggered deportation proceedings. On 17 July 2013, a deportation order was issued. He appealed to the First-tier Tribunal (Immigration and Asylum Chamber) ('FTT') against his proposed deportation, based on a claimed right to respect for his private life in the UK. It was accepted at the time that there was no family life in play. His appeal was dismissed, and he was refused permission to appeal to the Upper Tribunal (Immigration and Asylum Chamber) ('UT'). He exhausted his rights of appeal on 1 May 2015.

On 13 May 2015, the appellant's previous solicitors made further submissions to the Secretary of State, focusing on the fact that his partner at the time was pregnant. The submissions did not explicitly request that the deportation order be revoked, nor did they refer to human rights. The Secretary of State treated the representations as an application to revoke the deportation order on the basis that it would breach Article 8 of the ECHR. In a letter dated 23 June 2015, the Secretary of State concluded that deportation would not breach Article 8, refused to revoke the deportation order and decided that the submissions did not amount to a fresh human rights claim under paragraph 353 of the Immigration Rules ('rule 353').

The appellant's son was born on 26 July 2015. The appellant made further submissions to the Secretary of State on 28 July 2015 regarding the birth of his son and providing documentation from the hospital. In a letter dated 31 July 2015, the Secretary of State again concluded that deportation would not breach Article 8 and that the further submissions did not amount to a fresh claim.

The appellant appealed against the decision of 31 July 2015 but the FTT declined jurisdiction on the basis that there was no right of appeal against the decision. The UT dismissed his application for judicial review of the Secretary of State's decision that the further representations were not a fresh claim and the FTT's decision that he had no right of appeal. On 4 May 2017, the Court of Appeal dismissed his appeal.

JUDGMENT

The Supreme Court dismisses the appeal. Lord Lloyd-Jones gives the sole judgment with which the other Justices agree.

REASONS FOR THE JUDGMENT

The question in this appeal is: where a person has already had a human rights claim refused and there is no pending appeal, do further submissions that rely on human rights grounds have to be accepted by the Secretary of State as a fresh claim in accordance with rule 353 if a decision in response to those representations is to attract a right of appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') **[1]**? The appellant raises two principal arguments for why they do not.

1. BA (Nigeria)

The appellant submits that the line of authority beginning with *R v Secretary of State for the Home Department Ex p Onibiyo* [1996] QB 768, which established that it was for the Secretary of State to decide whether further

submissions constituted a fresh claim giving rise to a right of appeal, did not survive the Supreme Court's decision in *BA (Nigeria) v Secretary of State for the Home Department* [2009] UKSC 7 **[26]**. The Court disagrees as *BA (Nigeria)* was limited to cases where the further submissions have been rejected and there was an appealable decision **[50]**. Its reasons are as follows:

(1) *BA (Nigeria)* established that, where the Secretary of State receives further submissions on which he makes an immigration decision within section 82 of the 2002 Act, in the absence of certification there will be an in-country right of appeal. *Onibiyo* and rule 353, by contrast, address a prior issue of whether there is a claim requiring a decision at all **[46]**.
(2) The 2002 Act, particularly the powers of certification under sections 94 and 96, does not render *Onibiyo* and rule 353 redundant. The effect of rule 353 is that no right of appeal ever arises, rather than only to limit to an out-of-country appeal, and it operates at a prior stage to section 94. Section 96(1) addresses a different aspect of renewed claims, as it applies where a person relies on a matter that could have been raised in an earlier appeal but has no satisfactory reason for not doing so **[47]**.
(3) Parliament did not intend the 2002 Act to provide a comprehensive code for dealing with repeat claims or for rule 353 no longer to be effective. There was no attempt to repeal rule 353's predecessor and Parliament has approved subsequent amendments to the Immigration Rules that did not delete rule 353. Moreover, following the amendment of the 2002 Act in 2014, rule 353 was amended to ensure it applies to human rights claims and protection claims, which suggests it was still effective **[48]**.
(4) The appellant's broad reading of *BA (Nigeria)* is inconsistent with *ZT (Kosovo) v Secretary of State for the Home Department* [2009] UKHL 6, in which the House of Lords held that the Secretary of State had erred in applying section 94(2) of the 2002 Act rather than rule 353 in considering further submissions. *BA (Nigeria)* merely decided that rule 353 has no part to play once there is an appealable immigration decision. It contains no express statement that it intends to overrule or depart from *ZT (Kosovo)*, and it is extremely improbable that that was the intention **[49]**.

2. 2014 Amendments to the 2002 Act

The appellant submits that the amendments to the 2002 Act effected by the Immigration Act 2014 fundamentally changed the operation of the statutory scheme, with the result that rule 353 no longer applies **[58]**. The Court rejects these submissions for the following reasons:

(1) Referring to rule 353 to determine if subsequent submissions are a "human rights claim" does not result in the same words bearing different meanings. In *BA (Nigeria)* there was in each case a "human rights claim", but there was a right of appeal against an immigration decision, so the interpretation of "human rights claim" did not need to refer to rule 353. In this case, the issue is the prior question of whether there is a claim at all **[59]**.
(2) The 2014 amendments limit appeals to where there has been a refusal of a protection claim or a human rights claim, or the revocation of protection status. The structure and operation of section 82 remains unchanged. The amended section 82 does not relieve a person of the burden of establishing that the Secretary of State has refused a valid human rights claim **[60]**.
(3) Parliament is presumed to legislate in the knowledge of and having regard to relevant judicial decisions. In the present context, the Court of Appeal in *ZA (Nigeria) v Secretary of State for the Home Department* [2010] EWCA Civ 926 had provided an authoritative explanation of the effect of *BA (Nigeria)*. Parliament is therefore assumed to have legislated in light of a consistent line of authority establishing that a purported human rights claim short of the threshold of a fresh claim under rule 353 was not a claim at all. There is nothing in the 2014 amendments to suggest Parliament intended to enable repeated claims raising human rights issues to generate multiple appeals **[62]**.

Therefore, "human rights claim" in section 82 of the amended 2002 Act means an original human rights claim or a fresh human rights claim within rule 353. As a result, the Secretary of State's response to the appellant's further submissions did not attract a right of appeal **[64]**.

References in square brackets are to paragraphs in the judgment