Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00746/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 November 2017	**On 27 November 2017**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

TAGOE HANNAH AYELEY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Turner, instructed via direct access arrangements
For the Respondent: Ms J Isherwood, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant, born on 29 May 1955, is a national of Ghana. She entered the United Kingdom on 7 April 2004 with leave to enter for six months as a visitor. Thereafter, she remained in the United Kingdom unlawfully. On 22 April 2014 the appellant applied for leave to remain, such application being refused on 13 June 2014. A subsequent challenge brought by way of judicial review was unsuccessful, and on 29 September 2015 the SSHD served a decision to remove the appellant. This prompted the making of a

further application for leave to remain, reliant on Article 8 ECHR. It is the SSHD's response to that application that is the subject of the underlying appeal in the instant proceedings.

Appellant's underlying claim

2. At the core of the appellant's claim to remain the United Kingdom is her relationship with a Mr James Shelley. Mr Shelley is a British citizen who was 86 years old as of the date of the First-tier Tribunal's decision. He was widowed in June 1978, has five adult children living in the United Kingdom, ten grandchildren and six great grandchildren. Other aspects of the appellant's private life in the United Kingdom have also been prayed in aid, such as her connections to the church.

Summary of the First-tier Tribunal's Decision

3. The appellant's appeal came before First-tier Tribunal Judge White on 10 January 2017 and was dismissed in a decision promulgated on 10 February. The relevant features of the First-tier Tribunal's decision can be summarised thus:

   (i) Although the appellant and Mr Shelley are to be regarded as partners for the purposes of Appendix FM of the Immigration Rules she, nevertheless, fails under the Rules because;

      (a) the financial requirements of Appendix FM are not met (such conclusion not being the subject of challenge before the Upper Tribunal); and,

      (b) the appellant is in the United Kingdom in breach of immigration laws and does not meet the requirements of paragraph EX.1 of the Rules.

   (ii) Requiring the appellant to leave the United Kingdom does not lead to a breach of Article 8 ECHR outside of the Rules.

Grounds of Challenge

4. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Page in a decision dated 7 September 2017, the pleaded grounds being as follows:

   (i) the First-tier Tribunal erred in failing to have regard to the respondent's published policies/guidance relating to the assessment of *"insurmountable obstacles"* and *"exceptional circumstances";*

   (ii) the First-tier Tribunal erred in its approach to the evidence contained in a letter from the appellant's general practitioner, dated 5 November 2015;

(iii) the First-tier Tribunal erred in failing to give sufficient weight to Mr Shelley's evidence as to his phobia of flying.

5. At the hearing before the Upper Tribunal Mr Turner raised, for the first time, the following additional ground:

(iv) the First-tier Tribunal erred in its consideration of the national service undertaken by Mr Shelley between 1950 and 1952;

Decision and Discussion

6. For the reasons which follow, I conclude that the First-tier Tribunal's decision does not contain an error of law capable of affecting the outcome of the appeal and I do not set it aside.

7. Taking the grounds in turn, the application to the Upper Tribunal sets out (it appears in full) paragraphs 3.2.7c and 3.2.8 of what is described therein as *"the Secretary of State's own published guidance as to the issue of insurmountable obstacles and exceptional circumstances."*

8. Mr Turner accepted that a copy of the guidance had not put before the First-tier Tribunal. Furthermore, it is not said that submissions were made to the First-tier Tribunal to the effect that such guidance ought to be considered. At the hearing I invited Mr Turner to draw attention to any decision or legal principle which supported his contention that the First-tier Tribunal was in such circumstances required to take account of the aforementioned aspects of the Secretary of State's published guidance. In reply it was asserted that it was a *"Robinson obvious"* point - this being reference to the decision of the Court of Appeal in R v Secretary of State for the Home Department ex parte Robinson [1997] 3 WLR 1162.

9. The basis of the Robinson doctrine is, as Lord Woolf MR described at [1998] QB at P945B-G, that as organs of the state the Appellate Authorities are bound to exercise their powers to ensure the state's compliance with its international obligations. Robinson is a judicial artefact, the purpose of which is to ensure, within a narrow compass, that obvious points of Refugee Convention law did not go unconsidered, with the risk that this country might find itself to have breached its international obligations. The significance of Robinson is in its demonstration of the role of the courts and the Tribunal in ensuring that the United Kingdom does not fall foul of the Refugee Convention, even where an obvious point of Convention law has been missed by the practitioners. It also applies on the same basis to the ECHR, in particular given Section 6 of the Human Rights Act 1998 it is unlawful for a public Authority to act in any way which is incompatible with an ECHR right.

10. However, the decision in Robinson does not, in my view, lay a legal foundation requiring the First-tier Tribunal to give specific consideration to guidance published by the Secretary of State as to how she is going to give apply the insurmountable obstacles threshold set out in paragraph

EX.1 of the Immigration Rules. Neither does the application of the *Robinson* doctrine require the FtT to give consideration to the SSHD's guidance to her caseworkers on consideration of Article 8 ECHR outside the Rules.

11. The critical consideration for the First-tier Tribunal is whether requiring an appellant to leave the United Kingdom would breach Article 8 the Rules providing, in general, the Secretary of State's view as to where the public interest lies in any given case.

12. In any event, having considered the passages set out the grounds I can find no aspect of the First-tier Tribunal's decision which could have been materially affected by it having given specific application to the guidance. In coming to this conclusion, I have had, although not exclusive, regard to those passages which are emboldened in the grounds.

13. Moving on to the second of the pleaded challenges. This centres on a letter authored by the appellant's general practitioner on 5 November 2015 and submitted to the Secretary of State at the time of the application which led to the decision under challenge. The main body of the letter, the entirety of which I have considered, states as follows:

> "I confirm the above is registered with this practice.
>
> I also confirm that it would not be recommended on health grounds for a gentleman of his age with the following medical conditions to be forced to emigrate to Ghana.
>
> He would not be able to cope with the climate, the associated health risk of malaria.
>
> There would also be a very harmful effect by leaving his extended family and support network.
>
> He is appealing for his partner Hannah Tagoe to be given leave to stay in this country.
>
> He suffers from the long-term conditions listed below and is on regular medication and receives frequent health checks at the surgery.
>
> …"

The following medical conditions are then listed:

"essential hypertension", "hyperlipidaemia NOS" and *"diabetes mellitus".*

14. In her decision letter of 22 December 2015, the Secretary of State considered the aforementioned evidence stating, *inter alia*, that *"Mr Shelley's poor reaction to hot weather … is seen as speculative. Additionally, Mr Shelley does not currently suffer from malaria and, therefore, is assessed on the basis that he does not suffer from this*

disease." The decision also asserts that there are medical facilities available in Ghana to treat the conditions with which Mr Shelley presents.

15. The First-tier Tribunal initially considered this evidence as part of its assessment of whether there would be insurmountable obstacles to Mr Shelley relocating to Ghana, stating as follows at [17]:

> "I have a letter from Mr Shelley's GP … confirming that it would not be recommended on health grounds for a gentleman of his age to be forced to emigrate to Ghana. It is said that he would not be able to cope with the climate or the associated health risk of malaria and there would also be very harmful effects by leaving his extended family and support network. It is said that he is on regular medication and receives frequent health checks at the surgery. As noted by the respondent, there are medical facilities available in Ghana and there is no evidence that treatment for diabetes or high blood pressure, the conditions from which he suffers, would not be available. The suggestion that he would be unable to cope with the climate seems to me, with all respect to the doctor, to be wholly speculative. Again, I do not doubt that it would be a very significant move for him to have to make and would require a good deal of adjustment, but the threshold of insurmountable obstacles sets, and it is intended to set, the bar very high, and that is the law which I have to apply. It is not clear to what support network the doctor is referring. I have already noted the evidence of Mr Shelley's daughter that it is the appellant who looks after his daily needs."

16. Mr Turner asserts that the FtT was wrong to treat the conclusions of the GP's letter as speculative and that, given the terms of the letter and that it was authored by a medical professional, the First-tier Tribunal should have concluded that Mr Shelley would be unable to cope with the climate in Ghana and that he would be at risk of contracting malaria there.

17. In my conclusion, the First-tier Tribunal did not err in law in its consideration of this evidence. Whilst I accept that use of the term "speculative" may not have been entirely apt, it was clearly intended to be no more than shorthand for a finding that the letter lacks evidence based justification for the conclusions reached therein and that those conclusions lack precision. For example, the letter does not identify with any precision the meaning of the phrase *"could not cope with the climate".* That phrase imports a wide range of possibilities and it is for the appellant to demonstrate those circumstances likely to prevail for Mr Shelley if he were to move to Ghana. The same can be said of the GP's identification that there is an "associated health risk of malaria" in Ghana for Mr Shelley. One cannot ascertain from this the prospects of Mr Shelley contracting malaria and the consequences for him if he were to do so. It may be that the letter was intending to convey no more than that the prospects of Mr Shelley contacting malaria are greater in Ghana than in the UK.

18. The First-tier Tribunal particularised some of its concerns about the contents of the GP's letter. It noted the evidence therein to the effect that there would be *"very harmful effects* [for Mr Shelley] *by leaving his extended family and support network"*. It correctly observed, however, that the other evidence before it was to the effect that Mr Shelley's care

needs were undertaken by the appellant and that in the all the circumstances it was not clear *"what support network the doctor is referring to".* In addition, the Tribunal lawfully took account of the absence of any evidence to the effect that Mr Shelley could not obtain appropriate medical treatment in Ghana.

19. In summary, I do not accept that it has been demonstrated that the weight that the First-tier Tribunal attached to the GP's letter of 15 November 2015 was irrational or that it's consideration of such evidence was otherwise flawed by material legal error.

20. Turning then to the final ground pleaded in the notice of appeal. This ground has its origins in the evidence given orally by Mr Shelley, recorded at paragraph 14 of the First-tier Tribunal's decision in the following terms:

> "He [Mr Shelley] said that he has never been back to Ghana, that he has a phobia about flying, following a very bad trip from Thailand eleven years ago, that he is not very good sailor either, and that he has no inclination to leave the country."

21. The First-tier Tribunal considered this evidence within the context of its assessment of whether there were insurmountable obstacles to Mr Shelley moving to Ghana, concluding as follows at [18]:

> "In relation to potential difficulties of travel, I can understand that Mr Shelley might, after a long and very uncomfortable trip back to Thailand, feel very reluctant to fly again, but I have no evidence which would entitle me to find that he has a phobia of such description as to render him psychologically incapable of flying to Ghana, were he decide to go to live there with the appellant. Equally I have no evidence that would entitle me to find that he would be incapable of withstanding the sea journey, even though he might find it uncomfortable."

22. Mr Turner asserts the Tribunal should have proceeded on the basis that Mr Shelley has a phobia of flying, given that other aspects of his and the appellant's evidence were found credible, and that it acted irrationally in not doing so.

23. The Tribunal did not, as suggested by Mr Turner, reject Mr Shelley's evidence on this issue. It correctly observed that there was no evidence before it to support a conclusion that Mr Shelley had a condition which rendered him psychologically incapable of flying to Ghana. Mr Shelley himself did not give evidence that he was psychologically incapable of flying and the medical evidence before the Tribunal did not touch on this issue. There was nothing irrational or otherwise unlawful in the Tribunal's consideration of Mr Shelley's evidence in this regard.

24. In any event, the First-tier Tribunal observed, in the alternative, that there was no evidence before it to the effect that Mr Shelley would be incapable of undertaking a sea journey to Ghana, if he were unable to fly there. This aspect of the First-tier Tribunal's decision was not the subject of challenge in the written grounds of appeal. It was not until the hearing that Mr

Turner first made the assertion that such conclusion is irrational. However, I reject this contention given the absence of any evidence supporting a contrary view to that taken by the First-tier Tribunal.

25. Moving on to Mr Turner's attempt to pursue a further ground not pleaded in the written application for permission to appeal i.e. that the First-tier Tribunal erred in its consideration of the national service undertaken by Mr Shelley between 1950 and 1952. No formal application for permission to amend the grounds was received and no explanation was provided for the failure to raise the ground at an earlier juncture, this being despite the Tribunal observing during the hearing that such ground had not been pleaded. Having considered all the circumstances of the case, and given the failure to plead the ground at the appropriate time, the failure to provide any, let alone an adequate, explanation for such failure, the late hour at which the ground was eventually pleaded, the failure to make a formal application to amend the grounds and the fact that the ground is not obviously strong, I refuse to admit this ground for consideration. Had I admitted the ground I would nevertheless have rejected it.

26. The ground focuses its challenge on the rationale found at paragraph 24 of the Tribunal's decision, which reads:

> "I was invited to note that Mr Shelley had done national service between 1950 and 1952 and was described on his discharge as a capable and hardworking NCO and a smart and efficient soldier whom his commanding officer would be sorry to lose. That is clearly to his credit, but I am not persuaded that it can carry the kind of weight that Mr Turner sought to place on it. Obligatory national service in peacetime, without in any way playing down the demands it would have made, seems to me a rather different matter, when weighing in the scales of proportionality, than active service, particularly voluntary active service, in the time of war."

27. Mr Turner asserts that the First-tier Tribunal was wrong to state that Mr Shelley's service was undertaken during peacetime, because the Korean War was in full flow between 1950 and 1953 and British soldiers saw active service in that war.

28. I am prepared to take judicial notice of the dates between which the Korean war was fought and that British soldiers saw active service during it. However, such matters add nothing to the appellant's case. Mr Shelley's own evidence on this issue, found for example in his letter of 30 September 2015 to the Home Office and summarised in a letter of 5 November 2015 covering the application for leave to remain, is to the effect that Mr Shelley served national service in the army under both King George VI and Queen Elizabeth II between 1950 and 1952. There is no reference in this evidence to Mr Shelley seeing active service, whether in Korea or anywhere else, nor is there reference to any aspects of Mr Shelley's national service said to be impinged upon by the Korean War.

29. Whilst I, therefore, accept that the First-tier Tribunal was wrong to treat the period between 1950 and 1952 as being in "peacetime", I conclude

that the evidence before the Tribunal was such that this error is not one capable of affecting the outcome of the appeal.

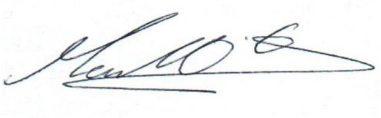
30. Standing back and looking at the First-tier Tribunal's decision in the round, I find that it took account of all material matters, did not take into account any material irrelevancies, properly directed itself in law and came to conclusions which were rational on the evidence presented. The Tribunal was entitled to conclude that the requirements of the Immigration Rules had not been met, and was also entitled to conclude that requiring the appellant to move to Ghana would be proportionate to the legitimate aim of maintaining immigration control - particularly given that she has lived in the United Kingdom unlawfully since the end of 2004 and engaged in her relationship with Mr Shelley in full knowledge of this fact.

31. This appeal is, therefore, dismissed.

Notice of Decision

The decision of the First-tier Tribunal does not contain an error of law capable of affecting the outcome of the appeal and is to remain standing.

Signed:



Upper Tribunal Judge O'Connor