Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00239/2014

THE IMMIGRATION ACTS

Heard at The Royal Courts of Justice, Belfast	**Decision Reasons Promulgated**
On 19 October 2015	**On 6 November 2015**

Before

The President, The Hon. Mr Justice McCloskey

Between

KLAUS PETER WAGNER

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
Appellant: In person
Respondent: Mr P Duffy, Senior Home Office presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant is a national of South Africa, aged 73 years. His wife is a British national. Having lived in South Africa for most of their lives, they moved to Northern Ireland in 2012, residing there ever since. His appeal to this Tribunal originates in a decision made on behalf of the Secretary of State for the Home Department, dated 06 December 2013, refusing his application for leave to remain in

the United Kingdom. By its decision promulgated on 16 February 2015, the First-tier Tribunal (the "*FtT*") dismissed his appeal. Permission to appeal to this Tribunal was granted in the following terms:

> "The Appellant complains that he and his wife were prevented from giving evidence by the Judge, that they were bullied by the presenting officer and that this was tolerated by the Judge. In short, it is said that the Appellant did not have a fair hearing."

The FtT Hearing and Decision

2. Immediately following the hearing before the FtT, on the same day, the Appellant wrote to the Secretary of State's presenting officer's unit. His letter complained in general terms of "*ill mannered, rude, insulting, bias and prejudicial conduct*" on the part of the presenting officer concerned (the "*PO*"). He adverted to a letter from his wife's General Practitioner containing the statement that "*…. She is on appropriate medication*". Having done so, he attributed to the PO the comment, when questioning his wife at the hearing:

> [a] "*… It is strange that you do not know the name of the antidepressant even though you take it every day*".

The letter continues:

> [b] "*The Honourable Judge intervened and mentioned that the doctor stated she is on 'appropriate' medication.*"

This, per the Appellant's letter, was followed by a question from the PO:

> [c] "*Why are the names of any medication not mentioned?*"

Next, the letter complains that, with reference to the Appellant's condition of DVT, the PO stated:

> [d] "*That's not a problem.*"

3. The decision of the FtT addresses medical issues in a number of places. First, the Judge summarises the Appellant's evidence that his wife is suffering from osteoporosis and arthritis; her health had deteriorated since arriving in the United Kingdom and he was her carer in various respects, which he particularised. The Judge also summarises the evidence of the Appellant's spouse, in these terms: she has been suffering from osteoporosis since the age of 40; her condition has deteriorated; she also suffers from osteoarthritis; she has been "*in and out of hospital*" on account of depression; she takes medication which does not help; the Appellant performs the basic household tasks; and she was "*one step away*" from resorting to a wheelchair.

4. In later passages of its decision, the FtT makes certain comments and findings about the medical issues:

> "I have before me a brief letter from her GP … who confirms that Mrs Wagner suffers from osteoporosis and osteoarthritis. This letter provides little information about the extent of her medical conditions and how they affect her. [The doctor] does not indicate that she will be confined to a wheelchair in the near future. The Appellant has suggested that she would be unable to live on her own. This suggests a significant level of disability but I had little medical evidence to support this claim …
>
> I also find it significant that in spite of claiming to be severely disabled, Mrs Wagner has not made application for Disability benefits which would assist her.
>
> There was no medical evidence to suggest that Mrs Wagner would be unable to travel to South Africa with the Appellant."

This latter statement is a reference to the scenario of the Appellant returning to South Africa for the purpose of making a settlement application, the evidence being that 96% of such applications are processed and determined within a period of 60 days.

This Appeal

5. The Appellant's letters in the immediate aftermath of the hearing at first instance stimulated the generation of some further evidence. First, as part of its investigation into the Appellant's complaint, the UKVI obtained a written response from its PO. Second, the Upper Tribunal Principal Resident Judge procured a response from the FtT Judge. Each was to the effect that nothing untoward or improper had occurred at the hearing. It was also highlighted that the Appellant was represented by Counsel, who made no protest or intervention.

6. Having considered the accounts provided by the Appellant, the PO and the Judge, it seems to me that there is no substantial dispute about the particulars of the matters raised by the Appellant. However, recalling the terms of the grant of permission to appeal, I can find no basis for concluding that the Appellant and his wife were "*prevented from giving evidence by the Judge*". This is simply not made out. The second limb of the grant of permission is that they were "*…bullied by the presenting officer and … this was tolerated by the Judge*". This has two elements. As regards the first, I can ascertain no basis for a finding of bullying. It is reasonable to conclude that conduct of this kind would have been the subject of vocal objection by the Appellant's representative. As regards the second on the Appellant's own account, the Judge was prepared to intervene when considered appropriate by him. Viewed in the round and realistically, I consider that the Appellant was not anticipating the adversarial element of the hearing and the vigorous, sometimes intrusive questioning which this can entail.

7. While it is clear from both the terms and the timing of the Appellant's letters that the conduct of the hearing at first instance was a cause of substantial concern and upset, I must balance his perceptions, genuinely held to my mind, with the assessment in the last preceding paragraph and the factor of legal representation. I must further take into account the Appellant's acknowledgement that there was at least one proactive judicial intervention in response to an objectionable question.

8. The ultimate question is whether the conduct of the hearing blighted the Appellant's ability to put forward his case or to respond to the challenge made to his case. I have concluded, on balance, that there was no such impairment. However, I would add that, as highlighted in the recently reported decision of Alubankudi (Appearance of bias) [2015] UKUT 54, the interaction of most litigants and witnesses with the judicial system is a transient one. Indeed, it is normally confined to a single litigation experience. I repeat what was said in Alubankudi at [14]:

> "The interface between the judiciary and society is of greater importance nowadays than it has ever been. In both the conduct of hearings and the compilation of judgments, Judges must have their antennae tuned to the immediate and wider audiences … it is of seminal importance that the fairness, impartiality and detached objectivity of the judicial office holder are manifest from beginning to end."

To this I would add that the importance of appearances, impression and perceptions must never be underestimated.

9. I would, however, hold unequivocally that questions and comments of the kind detailed at [2](a),(c) and (d) above are improper. As regards the second of these two matters, it was plainly inappropriate to ask the Appellant or his spouse why the medical expert who had compiled the report in question had not detailed the relevant medication. The Judge, of course, could not have prevented this question from being asked. However, the intervention which he had made immediately beforehand suffices to indicate that he was discharging his duty of fairness to both parties. As regards the first and third of these matters, fairness did not necessarily dictate any particular intervention or ruling on the part of the Judge, given the margin of appreciation available to him. However, the judge should have appreciated that the comment was perceived to be demeaning and insulting and a suitable intervention would have been appropriate.

10. To this I would add that mere comments by representatives under the guise of questioning of a party or witness are not appropriate. They are forbidden by the most elementary principles and rules of advocacy. Swift disapproval by presiding judges can only enhance both fairness and advocacy standards, thereby emphasising the authority of the Tribunal and enhancing its status of fair and impartial adjudicator. My final observation on this issue is that the role of the advocate does not properly encompass either aggressive questioning or confrontation: where either occurs, a boundary has been crossed and the presiding Judge should intervene. Improper conduct on the part of an advocate, unchecked and unrestrained by judicial authority and hearing management, can potentially render a hearing unfair.

11. I take this opportunity to summarise the governing principles. The Upper Tribunal has considered the right of every litigant to a fair hearing in a series of reported decisions. The wide variety of contexts in which this issue has arisen underlines the truism that every case is invariably fact sensitive. The central tenet of the right to a fair hearing is having the opportunity to put one's case and to respond on all material issues. In MM (Unfairness; E&R Sudan) [2014] UKUT 105 (IAC), this Tribunal noted, at [15], that it is doctrinally incorrect to adopt the two stage process

of asking whether there was a procedural irregularity or impropriety giving rise to unfairness and, if so, whether this had any material bearing on the outcome. These are, rather, two elements of a single question, namely whether there was procedural unfairness. This Tribunal further held that the reviewing or appellate Court should exercise caution in concluding that the outcome would have been the same if the diagnosed procedural irregularity or impropriety had not occurred

12. One particular reflection is apposite. Adjudication by the Upper Tribunal in respect of complaints relating to the conduct of a first instance hearing can be a difficult exercise. Since the FtT is not a court of record no transcript of the hearing is available. Furthermore, disagreement between the parties about the issues under scrutiny can occur. In some cases, as in Alubankudi, a party's representative makes a witness statement which may be of considerable assistance to the appellate tribunal. The contemporaneous notes of the parties' representatives may also be provided in certain cases. In addition, the record of proceedings, compiled by the Judge and maintained on the Tribunal's file, may provide insight and assistance. Sometimes, as in the present case, the response of the Presiding Judge is also available. Even where some or all of these aids are available, it is impossible to recreate matters such as atmosphere, intonation, facial expression, speed of response *et al;* and, fundamentally, the elusive quality of demeanour cannot be reproduced on appeal. The basic handicap is that there is no audio or written record of the words used by representatives, parties, witnesses and the presiding Judge.

13. I highlight also that in cases of this *genre* first instance advocates have the potential to become witnesses, normally via the provision of a witness statement. As this Tribunal emphasised in BW (Witness Statements by Advocates) Afghanistan [2014] UKUT 00568 (IAC) the roles of advocate and witness are distinct and, thus, in cases where a first instance advocate becomes a witness a different representative must be instructed.

Error of Law Conclusion

14. In pronouncing my decision at the conclusion of the hearing, I observed that, on careful analysis, the real issue of substance in this appeal concerned the FtT's consideration of the medical evidence. An unsophisticated assessment exposes the fact that part of the medical evidence was disregarded by the Judge. While in his decision he refers to a brief letter from a particular medical practitioner, he makes no mention of a second letter written some two weeks earlier by a different practitioner belonging to the same practice. In this earlier letter the doctor confirms that the Appellant's spouse:

> "… has difficulties with her health due to arthritis and osteoporosis that requires the assistance of a carer i.e. her husband. She would be greatly affected if he was not present to assist her due to her neck and hand problems especially."

The Judge makes no mention of this evidence. Furthermore, in his decision he suggests that he had "*little medical evidence*" to support the Appellant's claim that his

wife would be unable to live on her own. This does not withstand analysis, since the report which the Judge did consider, contains the following unambiguous statement:

> "She would not be able to cope living in a house on her own."

These two omissions are of obvious materiality given the Judge's generally sceptical attitude regarding the medical issues.

15. Given the above analysis I conclude that the decision of the FtT cannot be sustained. It is infected by a demonstrable failure to consider all the evidence and an associated failure to ensure a fair hearing. The decision is set aside accordingly.

The decision remade

16. I have acceded to the Appellant's application for the admission of further evidence. This consists of a third medical report emanating from the source mentioned above. It contains the following additional evidence relating to the Appellant's spouse:

> "She is currently awaiting gall bladder surgery after an acute admission from A&E on 24/04/15 …. Over the past few years she has had several visits via ambulance to A&E with back pain … chest infection … chest pain … for which she later attended the chest pain clinic ….."

The medical practitioner states further:

> "She relies on her husband as her main carer with her ongoing health issues and would find it very difficult to manage on her own physically and mentally."

17. The two Tribunal appeals in which the Appellant has been engaged have been conducted on the unspoken premise that if the claims about his wife's health and dependency on him are made good the impugned decision of the Secretary of State will, potentially, be unlawful as constituting a disproportionate interference with the right to respect for the private and family life of the couple. The Appellant's case falls outwith the framework of the Article 8 régime of the Immigration Rules.

18. With reference to the obligatory exercise to be conducted under Part 5A of the Nationality, Immigration and Asylum Act 2002:

    (a) The public interest in the maintenance of effective immigration controls provide the starting point.

    (b) The public interest relating to English speaking members of the population is not infringed.

    (c) The public interest in a population comprising financially independent members is not infringed either.

    (d) The Appellant's private life and his relationship with his wife were established long before his advent to the United Kingdom in 2012.

    (e) While the Appellant's immigration status has been precarious, his case does not depend upon private life further established by him during the period of

uncertainty and, given the couple's ages, this pales into insignificance in any event.

Accordingly, the application of Part 5A yields a largely positive outcome for the Appellant.

19. Very properly, it forms no part of the Respondent's case to challenge the medical evidence which has been assembled. Having no reason to doubt or question this evidence, I accept it. Considered in its totality, it makes a potent case for the Appellant and his spouse under Article 8. I find without hesitation that the Appellant's spouse is heavily dependent upon him, increasingly so and is of deteriorating health. In contrast with the Judge, I decline to speculate about the availability of assistance from relatives or publicly funded interventions. There is absolutely no evidence relating to either of these measures. Furthermore, it is not in dispute that they have not had to resort to the latter.

20. Given the very particular and highly fact sensitive nature of this case, it is unsurprising that it has no specific prescription within the Article 8 regime in the Immigration Rules. Finally, I weigh in the balance the implicit acceptance on the part of the Respondent that if the Appellant were to return to South Africa, his settlement application would be decided within a period of some three months and, further, would have a positive outcome. This means that the Chikwamba principle is engaged.

21. The findings, analysis and assessment above impel to the clear conclusion that this is one of those comparatively rare cases out with the framework of the Immigration Rules in which a disproportionate interference with the Article 8 rights of those concerned has been demonstrated. In the balancing exercise, the facts and considerations on the Appellant's side of the scales combine to outweigh the public interest in play. I remake the decision by allowing the appeal.

Signed

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 20 October 2015