Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16219/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 August 2019	**On 2 September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

MS SHAHANA AKTAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Aslam, Counsel.
For the Respondent: Ms A Fijiwala, Home Office Presenting Officer.

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh who made an application for leave to remain as the married partner of a Mr Uddin, a settled person under Appendix FM and outside the Immigration Rules under Article 8 of the European Convention on Human Rights. Her application was refused and she appealed and in a decision promulgated on 18 February 2019, Judge of the First-tier Tribunal S L Farmer, dismissed the appeal both under the Immigration Rules and on Article 8 grounds.

2. The Appellant sought permission to appeal. This was initially refused but a renewed application to the Upper Tribunal was granted by Deputy Upper Tribunal Judge Mailer on 26 June 2019. His reasons for the grant were: -

> *"1. The appellant is a national of Bangladesh born on 20 June 1988. She renews her application for permission to appeal the decision of the First-tier Tribunal Judge who dismissed her appeal against the respondent's decision to refuse to grant her leave to remain as the married partner of her spouse, a settled person.*
>
> *2. It is arguable that there was evidence that the financial, English language and relationship requirements may have been met, and that in accordance with the decisions in Chikwamba and Agyarko, the Judge should have considered whether in the circumstances, there was any public interest in the appellant's removal.*
>
> *3. Permission to appeal is granted on all grounds."*

3. Thus, the appeal came before me today.

4. At the outset of the hearing, I gave the parties some time. I was then informed both representatives accepted that the financial, English language and relationship requirements of the Immigration Rules were met, but the outstanding issue remaining was the fact that the Appellant had not had any valid leave to remain in the United Kingdom since 11 August 2016 and was therefore unable to meet the requirements of E-LTRP 2.1 to 2.2.

5. Mr Aslam relied upon the grounds seeking permission to appeal. He referred me to paragraph 28 of the First-tier Tribunal Judge's decision, where the Judge found that the Appellant can continue her family life abroad and can return to her country of origin to make an application from abroad. He submitted that the conclusion that the Appellant can return to make an application, in circumstances where the financial and other requirements are met, and, as here, where there is ongoing medical treatment, is contrary to the guidance in **Chikwamba v SSHD [2008] UKHL 40.** In particular, he relied upon paragraph 44 of that judgement which states:-

> *"I am far from suggesting that the Secretary of State should routinely apply this policy in all but exceptional cases. Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad. Besides the considerations already mentioned, it should be borne in mind that the 1999 Act introduced one-stop appeals. The article 8 policy instruction is not easily reconcilable with the new streamlined approach. Where a single appeal combines (as often it does) claims both for asylum and for leave to remain under article 3 or article 8, the appellate authorities would necessarily have to dispose substantively of the asylum and article 3 claims. Suppose that these fail. Should the article 8 claim then be dismissed so that it can be advanced abroad, with the prospect of a later, second section 65 appeal if the claim fails before the ECO (with the disadvantage of the appellant then being out of the country)? Better surely that in most cases the article 8 claim be decided once and for all at the initial stage. If it is well-founded, leave should be granted. If not, it should be refused."*

6. Also, he relied on the authority of **Agyarko and Ikuga, R (on the applications of) v. SSHD [2017] UKSC 11** and in particular paragraph 51 of that judgement which states:-

> *"Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in Chikwamba v Secretary of State for the Home Department."*

7. Further, that where the financial, English language and relationship requirements are met (although the Judge failed to make finding in relation to these), there is no public interest in returning the Appellant to her country of origin. The Judge fell into speculation when concluding that there were no ongoing health problems for the Appellant. She has not been fully discharged from hospital.

8. Mr Aslam also submitted that the Appellant had always been dependent upon her husband's status. He applied for indefinite leave to remain, but this was refused as the Respondent alleged that within the ETS process he had used deception. That decision was subject to Judicial Review proceedings which were conceded by the Secretary of State and the Appellant's husband was consequently granted Indefinite Leave to Remain. It was that Judicial Review process, brought about by the Respondent's error, that resulted in this Appellant not having section 3C leave.

9. Ms Fijiwala submitted that the Immigration Rules were not met and it was, therefore, open to the Judge to find that there were no insurmountable obstacles to the Appellant's reintegration into Bangladeshi society. The Judge was equally entitled to conclude that there was nothing unjustifiably harsh in the Appellant returning to her country of origin. There is no reason why family life with her husband could not continue in Bangladesh.

10. In granting permission to appeal, Deputy Judge of the Upper Tribunal Mailer found it arguable that there was evidence that the financial, English language and relationship requirements may have been met and that accordingly, the Judge should have gone on to consider whether, in the circumstances, there was any public interest in the Appellant's removal. I find that the Judge did not do this.

11. Before me today, the Respondent recognised that the financial, English language and relationship requirements were indeed met. In these circumstances, the issue as to whether there is any public interest in the Appellant's removal falls to be considered. I find that there is none. I take account of the background evidence. The Appellant

has some medical issues for which treatment is ongoing. However, more importantly, this is an Appellant who has always been dependent upon the status of her husband's. He now has Indefinite Leave to Remain, in circumstances where the Respondent, within Judicial Review proceedings, conceded the position in relation to an allegation that within the ETS process deception was used. It was indeed the Respondent's own error which resulted in the Appellant in these proceedings not having section 3C leave. It is acknowledged at today's hearing that the financial, English language and relationship requirements are met and in all the circumstances I find that there is no public interest in this Appellant's removal to make her application from abroad.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I remake the decision in the appeal by allowing it.

Signed Date 22 August 2019

Deputy Upper Tribunal Judge Appleyard

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of £140 which has been paid or may be payable.

Signed Date 22 August 2019

Deputy Upper Tribunal Judge Appleyard