Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16515/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th August 2019	**On 4th September 2019**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

ANINDITA [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Salim, instructed by Thamina Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal Judge Hussain promulgated on 27th March 2019, dismissing the appeal against the refusal of the Secretary of State for leave to remain as a spouse.

2. The appellant is a national of Bangladesh born in 1976 and she entered the UK on 10th November 2011 as a points-based system dependant spouse, with leave until 24th December 2012. She was granted further leave in this capacity until 9th May 2015. On 29th

September 2014 she applied for further leave which was refused on 18th March 2015 and although she appealed that decision, she was appeal rights exhausted on 5th December 2016. On 16th December 2016 she was included as a dependant spouse on an application which was varied on 28th April 2018 to an FLR(M) application. On 29th July 2018 her application was refused, and which generated the appeal before the First-tier Tribunal, Judge Hussain.

3. First-tier Tribunal Judge Hussain recorded that the refusal noted that she did not meet the eligibility requirements with regard to relationship because her partner was neither a British citizen, present and settled in the UK nor a refugee or with humanitarian protection. The judge also noted that the appellant did not include the child on her application and the child was not "applying with her".

4. The judge noted that the Secretary of State conceded that the appellant was in a genuine and subsisting relationship with her partner who was also a national of Bangladesh. However EX.1 did not apply. Further, there was no evidence that there were any insurmountable obstacles in accordance with paragraph EX.2, which would be faced by her or her partner in continuing family life outside the UK and on return to Bangladesh.

5. Additionally, it was not accepted with regards to paragraph 276ADE that there will be very significant obstacles to her integration into Bangladesh because she had spent the majority of her life in her home country and would be accustomed to a way of life there.

6. The judge noted albeit that the appellant had not included the child in her application that although Section 55 was applied by the Secretary of State.

7. The hearing took place on 6th March 2019. The judge at paragraph 7 of his determination identified that the appellant was not represented either in person or through his representative but that in a letter dated 5th March 2019, Thamina Solicitors wrote to the Tribunal asking for a disposal on the papers. In a previous letter dated 4th March 2019 the representatives explained that the appellant relied on her husband's immigration status for the success of her application. His application to remain was refused by the Secretary of State against which she appealed and that appeal was heard on 19th November 2018 and allowed by the First-tier Tribunal. The letter explained that the Secretary of State had been granted permission to appeal the grant obtained leave against that decision and the substantive hearing was held at the Upper Tribunal on 27th February 2019. A decision was awaited from the Upper Tribunal. The letter of 4th March 2019 requested an adjournment.

8. The judge noted at paragraph 8 that the success or failure of the appellant's appeal was dependent on her husband's immigration

status and that an application had been made to adjourn the hearing to await the outcome of the husband's appeal. The judge made the following findings:

> *"10. It will be apparent from above that the Secretary of State's decision to refuse the appellant's application is not being challenged on the merits. This [is] because, as was accepted by the appellant's representative, the appellant's husband does not enjoy any of the statuses mentioned in the refusal letter. Her case is in a nutshell that she is enjoying family life with her child and husband whose immigration status remains unresolved.*
>
> *11. Whilst I can see the logic of the appellant's representative's request for an adjournment, I find that it is not necessary for a just disposal of the appeal.*
>
> *12. By now, the Upper Tribunal's decision may well have been promulgated and if the outcome is in the appellant's favour, then it seems to me that a request for reconsideration by the Secretary of State would be in order. If his appeal has failed, then the appellant would be left in a situation where neither she nor her husband have any immigration status.*
>
> *13. For present purposes, I find that the Secretary of State's decision is in accordance with the Immigration Rules.*
>
> *14. It is now well-established law that if an applicant fails to meet the Immigration Rules, then their circumstance would have to be exceptional to warrant the grant of leave outside of the Immigration Rules. Like the Secretary of State, I find that there are no exceptional circumstance in the appellant's case to merit the grant of leave outside of the Immigration Rules on conventional Article 8 grounds."*

9. The grounds for permission to appeal asserted the following:

> Ground (i) procedural unfairness - The judge proceeded to the hearing with the absence of the appellant and her representative. Although the judge could see the logic of the appellant's request he did not grant the adjournment which would contradict his own findings. The appellant had set out in her witness statement the circumstances regarding the appellant's husband's appeal and that the Upper Tribunal had not decided the matter. As the husband's appeal had not been decided the representative made an application on 4th March to get the adjournment on her appeal and requested a new hearing date. It was submitted that both the appellant and her solicitors made a request for an adjournment. It was not in the interests

of justice for the determination to be heard or promulgated in those circumstances and the judge should have considered the adjournment application properly by giving a reason and given a new hearing date and as such there had been a procedural irregularity. That had led to the appellant being deprived of a right of appeal triggering **Nwaigwe (adjournment fairness) [2014] UKUT 00418**.

Ground (ii) - The judge erred in law by improperly making his own assumptions of the sponsor's current immigration status including appending appeal. This was evident at paragraph 12 of the judge's determination. The judge made a completely wrong assumption in relation to the outcome of the appending appeal. Bearing in mind the options available to the appellant she would not be left in a situation in the near future where neither she nor her husband had any immigration status. The judge proceeded on the wrong assumption.

Ground (iii) – Section 55 of the Borders, Citizenship and Immigration Act did not appear to have crossed the judge's mind and no findings were made in that respect.

10. Permission to appeal was granted on the basis that

> *"It was arguable that when considering the request for an adjournment greater consideration should have been given to the fact that the appellant's husband had been successful before the First-tier Tribunal and as at the date of hearing this was a relevant though potentially a temporary factor when considering the appellant's Article 8 rights."*

11. The approach adopted at [12] namely that if the husband successfully resisted the respondent's appeal reconsideration could be sought from the respondent arguably failed to engage with the requirement that Article 8 rights be considered as at the date of the hearing.

12. Mr Melvin submitted that it was up to the appellant to make her case and if the sponsor chose not to attend and the solicitors chose not to attend it was left to the judge to assess the matter on the evidence. It was not incumbent on the judge to go looking for information. The complaint with regard to Section 55 had no merit. This was a separate appeal from that of her husband and on the evidence it was simply not possible to allow this appeal.

Discussion

13. As set out in the refusal letter of the Secretary of State on 26th July 2018 the appellant's sponsor husband did not have the relevant immigration status. The appellant was given the date, time and venue of the hearing before the First-tier Tribunal and together with

her solicitor chose not to attend. There is a letter on file from Thamina Solicitors dated 5th March 2019 which specifically states the following:

> *"We continue to act for the appellant. Our client's case is listed for an oral hearing on 6th March 2019. She has instructed us that she wishes to have a "paper hearing" instead of oral one. In the circumstance, we sincerely request the Honourable Tribunal to determine the case on the basis of submitted documents."*

14. That application was received by the Tribunal on 6th March 2019 and was clearly before the judge. I note there was no such repeat of the adjournment request in the covering letter of 5th March 2019 from Thamina's Solicitors. There was also a witness statement dated 5th March 2019 signed by the appellant specifically stating that the primary reason for her refusal of her application was that her sponsor/husband "has not been granted indefinite leave to remain status in the UK yet". At paragraph 6 of the witness statement the appellant set out the history of the appellant's husband's appeal and it was quite clear that the Upper Tribunal had not yet decided the appeal. What was clear was that the appellant's husband had not as at the date of the hearing before Judge Hussain had been granted indefinite leave to remain. The appellant could not therefore fulfil the requirements of the Immigration Rules.

15. The appellant merely stated at paragraph 7 of her witness statement that "she is not able to proceed with her case at this moment". She realised a previous adjournment request had been refused and in the body of her witness statement repeated the request for an adjournment. The Judge clearly reasoned differently and proceeded on the papers as Thamina Solicitors had requested. Although the appellant states that the legal representative had made an application on 4th March 2019 for an adjournment on my appeal there was in fact, as I have pointed out the subsequent covering letter specifically stating that the matter should be decided on the papers.

16. Although the judge might be able to see the logic of the appellant's representative's request for an adjournment the judge applied the correct test of whether there should be another adjournment such that it was not necessary for a just disposal. He considered the concept of fairness in accordance with *Nwaigwe*. He did not materially err in that regard.

17. As was accepted by the appellant's representative, Mr Salim, the appellant's husband did not enjoy any of the status mentioned in the refusal letter and that her husband's immigration status remained unresolved. That was the position as at the date of the hearing. The fact is that even though the appellant's husband had been successful

before the First-tier Tribunal it was known that this had been challenged by the Secretary of State and it was clear no settled status had been granted as at the date of the hearing. The Judge based his decision on the facts as they were at the hearing.

18. This approach was condoned and adopted in *KK (India) v SSHD* [2019] EWCA Civ 369 at [47]

> *'[Counsel] sought to argue that the fact that the Appellant's mother and brother might obtain ILR was a relevant factor which the UT Judge ought to have taken into account. This is misconceived. It is axiomatic that the UT Judge was bound to have regard to the facts as they stood at the time before the decision-maker when determining the lawfulness of the decision in question. The fact that the Appellant's mother and brother were granted ILR in April 2018 is separate matter which may, or may not, lead to a further application'.*

19. There was no certainty that the husband, even if he succeeded in his appeal, would be granted status. The Judge specifically found at [13] that the refusal decision was in accordance with the Immigration Rules and made a specific finding at [14], knowing the position, that there were no exceptional circumstances outside the Rules. Even if the husband were granted status that still does not undermine the judge's conclusion that there were no insurmountable obstacles *on the evidence* as to the possibility of relocation of the appellant to Bangladesh (with her partner) and thus no unjustifiably harsh consequences on the appellant's refusal, *R (Agyarko)* [2017] UKSC 11. I find no material error of law.

20. Additionally, nowhere was the fact of a "new matter", of the husband's potentially changed status, raised and further Section 85(5) of the Nationality, Immigration and Asylum Act 2002, the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so. The Secretary of State's refusal clearly proceeded on the basis that the appellant's husband did not have settled status and the change of such immigration status would be a new matter.

21. In relation to ground 2 the criticism that the judge erred in making his own assumption as to regards the outcome of the sponsor's appending appeal is not founded because as I repeat at the date of the hearing the appellant's husband did not have settled status.

22. Ground 3 has no merit. I was told that the child was mentioned in the application form but that specifically states in response to "is this child applying with you" and the answer given is "no" and in a box outlined the application states not applying. The judge recorded that the Secretary of State had nonetheless made reference to Section 55.

There was no information about this child on the file and in the circumstances, I find no error in the judge's approach to Section 55.

23. I find no error in the decision and I note that the decision of the Upper Tribunal was such that the Secretary of State's appeal was allowed, the matter in relation to the husband has been remitted de novo to the First-tier Tribunal. The appellant's husband still does not have settled status.

24. The determination of the First-tier Tribunal in this matter contains no material error of law and will stand. Mrs [S]'s appeal remains dismissed.

No anonymity direction is made.

Signed Helen Rimington Date 23rd August 2019
Upper Tribunal Judge Rimington