Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00212/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral determination given following hearing	**On 10 July 2019**
On 18 June 2019	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MALIKA [R]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr F Farhat, Solicitor of Gulbenkian Andonian Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal was before me on 5 March 2019 when I found that there had been an error of law in the decision of the First-tier Tribunal such that the appeal would have to be reheard. I gave directions that the appeal would be then relisted before me on Tuesday 16 April 2019 and set out my reasons for so doing. Much of what I wrote in that decision WILL of necessity be repeated below.

2. I heard evidence at the hearing on 16 April 2019 but owing to lack of court time that hearing had to be adjourned until today when it was resumed.

3. The appellant is a national of Morocco who has been in this country now since about 2002. Having been born in July 1985 she was a minor for the first period of her stay. She had entered illegally (albeit that at that time she was a minor and was doing what her family had advised her to do) in order to join her family but she remained in this country after becoming of age and remained without leave. She has not been convicted of any criminal offences and other than having been in this country unlawfully it is not suggested she has committed any.

4. In 2008 the appellant sought a residence card as the spouse of an EEA national but this was refused in February 2010 because the respondent believed that the EEA national whom the appellant had married had in fact been married to someone else. The respondent's records (or so it was believed) indicated that the spouse or alleged spouse of the appellant had previously sought to support an application made by another lady said to be his wife, using another name and for this reason the respondent refused the appellant's application. The respondent informed the appellant that this decision had been made on the basis that her marriage was bigamous because her husband was married to someone else and had never been divorced.

5. This unsurprisingly led to tensions within the relationship between the appellant and her former "husband" and although that gentleman assured the appellant that the respondent's information was false and he had never been married before, the appellant was understandably very confused by all of this. She formed the view (and I shall refer below to the evidence given before this Tribunal today) that the Home Office could not be wrong in this matter and that it followed that her "husband" must have been lying to her all along. As a result of this the appellant separated from her previous husband and obtained a divorce from him. That divorce was finalised in or about June 2011.

6. It should be noted that since that date until the hearing today the respondent maintained the position that the first marriage had been invalid because the "husband" had not been free or had not established that he was free to marry.

7. The appellant did not leave the UK following the refusal of her application for a residence card and she says that she was (in the circumstances possibly understandably) depressed and anxious as a result of discovering that the man whom she claims to have loved had deceived her in the way that at that time she believed was the position.

8. Subsequently the appellant after no doubt some years of misery met a British national of Algerian descent, who is now a naturalised British citizen and she married him in October 2016.

9. The applicant in November 2014, prior to her marriage had made an application for leave to remain in the basis of this relationship which application was refused. The appellant appealed against this refusal and her appeal was dismissed by the First-tier Tribunal. It is not necessary for the purposes of this decision to set out the basis of this appeal because having been given permission to appeal to the Upper Tribunal against this decision by Upper Tribunal Judge Plimmer, the appellant's appeal was eventually heard in the Upper Tribunal by Upper Tribunal Judge Kekic who found that the decision of the First-tier Tribunal contained an error of law and the appeal was remitted back to the First-tier Tribunal for rehearing. At the hearing before Judge Kekic it had been argued both that the appellant should be allowed to remain on the basis that the decision of the Court of Appeal in *Chikwamba* applied but also because by that stage the appellant was seeking to argue that as a matter of fact her first marriage had not been a bigamous one and that the respondent had made a mistake. If this was right, it was argued, then the weight to be given to the importance of maintaining effective immigration control would be reduced because of this factor. So the argument which fell to be considered in the course of the Article 8 application which was now to be reheard was put on the basis that but for this mistake the appellant would or should have been granted a residence card in 2008 under the EU Regulations and that accordingly she was now suffering as a result of the mistake made by the respondent which at the very least ought to reduce the weight to be given to the public interest in excluding her now from the UK. It was argued that this was almost a classic *Chikwamba* situation in that because the appellant was almost certain to be granted permission to return it would not in these circumstances be proportionate to remove her.

10. I noted in my earlier decision in which I found an error of law in the subsequent decision of the First-tier Tribunal that it was the respondent's position as stated before the Tribunal at that hearing by Ms Cunha, that the appellant would probably be granted permission to return but that for this reason it would be proportionate to remove her because the weight which was to be given to the public interest of maintaining effective immigration control under Section 117 of the Nationality, Immigration and Asylum Act 2002 (as inserted by Section 14 of the Immigration Act 2014) was sufficiently large as to make her removal proportionate, notwithstanding that ultimately there might be no apparent reason to prevent her re-entry. Further reference will be made to this below. At that hearing the respondent indicated that the Tribunal would need to have regard to the guidance given by the Court of Appeal in *Hyatt*.

11. The rehearing which had been directed took place in front of First-tier Tribunal Judge Geraint Jones QC sitting at Hatton Cross on 21 December 2018. That was apparently a very lengthy hearing in which the appellant's case that the respondent had made a really quite devastating error with regard to the position of the appellant's first husband was advanced in detail. It is not necessary for the purposes of this decision to do more than note that for the reasons which I set out at length in my earlier decision I considered with Judge Geraint Jones QC's decision dismissing the appeal

contain significant and material errors such that it was not sustainable and would have to be set aside. I then as noted directed that the appeal be reheard before me and as I have also noted that rehearing commenced on 16 April this year and has been concluded today. I also recorded in that decision that it had been accepted very fairly by Ms Cunha on behalf of the respondent that Judge Geraint Jones QC's decision was not sustainable.

The Hearing

12. At the outset of the resumed hearing Ms Cunha informed the Tribunal that she had made her own enquiries and had ensured that the respondent considered properly the evidence which had been given at the previous hearing on 16 April by a French gentleman whom the respondent had believed or at any way stated was an alias of the appellant's former husband. It was on this basis that the respondent had believed that the marriage was a bigamous one following which the appellant had divorced him. It was because of extensive enquiries which had been made by the appellant's current solicitors in conjunction with the appellant herself that the evidence of this French gentleman had been obtained from which it appeared (and this might have been a matter that this Tribunal would have had to determine) that in fact the respondent had been wrong in concluding that the marriage had been a bigamous one and had in fact made a ghastly mistake with appalling repercussions both for the appellant's former husband and also for the appellant herself who for some years had lived with the belief that she had been wholly deceived by a man whom as she now says she married for love. Fortunately, it was not necessary for this Tribunal to make any findings because the respondent having investigated further as a result of Ms Cunha's intervention now accepts that the decision made in 2010, refusing the application then for a residence card had not been justified. Ms Cunha set out the respondent's current position regarding this decision as follows:

> "The respondent's position is that we now accept we made a mistake by concluding that the applicant's previous husband had used an alias [under which he had been married to another person] and that therefore his marriage to the appellant was a bigamous marriage.
>
> We accept that it was not, and as a result of that we also accept that the application for residence [made in 2008] was wrongfully refused."

13. Although Ms Cunha made further submissions with regard to the effect of this mistake, she very fairly and very properly advised the Tribunal that the refusal in 2010 could not be justified.

14. I then heard the evidence from the appellant who relied on her previous statements and was cross-examined and I also had before me the evidence of her current husband, the English national whose evidence was not challenged. The current position is that the respondent accepts that the appellant's present relationship with her husband is a genuine one, that the financial requirements set out within the Rules are satisfied and there is currently no reason of which the respondent is aware why if she

returned to Morocco to make an application for entry clearance from there that application should be refused. It was however the respondent's position, which Ms Cunha was obliged to argue on behalf of the respondent that the public interest in maintaining effective immigration control is sufficiently large that notwithstanding the previous error the proper course would be for the appellant to return to Morocco and make her application from there. She had been resident in this country unlawfully for some considerable period and therefore it would be appropriate for her to make her application on the basis of her present relationship in the usual way from abroad.

15. On behalf of the appellant, Mr Farhat submitted that there were a number of factors why the Tribunal should consider this case to be exceptional. The error was compounded by the respondent's position in maintaining that error for many years; she had been in this country now for some seventeen years, all of her adult life and half of her life, and although that was not on its own sufficient to entitle her to remain, nonetheless it was a factor which had to be taken into consideration when considering whether it was proportionate to remove her; further, there was no reason why she would not ultimately be entitled to come back to this country and to insist on her now leaving to apply to come back would heap further misery on a lady who had already suffered enough at the hands of the authorities in this country.

Discussion

16. I must state at the outset that having heard the appellant give evidence and the answers which she gave when she was cross-examined, I am entirely satisfied and accept that she was as she has claimed devastated when she discovered (or so she believed) that her first marriage had been a bigamous one. It would appear that her previous husband had been working in this country and so she would have been entitled under European law and under the EEA Regulations, to a residence card then. Rather more importantly she would have expected to continue living as the wife of a man she loved and in a marriage which to all intents and purposes appeared to be an entirely happy one and would have continued her life in this country from that time on perfectly lawfully. While as it is accepted on her behalf that does not give her what can technically be called a "legitimate expectation" to remain, nonetheless when one looks now at the proportionality of a decision to remove her this is a factor which must be taken into account.

17. The sad fact is that because of this reprehensible error made on behalf of the respondent this appellant's first marriage which but for this error might very well have continued to this day was ruined and this appellant as I find has suffered considerable heartache because of what she believed for a number of years to have been her husband's cruel deception of her. Now, of course, she also doubtless suffers the guilt of not having believed him as strongly as she should which is something that she will have to live with for the rest of her life.

18. Happily, her current relationship is a strong one. Her husband has attended with her throughout these hearings and has been entirely supportive and this Tribunal has no reason to doubt that this also is a genuine relationship which has survived despite the considerable immigration difficulties which this appellant has been under now for very many years. What the respondent is effectively seeking to do is to say that notwithstanding that the authorities regret having wrecked the appellant's first marriage (as is now implicitly accepted and as I find) it is still in the public interest now to make her go through further hoops (thereby causing disruption to her existing relationship) so that it can be shown to the public that immigration control is taken seriously.

19. In the judgment of this Tribunal in the circumstances of this case this is an entirely disproportionate approach. It is accepted by this Tribunal that the general position would be and ought to be that persons who stay in this country unlawfully will not be permitted to remain merely because in the meantime they have formed a genuine relationship with a partner. It is clear from Sections 117B(4) and (5) of the Nationality, Immigration and Asylum Act 2002 (as inserted by the Immigration Act 2014) that only little weight can be given to such a relationship in such circumstances. However, one must in every case look at the particular circumstances of the individual case. In this case the circumstances are in the judgment of this Tribunal very compelling indeed such that it would be entirely inappropriate to ignore the effect on the appellant and her life of the appalling and reprehensible error made previously by the respondent. But for that error and the effect it has had on the appellant it may very well be that it would have been appropriate to require the appellant to return to Morocco in order to make her application from outside the UK but her life has already been disrupted (needlessly and wrongfully) because of the respondent's dreadful mistake and it would be quite wrong now to insist on further disruption to this appellant's family life which she has managed to re-establish after a considerable period of heartache, merely in order to enable the respondent to demonstrate that the Rules are and are intended to be inflexible.

20. It follows that this Tribunal is entirely satisfied that this appeal should be allowed under Article 8 outside the Rules and will so order.

Notice of Decision

The decision of First-tier Tribunal Judge Geraint Jones QC is set aside as containing material errors of law and the following decision is subsisted:

The appellant's appeal is allowed under Article 8, outside the Rules.

No anonymity direction is made.

Upper Tribunal Judge Craig

Date: 30 June 2019