



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/00212/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 23 November 2017**

**Determination Promulgated  
On 30 November 2017**

**Before**

**UPPER TRIBUNAL JUDGE KEKIĆ**

**Between**

**MALIKA RAIDI  
(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr P Nathan of Counsel, instructed by Moorehouse Solicitors

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

- 1.** The appellant challenges the determination of First-tier Tribunal Judge Kaler promulgated on 25 January 2017 dismissing her appeal against the respondent's decision of 31 December 2015 to refuse her article 8 application.

- 2.** The appellant is a national of Morocco, born on 6 July 1985. She entered illegally in October 2002, albeit as a minor with her family, after an unsuccessful student entry clearance application and was here when her entry clearance appeal (which she did not attend) was heard. There is no record of any leave ever having been granted to her. She sought a residence card as the spouse of an EEA national in 2008 but the respondent was not satisfied that the sponsor was free to marry and refused the application in February 2010. In January 2011, the applicant made an application for leave to remain on the basis of ten years' residence but this was refused on 24 February 2011. She divorced her first husband in June 2011. In November 2014, she made an application for leave to remain and relied on her relationship with a British national whom she married in October 2016.
- 3.** It is relevant to mention (for reasons which will become clear later) that the appellant maintains that her first marriage ended due to the errors of the respondent who confused her first husband's identity with another applicant whose wife had sought a residence card and had consequently erroneously maintained that her husband had not been free to marry her. This had led to conflict between herself and her husband whom she believed had failed to disclose an earlier marriage.
- 4.** Judge Kaler heard evidence from the appellant and her husband. She concluded that the appeal failed because: (i) the appellant would not be at risk from her family members on her return for her "adultery" (at 30); (2) the insurmountable obstacles test had not been met (at 31 and 33-34) and the appellant could make an application from abroad to join her husband (at 32 and 34); and that removal would be proportionate under article 8 (at 36-38).
- 5.** Two points were argued in the application for permission to appeal to the First-tier Tribunal which was refused by First-tier Tribunal Judge Parkes on 11 August 2017 but granted (on ground 1 only) by Upper Tribunal Judge Plimmer on 20 September 2017.
- 6.** The first point was that the Tribunal had failed to address the proportionality of expecting the appellant to return to Morocco to make an entry clearance application when she met the requirements of the rules and there were compelling circumstances such as her length of residence, employment and ongoing fertility treatment which would be disrupted: the Chikwamba/Chen point. The second argument concerned the confusion in the respondent's records (referred to above at paragraph 3) and appears to maintain that had it not been for the errors of the Secretary of State, the appellant may have acquired a retained right of residence under the EEA

Regulations. It is argued that this historic wrong further diminishes the public interest in the need to insist on an entry clearance application. As stated, permission was only granted on the first argument.

## **7. The Hearing**

- 8.** At the hearing before me on 23 November 2017, I heard submissions from the parties. The appellant and her husband were in attendance.
- 9.** Mr Nathan relied on the skeleton argument prepared by Counsel at the hearing before the First-tier Tribunal and pointed out that the Chikwamba argument had been raised at paragraphs 12-14 (specifically at 13) and that the judge had failed entirely to address this given the submission that all the requirements of the rules had been met.
- 10.** Ms Isherwood maintained there was no material error of law. She pointed to the appellant's illegal entry, to the consideration of her family life by the judge, to the issue of insurmountable obstacles (as summarised in paragraphs 20-21 of the determination), to the adverse credibility findings, the rejection of the claim of threats in Morocco and to the circumstances of the appellant and her spouse. She submitted that the issue of insurmountable obstacles could not be put aside simply because an appellant said he/she met the requirements of the rules.
- 11.** Mr Nathan responded. He submitted that the respondent's submissions were misconceived and that there had been a misunderstanding over what the judge was expected to assess when considering article 8. Whilst the case was argued and lost under Appendix FM and insurmountable obstacles, there was also a second limb - the Chikwamba point - and there had been no consideration of this. Mr Nathan referred to the first headnote of Chen (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UJUT 00189 (IAC). He pointed out that the appellant's representatives had made the point that all the requirements of the rules except for the provision on entry clearance, had been met and the judge had failed to engage with that submission. There had, therefore, been a material error of law.
- 12.** Mr Nathan urged me to allow the appeal or, failing that, to remit it for a de novo hearing with a direction to the respondent that there was disclosure of Home Office records which resulted in the belief that the appellant's first husband had been previously married and led to the refusal of the appellant's application for a residence card.

- 13.** Ms Isherwood objected to such a direction and pointed out that permission had not been granted on that point and that Judge Plimmer had not found it to be of relevance when granting permission.
- 14.** Mr Nathan argued that the issue was relevant in the context of the Chikwamba issue as it went to the appellant's immigration history which had been taken as a point against her.
- 15.** At the conclusion of the hearing, I reserved my determination.

## **16. Conclusions**

- 17.** I make this decision conscious of the wish of the appellant and her husband to have the matter resolved at the earliest opportunity. However, that has not been possible in this case for the following reasons.
- 18.** The appeal turns on a fairly narrow point; that is whether the judge when assessing article 8 outside the rules failed to take account of the Chikwamba point argued in Counsel's skeleton argument and whether, if she did, that was a material error of law. Notwithstanding Ms Isherwood's submissions, I find that she did and that it is.
- 19.** Whilst it may have been argued that her consideration of Agyarko [2015] EWCA Civ 440 (at 31), the circumstances of the appellant and her spouse (at 32-34) and her conclusion that the appellant should make an entry clearance from Morocco for re-entry (at 32 and 34) suggested that she had the Chikwamba point in mind, Ms Isherwood did not take that approach and, even if she had, those findings were made in respect of Appendix FM.
- 20.** We know from Chen (*op cit*) that "*Appendix FM does not include consideration of the question when it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the UK*" and that "*there may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate*". This was an argument clearly made in Counsel's skeleton argument which was, in turn, relied upon in her oral submissions before Judge Kaler. The judge commences her consideration of article 8 outside the rules at paragraph 36 and I can

see nothing in the ensuing paragraph to suggest that she addressed that submission. There was, in my view, a clear failure to address a relevant submission made for the appellant and that is an error of law. It is material because it may have affected the outcome of the appeal notwithstanding the judge's comments on the appellant's ability to make an entry clearance application (at 32 and 34). I say that because the judge made those observations without having regard to the guidance and principles of Chikwamba and Chen.

- 21.** It follows that the decision is flawed and I set it aside.
- 22.** I have considered whether or not it is necessary for the entire matter to be re-heard or whether it is possible for the appeal to be allowed outright as Mr Nathan urged. I do not consider that the latter option is viable due to the absence of all relevant documentary evidence as of what would have been today's substantive hearing.
- 23.** Further, I consider that a re-hearing on all matters is required because the issue of the appellant's immigration history is relevant to the assessment of whether the Chikwamba principles should apply to her. Relevant to that is the matter of the appellant's first marriage and the issue of why her application for a residence card was refused in 2009.
- 24.** I decline, however, to make the direction for disclosure to the respondent which Mr Nathan sought. I consider it is more appropriate for the appellant's representatives to seek that information from the respondent by way of representations in the first instance and to provide reasons why they make such an allegation and any evidence in support of it.
- 25.** In conclusion, then, I set aside the determination in its entirety except as a record of proceedings and direct that a fresh decision shall be made on all issues by the First-tier Tribunal.
- 26.** Should the appellant's representatives have difficulties in obtaining the information they seek from the respondent, it is open to them to approach the Tribunal for assistance, either by way of a paper application or by requesting a 'for mention' hearing at which further submissions as to the relevance of the information may be made. However, I do not seek in any way to bind the First-tier Tribunal to how it responds to such a request.
- 27.** The appellant is reminded that she will be required to adduce evidence to show that a temporary separation would interfere

disproportionately with her protected rights and that a reliance solely on case law will be insufficient (as per Chen; headnote 1).

**28.** For the above reasons, I find that the judge made material errors of law and her decision cannot stand. The matter shall therefore be transferred to the First-tier Tribunal for a fresh hearing at which the decision shall be re-made.

**29. Decision**

**30.** The First-tier Tribunal made errors of law such that the decision is set aside. It shall be remade by another judge of that Tribunal at a date to be arranged.

**31. Anonymity**

**32.** No request for an anonymity order was made and I see no reason to make one.

Signed

A handwritten signature in black ink, appearing to read 'R. Keir' with a small dot at the end.

Upper Tribunal Judge

Date: 23 November 2017