



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

Appeal no: **OA079202015**

THE IMMIGRATION ACTS

At **Field House**

Decision & Reasons
Promulgated

on **20.06.2017**

25 on 25.07.2017

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Nadia BALOUAH

Appellant

and

Entry Clearance Officer, PARIS

Respondent

Representation:

For the appellant: *Andrew Otchie* (counsel instructed by Tremont Midwest)

For the respondent: Mr Sebastian Kandola (on 20 June); Miss Julie Isherwood (on 24 July)

DETERMINATION & REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Ian Howard), sitting at Hatton Cross on 17 August 2016, to dismiss an appeal against refusal of a wife visa, by a citizen of Morocco, born 1988.

2. The sponsor, also a citizen of Morocco, had entered into a civil partnership with a Frenchman in this country in 2008, following which he remained in this country on an EEA residence card. In 2013 he and the appellant married in Morocco; but it was not till 2014 that his civil partnership was dissolved. The respondent took the point that he had not been free to marry the appellant when he did.

NOTE: (1) *no anonymity direction made at first instance will continue, unless extended by me.*

(2) *persons under 18 are referred to by initials, and must not be further identified.*

3. This was one of the two points on which the judge dismissed the appeal, after finding that the appellant and the sponsor did have a ‘genuine and subsisting relationship’. The other involved the lack of the required TB certificate at the date of the decision. Since there is one now, and the decision involved the validity of the parties’ marriage, that question needs to be decided, whether or not it could affect the result under the Immigration Rules.

4. The judge dealt with the validity point in this way:

11.[The applicant maintains] that it is a valid Moroccan marriage as the sponsor’s civil partnership, extant at the date of the marriage, would not be recognised in Morocco at all. I have no evidence to support this contention beyond the appellant’s assertion in her grounds of appeal.

12.The marriage would not be recognised in the UK by virtue of the civil partnership still being extant and in the absence of evidence I must treat the legislation of the home country as being the same as that in the UK. Accordingly I am not satisfied the marriage is legal.

The grounds of appeal challenged his decision on the basis set out there; but permission was given on the other point pleaded, which was that, contrary to the judge’s paragraph 5, the sponsor had been “... available to give oral evidence, had he been called to do so”.

5. While the grounds referred to Morocco being governed by *shari’a* law, which does not recognize civil partnerships between homosexuals, they made no attempt to deal with the relevant private international law. Under that, while questions of formal validity are governed by the *lex loci celebrationis*¹, questions of capacity are to be decided by the *lex domicilii*² of the parties; and each party must have the relevant capacity.

6. It follows that, before the judge made any assumptions, right or wrong, about the law of Morocco, he needed to investigate the domicile of the parties, in order to decide which was the relevant law. While it was entirely for Mr Otchie to decide whether to call the sponsor or not, it was for the judge to make that inquiry.

7. Mr Kandola argued that the judge had nevertheless reached the right result, if by the wrong route. In order to decide whether that is so or not, I need to reach my own views on the relevant law, so far as I can without further evidence. The appellant clearly retains her domicile of origin in Morocco; and I am quite prepared to take judicial notice that the law of Morocco is based on *shari’a*, and would not recognize the sponsor’s civil partnership. It follows that the appellant was free to marry him when she did.

8. The position, so far as the sponsor is concerned, is more complicated. If he had become a British citizen, then, although that is not conclusive evidence of his acquiring a domicile of choice, it could safely be assumed, in the absence of evidence to the contrary, that he was at the time of the

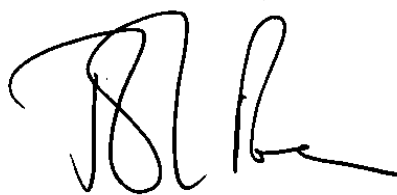
¹ law of the place of celebration
² law of the domicile

relevant events domiciled in England and Wales, and so unable to marry till his civil partnership was finally dissolved.

- 9.** However, the sponsor's status in this country depends on his former relationship with an EEA citizen: on that basis, he may or may not be entitled to permanent residence. When I raised the question of his domicile on 20 June, Mr Otchie invited me to take it up with the sponsor directly; so I did. The sponsor very frankly told me that he wanted to stay in this country, and looked forward to growing old here. While those were answers on which I might have taken the view that he had acquired a domicile of choice here, I decided that, as, partly by Mr Otchie's fault, and partly by the judge's, he had not so far had an opportunity to give full oral evidence on this point, he ought now to be given one.
- 10.** As it turned out, the documents submitted with the visa application form included a permanent residence card, issued on 28 May 2013: this, together with his own statement, amounts to clear and unequivocal evidence that he had acquired a domicile of choice in this country by then. His marriage to the appellant took place on 6 September 2013, and the dissolution of his civil partnership not till 2014 (conditional order on 30 July, absolute 21 October).
- 11.** Mr Otchie did not seek to put forward any further evidence or argument on this point; so it follows that the basis for the visa application in this case was misconceived, since at the date of the marriage the sponsor was not free to marry by the law of his domicile, since his civil partnership had not yet been dissolved.
- 12.** This of course forms no bar to the sponsor going through another ceremony of marriage with the appellant, in any jurisdiction which recognized a marriage taking place in those circumstances; or to her making a fresh application on whatever basis may be available to her. In those circumstances, unless there were good reason for saying that things had changed, the entry clearance officer would be expected to follow the judge's findings about the 'genuine and subsisting relationship' between the appellant and the sponsor.

First-tier decision set aside

Appeal dismissed



Tribunal)

(a judge of the Upper

Signed: **24.07.2017**

