



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/11109/2016

THE IMMIGRATION ACTS

Heard at Field House
Oral determination given following hearing
On 21 January 2019

Decision & Reasons Promulgated
On 08 March 2019

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MS INNA PAVLIUK
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Norman, Counsel
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The applicant is a national of Ukraine who had apparently arrived in this country without leave and remained unlawfully for about two years before returning to Ukraine. On 14 February 2011 she was recorded on exit as having been in this country unlawfully. While in the Ukraine she married a Lithuanian national and on 21 August 2011 she applied for a residence card to be with him in the UK where he was exercising treaty rights and this residence card was issued. At this stage there was no investigation as to whether or not the marriage was a genuine one or whether it had been a marriage of convenience.

2. The marriage ended in divorce on 28 January 2015 following which on 11 February of that year she applied for a retained right of residence as she would be entitled to, if the marriage had been genuine and they had been living together for a year and the marriage had lasted for more than three years before the commencement of divorce proceedings.
3. It is not known when the divorce proceedings were commenced but the respondent has not suggested that they were commenced before the couple had been married for three years and accordingly there is no basis for finding other than that subject to the marriage not having been a marriage of convenience the appellant would indeed be entitled to a retained right of residence as claimed.
4. Again a permit confirming that she had a retained right of residence was issued without any further investigation.
5. On 8 March 2016 the appellant applied for permanent residence on the basis that she had been residing in the UK for five years in accordance with the EEA Regulations but following this application for the first time the respondent decided to interview her. They discovered that she was living with someone, not her husband, which would not of itself have been surprising for a young lady who was by this time divorced. However during her interview a number of other matters arose which caused concern. There were inconsistencies within the interview and also it appeared to the respondent that the appellant had in fact been living with her current partner both before and during the time when she was married to her "husband". The respondent accordingly took the view that the previous grants of residence cards have been obtained by deception and that the "marriage" had been a marriage of convenience from its inception. For this reason the application for a permanent residence card was refused.
6. The appellant appealed against this decision and her appeal was heard before First-tier Tribunal Judge Lucas, sitting at Hatton Cross on 13 September 2018. In a decision and reasons promulgated on 15 October 2018 Judge Lucas dismissed the appeal.
7. The issue before the judge was whether or not the marriage had from its inception been a marriage of convenience and in the course of his decision the judge emphasised that there had been a lack of evidence from either the appellant's "husband" or from her current (or as the respondent believed previous and permanent) partner. This was emphasised by the judge as a reason for his finding that the marriage was a marriage of convenience.
8. In fact (and this has been confirmed by a note which was referred to by Mr Whitwell, representing the respondent at the hearing before this Tribunal), there had been brief statements before Judge Lucas which were contained in the supplementary bundle from both the appellant's husband and her current partner. Clearly therefore the judge's reference to there having been no witness statement "from either the appellant's partners in this case" (at paragraph 24 of his decision, repeated at paragraph 30) was an error.

9. The appellant's husband's statement includes as follows:

"I am writing to confirm that [the appellant] and I were in a relationship from July 2009 until we got divorced in January 2015. [The appellant] and I married on 18 February 201 (sic). I confirm that our relationship was genuine from the moment we (sic) we met in 2009 until we separated".

10. The appellant's husband also confirmed that they had lived in Peterborough from December 2009 until January 2011, which had been a matter relied upon on behalf of the appellant during the hearing, because the appellant's current partner had not, although this was not referred to in the decision.

11. The statement from the appellant's current partner refers to having first met the appellant in 2007 (which suggests that the stay of the appellant in the UK may have been longer than is currently claimed) and that they lived together for a brief period in that year but that they did not maintain any form of relationship thereafter. He says that he met his ex-wife in 2010 after Christmas and that they were married from June 2012 until their divorce in November 2015 and that that relationship was genuine. He says that he reconnected with the appellant when her then husband moved into a room in the property that he was renting in Greenford and that although they became friends at first "but as both of our relationships started to break down we became closer" and that they "started an affair when we went to the Dominican Republic together in April 2013".

12. In other words, the statements of both the appellant's husband and her former partner are to the effect that the marriage was a genuine marriage and that it had not been a sham conducted during a period when the appellant and her current partner were in fact in a relationship together.

13. On behalf of the respondent, Mr Whitwell accepted that as these witness statements had been before the First-tier Tribunal, the judge's statement both at paragraph 24 and 30 of his decision that there had not been witness statements from either of these witnesses had been a material error, because it had led to the finding at paragraph 31 that the relationship was not genuine.

14. In my judgment Mr Whitwell was entirely correct in so accepting. It may well be the case that the marriage was indeed a marriage of convenience, as was asserted on behalf of the respondent, but the appellant was and remains entitled to have her case considered having regard to all the evidence which is put before the Tribunal, including such evidence as supports her claim that the marriage was a genuine one. Her case was not so considered and accordingly must now be reheard.

15. As the appellant's case has not been considered properly it is appropriate to remit this case back to the First-tier Tribunal so that it can be considered by any judge other than Judge Lucas, with no findings retained and I shall so order.

Notice of Decision

The decision of First-tier Tribunal Judge Lucas, dismissing the appellant's appeal, is set aside as containing a material error of law and the appeal is remitted to the First-tier Tribunal sitting at Hatton Cross for rehearing before any judge other than First-tier Tribunal Judge Lucas.

No anonymity direction is made.

Signed:

A handwritten signature in black ink that reads "Ken Craig". The signature is written in a cursive style with a long, sweeping tail on the letter 'g'.

Upper Tribunal Judge Craig

Date: 27 February 2019