



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

Appeal Number: OA/16124/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 4 July 2016**

**Decision & Reasons  
Promulgated  
On 8 July 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHAERF**

**Between**

**ENTRY CLEARANCE OFFICER - NAIROBI**

Appellant

**and**

**FAIZA BAISHE ASMAN  
(ANONYMITY ORDER NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms Z Ahmad of the Specialist Appeals Team  
For the Respondent: Mr R Solomon of Counsel instructed by Shanthy & Co,  
solicitors

**DECISION AND REASONS**

## **The Respondent**

1. The Respondent, to whom I shall refer as “the Applicant”, is a citizen of Kenya born on 28 July 1978. Her several applications for entry clearance to the United Kingdom are briefly described in paragraph 1 of the decision by Judge of the First-tier Tribunal Peter-John White promulgated on 8 January 2016 allowing her appeal against the refusal on 11 November 2014 by the Appellant (the ECO) to grant her entry clearance to join her husband Daudi Md. Yusuf, a national of Kenya, born on 1 July 1959, to whom on 7 October 1991 indefinite leave was granted.
2. They had married in Mombasa on 16 December 2011. He is her Sponsor. He has an adult daughter by his previous marriage who lives with her mother. He has a son born in 1999 who lives with him and in respect of whom a Parental Responsibility Order in his favour was made on 27 November 2000.

## **The Original Decision**

3. In the refusal of 11 November 2014 the ECO considered the Applicant did not meet the requirements of paragraph E-EC-P.1.1 (eligibility for entry clearance) of Appendix FM of the Immigration Rules and noted the Applicant had not submitted the Sponsor’s divorce certificate and the evidence which she had submitted of the subsistence of the marriage was limited and that there was no clear evidence whether he had visited her since January 2012. The ECO concluded that the Applicant’s relationship with her husband was not genuine and subsisting and that they did not intend permanently to live together. However at the part of the decision referring to paragraph E-ECP.1.1 the ECO stated the Applicant had “not submitted the required financial requirement Appendix form and had therefore not provided information that is pertinent to the consideration of your visa application.”
4. On 16 July 2015 the Entry Clearance Manager reviewed the decision. The record of the review is in formulaic terms.
5. On 9 December 2014 the Applicant through her solicitors lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are lengthy. In essence they assert the ECO should have taken into account documentation including the divorce certificate which had previously been lodged by the Applicant in relation to earlier applications made in 2012. Alternatively the Applicant should have been asked to supply such documentation if it had been omitted from her Visa Application Form before the ECO made a decision. Reference is also made to her rights to a private and family life protected by Article 8 of the European Convention.

## **Proceedings in the First-tier Tribunal**

6. By the decision promulgated on 8 January 2016 already mentioned, the Applicant's appeal was allowed under the Immigration Rules. The Judge found that the evidence of the Applicant's husband was credible and reliable as was the evidence of his son. The Judge concluded the Applicant's marriage was genuine and subsisting and allowed the appeal under the Immigration Rules.
7. The ECO sought permission to appeal and on 26 May 2016 Judge of the First-tier Tribunal J M Holmes granted permission to appeal on the "short point that the Judge failed to engage with all the reasons given by the ECO for refusing the application, and thus failed to resolve all of the disputed issues of fact." He went on to explain it was arguable that Judge White was bound to consider the evidential requirements of Appendix FM-SE.

### **The Upper Tribunal Hearing**

8. The Sponsor attended the hearing in the Upper Tribunal although he took no active part in the proceedings.
9. For the ECO, Ms Ahmad submitted the decision made it clear that the ECO considered the Applicant had not met the financial requirements of the Immigration Rules. The need for the Applicant to meet these requirements had not been conceded. The details of the Sponsor's employment had been inserted in the Applicant's Visa Application Form of 10 November 2014 (the VAF). At paragraph 9 of his decision the Judge had referred to evidence which had been put before him of the husband's financial circumstances but subsequently had made no reference to it and whether the Applicant had shown she with her husband could satisfy the relevant maintenance requirements of the Immigration Rules. The Judge had not addressed this issue and consequently his decision could not stand.
10. For the Applicant, Mr Solomon submitted there was no material error of law in the Judge's decision. It was necessary to distinguish between a failure to meet the requirements of the Immigration Rules and a failure to complete the relevant form with the requisite financial information. Failure to submit the form was not material to the application and it did not mean the Applicant did not meet the financial requirements. The ECO had failed to separate the two elements of the refusal and had dealt with the application exclusively by way of reference to paragraph E-EC-P.1.1 which set out the criteria for eligibility for entry clearance as a partner. The ECO had not referred to paragraph E-ECP.3 which dealt with the financial requirements.
11. The first paragraph of the section of the refusal headed "Decision" was simply a mere observation and did not amount to a reason for refusal of entry clearance. This view was strengthened by the absence of any reference to paragraph E-ECP.3 in the decision. The Judge was therefore correct in viewing the only issue raised in the refusal was the Applicant's marriage.

12. In the alternative, Mr Solomon submitted that the relevant sections of the VAF comprised the relevant form.

### **Consideration and Decision**

13. Copies of the ECO's decisions on the previous application made by the Applicant for entry clearance as a spouse or the documentary evidence to show that the maintenance requirements of Appendix FM were met were before neither the First-tier Tribunal nor the Upper Tribunal. Accordingly, there was no evidence that at any prior time the ECO had accepted the Applicant with her husband was able to satisfy the requirements of Appendix FM or indeed Appendix FM-SE because the reference in the decision is to the completion of the relevant form with submission of the relevant supporting documentation. Subsequent to the Applicant's appeal, it is clear the Entry Clearance Manager's review did not identify the point. Nevertheless, the original grounds of appeal state that the Applicant's earlier application had been refused in part because the Applicant had not shown that she and her husband were able to meet the maintenance requirements of the Immigration Rules: see para.4.
14. Consequently, the Applicant had been made aware that when preparing her later application leading to the decision under appeal she would have to address the maintenance requirements of the Immigration Rules. I do not think that either the Applicant or the ECO were assisted by the fact that the ECO's agent who assembled the application incorrectly completed the section on the checklist of documents filed under the section "Finances": see page 44 of the ECO's bundle.
15. The Applicant was on notice from her previous settlement application and from an awareness that she would have to establish that she would be adequately maintained in the United Kingdom in accordance with the requirements of the Immigration Rules that she was not misled into believing that the ECO had conceded that requirement or that it was one from which she had been exempted.
16. The Judge was on notice from the reference, albeit mis-placed, in the ECO's refusal of entry clearance that the obligation of the Applicant to meet the financial requirements of the Immigration Rules was outstanding. Similarly, the Judge erred in law by not addressing whether the Applicant satisfied the financial requirements of the Immigration Rules.
17. Consequently his decision in that respect must be set aside but his findings as to the genuineness and subsistence of the Applicant's marriage are retained and shall stand. This is not a Points-Based System appeal and so the principles in *DR (Morocco) (ECO: post-decision evidence) [2005] UKIAT 00038* will apply and the Applicant and her husband will have ample opportunity to ensure that the relevant documentation to

show the Applicant meets the requirements of Appendix FM is supported by evidence in the specified form as provided by Appendix FM-SE.

18. Having regard to Section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 and paragraph 7 of the Practice Statement of 10 February 2010 (as amended), the case is remitted to the First-tier Tribunal to decide whether the Applicant with her husband can meet the relevant maintenance requirements of the Immigration Rules. For the avoidance of doubt, in this instance, maintenance does not include accommodation in respect of which the Applicant has already filed sufficient evidence.

### **Anonymity**

19. There was no request for an anonymity direction and having considered the appeal I find none is warranted.

### **NOTICE OF DECISION**

**The decision of the First-tier Tribunal contained a material error of law and is set aside and cannot stand. The findings of fact in respect of the subsistence of the Applicant's marriage are retained. The appeal is remitted to the First-tier Tribunal for consideration whether the Applicant has shown she meets the maintenance requirements of the Immigration Rules.**

**Anonymity direction not made.**

Signed/Official Crest

Date 08. vii. 2016

Designated Judge Shaerf  
A Deputy Judge of the Upper Tribunal