



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/04922/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 6<sup>th</sup> September 2018

Decision & Reasons Promulgated  
On 18<sup>th</sup> September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

CATHY BAMBOLE  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - PRETORIA

Respondent

**Representation:**

For the Appellant: Mr D Eteko, Counsel instructed by Iras & Co

For the Respondent: Mr S Kandola, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant, Cathy Bambole, appeals against the decision of Judge Lawrence to dismiss her appeal against refusal by the Entry Clearance Officer in Pretoria of her application to join her husband, Blaise Kituantala, who is settled in the United Kingdom. I will refer hereafter to Mr Kituantala as 'the Sponsor'. Anonymity was not directed in the First-tier Tribunal and I see no reason to do so now.
2. The Entry Clearance Officer refused the application on two grounds. Firstly, that the evidence did not prove to the requisite standard that the marriage was genuine and

subsisting at the date of the application. Secondly, that not all the documents specified in Appendix FM-SE of the Immigration Rules had been submitted. In upholding that decision, the judge dealt with the respondent's reasons in reverse order. However, I propose to deal with them in the order they were dealt with by the Respondent, which is also the order they appear in the grounds of appeal. This is because, if I find that the judge was entitled to hold that the Appellant had failed to prove that her marriage was genuine and subsisting, the correctness of his approach to the financial requirements of the Immigration Rules would be immaterial to the outcome of her appeal.

3. In granting permission to appeal, Judge Grimmett said that it was arguable that the Judge Lawrence had failed to make proper findings as to the genuineness of the marriage because he (Judge Grimmett) could not understand why the appeal had been dismissed. I am however satisfied that Judge Lawrence's reasons are perfectly intelligible and the grounds of appeal do not suggest otherwise. I shall therefore focus on the grounds themselves, as they were ably presented to me by Mr Eteko.
4. Mr Eteko submitted that the judge was wrong to say that the certificate evidencing the marriage between the Appellant and Sponsor was full of spelling mistakes. It is right to say that the only example Judge Lawrence gave of this was that the word 'marriage' had been spelt with only one 'r'. Mr Eteko told me (although I have no evidence to support his assertion) that 'marriage' was correctly spelt in the language of the document (French). However, assuming in the Appellant's favour that the judge was wrong to make that criticism, his error was not necessarily material to his overall reasoning and thus to the outcome of the appeal. This is because - as was made plain at paragraph 13 of the judge's decision - the Presenting Officer in any event accepted that the parties had undergone a ceremony of marriage. The question of whether there were deficiencies in the certificate evidencing that fact was thus arguably immaterial to the question of whether the relationship was genuine and subsisting at the date of the application.
5. The question remains as to whether the fact the judge took account of an arguably immaterial consideration (if it was a consideration at all) is one that infects the remainder of his reasoning. I have concluded that it does not. The judge noted and apparently accepted the submission of the Presenting Officer that the fact the Appellant and the Sponsor had undergone a lawful ceremony of marriage was not of itself evidence that it was and remained a genuine and subsisting relationship as at the date of the application. If that is right (which it plainly is) then it seems to me that the judge must also have accepted that any technical defect in the legality of the original marriage contract would not of itself have impacted adversely upon the question of whether the relationship was genuine and subsisting at the date of application. I therefore conclude that any error the judge may have made in his assessment of the marriage certificate was immaterial to the outcome of the appeal. I accordingly turn to the remainder of his reasoning.
6. The judge next considered evidence that the Sponsor had previously entered a 'traditional marriage' with a third person, albeit that this appears to have been followed by a 'traditional divorce' prior to the Sponsor marrying the Appellant. The judge seems to have reasoned from this that Appellant's credibility was undermined

by the fact that he had described himself as 'single' rather than 'divorced' at the time when he married the Appellant. It may well be that I would not have attached as much weight to this fact as did the judge given that the distinction between being a 'divorced' and a 'single' person may be considered to be a fine one. However, I am satisfied that it was reasonably open to the judge to conclude that the failure of the Sponsor to mention that he had been previously been married in a traditional marriage was a matter that undermined his overall credibility as a truthful witness.

7. Mr Eteko drew attention to the fact that the judge accepted that there was evidence before the Tribunal of contact between the Sponsor and Appellant and submitted that the judge had erred in failing to treat this as evidence of intervening devotion that sufficed to discharge the burden of proving that the marriage was genuine and subsisting at the date of the application. It is plain the judge did attach some weight to this evidence. However, I am satisfied that it was reasonably open to him to balance that evidence against other factors that pointed in the other direction. This included the fact that the Sponsor had not visited the Appellant in the Democratic Republic of Congo since the decision. Moreover, the explanation that the Sponsor had given for not doing so had not always been consistent, and the Sponsor had changed his account of his visits to the Appellant after hearing submissions by the Presenting Officer that he had been inconsistent in that regard. The judge noted in the Appellant's favour that there had been money transfers from the Sponsor to the Appellant, which he considered in the round with the other evidence. He also noted the Sponsor's mother-in-law (the Appellant's mother) had been unable to give evidence because it was plain that she did not speak English. In those circumstances, the judge was entitled in my view to attach less weight than otherwise to her supporting witness statement that was written in English. The judge was also in my view entitled to question why the signature on her statement was similar to that on the Sponsor's witness statement, and to conclude that their statements were formulaic and mainly based on assertion rather than evidence of facts.
8. Mr Eteko accepted that ultimately his argument in relation to the first ground of appeal was that the judge's finding in relation to the subsistence of the marriage was contrary to the weight of the evidence. However, this was in effect asking me simply to disagree with the reasoned decision of the judge. I therefore conclude that it has not been established that the judge made a material error of law upon this issue. That being the case, it is not strictly necessary for me to consider the second ground of appeal. This is because even if the judge made an error of law in relation to specified documents, the appeal could not have succeeded without the Appellant in the first instance proving that hers was a genuine and subsisting marriage. That logic applies equally whether the matter is considered within the confines of the Immigration Rules or within the potentially broader scope of Article 8 of the Human Rights Convention. I have nevertheless considered the second ground for the sake of completeness.
9. The judge rightly began his Article 8 analysis on this aspect of the case with the Immigration Rules. Mr Eteko agreed that this was the appropriate starting point.
10. The problem with the application was that there were a significant number of missing bank statements. Mr Eteko argued before the judge, as he indeed did before me, that

the Respondent should have exercised the discretion, conferred by the Rules, to write to the Appellant drawing attention to the large number of missing bank statements and inviting the appellant belatedly to submit them. The judge noted that submission at paragraph 12 of his decision. His response was this:

“It appears to me that this submission is contrary to the Rules. As highlighted above, the Respondent is obliged to contact the Sponsor if a document is missing from a series and not when only one in that series was provided”.

That seems to me to be a perfectly accurate statement of the legal position regarding the scope of the discretion afforded to Entry Clearance Officers under Appendix FM-SE.

11. However, the real point is whether the judge was wrong not to have had regard to the fact that the deficiency in the Appellant’s documents (and thus her application) had apparently been made good by the date of the hearing. The pleaded ground of appeal in this regard is in fact entirely misconceived. This is because it is based upon an old version of Section 85 of the Nationality, Immigration and Asylum Act 2002 which, it will be recalled, made a distinction between evidence that was admissible and relevant to an entry clearance appeal and that which was admissible and relevant to an in-country appeal. However, that eversion of Section 85 was repealed with effect from the 5<sup>th</sup> April 2015. The Tribunal may now in all cases take account of evidence post-dates the decision providing it is relevant to “the substance of the decision”. The question is thus whether the ‘missing documents’ were relevant to the substance of the Respondent’s decision, to which I now turn.
12. As previously noted, Mr Etoko accepted that the starting point for an Article 8 assessment is the Immigration Rules. However, the Rules say that the documents in question must be submitted with the application. That seems to me not only to be reasonable but obviously necessary given that it is difficult to see how the Entry Clearance Officer could consider an application under either the Rules or under Article 8 save on the basis of documents actually submitted with the applicant. Thus, whilst the belated submission of documents that ought to have been submitted with the application may be a relevant factor in the wider analysis under Article 8 (outside the Rules) it does not seem to me that it can of itself lead to the conclusion that it would be a breach of a person’s fundamental human rights to insist the application be made afresh in its proper form.

### **Notice of Decision**

13. The appeal is dismissed

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Kelly