



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/11497/2013

**THE IMMIGRATION ACTS**

Heard at Columbus House, Newport  
On 12 May 2014

Determination Promulgated  
On 28 May 2014

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ENTRY CLEARANCE OFFICER - BEIRUT

and

BASEL ESLEEM

Appellant

Respondent

**Representation:**

For the Appellant: Mr I Richards, Home Office Presenting Officer  
For the Respondent: Ms R Thomas, Sponsor

**DETERMINATION AND REASONS**

1. This is an appeal by the Entry Clearance Officer against a decision of the First-tier Tribunal (Judge Elson MBE) which allowed the claimant's appeal against a decision dated 26 April 2013 refusing him entry clearance as the spouse of a British citizen (Rachel Thomas) under Appendix FM of the Immigration Rules (HC 395 as amended).

2. For convenience, I will refer to the parties hereafter as they appeared before the First-tier Tribunal.

### **Background**

3. The appellant is a citizen of Syria who was born on 30 April 1986. The sponsor is a British citizen. The appellant and sponsor met on the internet in 2011. Their relationship developed and on 20 July 2012, the sponsor went to the Lebanon to meet the appellant. They remained together for five weeks and on 14 August 2012, they married in Lebanon. The sponsor returned to the UK and the appellant relocated to the United Arab Emirates.
4. In February 2013, the appellant made an application for entry clearance to join his spouse in the UK under Appendix FM. In a decision dated 2 May 2013, the Entry Clearance Officer refused the appellant's application on three grounds. First, he was not satisfied that the sponsor had established by the required evidence that she had a gross income of at least £18,600 per annum (see para E-ECP3.1). Secondly, he was not satisfied that the appellant had provided satisfactory evidence of adequate accommodation (see E-ECP3.4). Thirdly, the Entry Clearance Officer was not satisfied that the relationship between the sponsor and appellant was a genuine and subsisting one and that they intended to live together permanently (see E-ECP2.6 and 2.10).

### **The First-tier Tribunal's Decision**

5. The appellant appealed to the First-tier Tribunal. Judge Elson MBE determined the appeal on the papers as no oral hearing had been requested. The Judge found in the appellant's favour on two of the three issues raised by the Entry Clearance Officer.
6. First, Judge Elson was satisfied that the appellant would be adequately accommodated in the UK on the basis of documentation submitted by the sponsor concerning her flat (see para 13).
7. Secondly, the judge was satisfied on the basis of the evidence submitted, including evidence of contact between the parties and a post-decision visit by the sponsor to be with her husband in the UEA from 18 August 2013 to 11 September 2013, that their relationship was genuine and subsisting and that they intended to live together permanently. At para 14 of his determination, Judge Elson said this:

"The entry clearance officer does not dispute that the Sponsor and the Appellant are married. I accept the Sponsor's explanation as to the nature and length of her visits to the Sponsor, namely that she has a job in the United Kingdom. It is apparent that she supports herself and has a flat which is subject to a mortgage and that she has to meet her work commitments in the United Kingdom. I accept that the Sponsor and the Appellant do enjoy a genuine and subsisting relationship and I accept that it is their intention to live together permanently as husband and wife."

8. Finally, as regards the sponsor's employment, Judge Elson accepted that the sponsor's payslips indicated that her gross salary exceeded £18,600 as required by

Appendix FM (see para 13). However, he was not satisfied that the appellant had provided the required documentation as, despite providing the relevant payslips, the letter from the sponsor's employer had not been included with the documents provided with the application (see para 15). The judge referred to a letter dated 29 May 2013 which was before him but which, given its date, could not have been submitted with the application. As a consequence, Judge Elson concluded that the appellant had not established, by the required evidence, that he met the requirements of Appendix FM.

9. Nevertheless, at para 16 Judge Elson allowed the appeal as not being in accordance with the law on the basis that the ECO had not applied the 'evidential flexibility' policy to seek from the appellant the missing documents. At para 16, Judge Elson said this:

"From the papers before me there is no indication that the entry clearance offer pointed out to the Appellant that he had not included certain documents with his application or gave him the opportunity to supply such missing documents prior to the entry clearance officer reaching his decision to refuse the application which he should have done in accordance with the Secretary of State's own evidential flexibility policy. There is however now with the papers (without any explanation as to how it came to be there) the required employer's letter. I conclude that the entry clearance officer did not therefore act in accordance with the before mentioned policy so that she did not act fairly and I conclude that her decision was not in accordance with the law."

### **The ECO's Appeal to the Upper Tribunal**

10. The Entry Clearance Officer sought permission to appeal on two bases. First, the judge had erred in law in finding that the ECO had failed to apply the 'evidential flexibility' policy. Secondly, the judge had failed to give adequate reasons as to why the appellant and sponsor had a genuine and subsisting marriage and intended to live together permanently in the UK on the basis that the appellant and sponsor had failed to provide sufficient evidence to demonstrate they had been in regular contact.
11. On 12 February 2014, the First-tier Tribunal (Judge Levin) granted the ECO permission to appeal to the Upper Tribunal on the basis that the judge had been arguably wrong to end his determination by stating that he allowed the appeal "under the Immigration Rules" given his finding in para 15 that the appellant could not meet the requirements of the Rules. In addition, the judge had been arguably wrong to allow the appeal on the basis that the ECO had failed to follow the 'evidential flexibility' policy without identifying that policy.
12. At the hearing, Mr Richards represented the ECO and the sponsor appeared in person.
13. Mr Richards invited me to find that the judge had erred in law in applying the 'evidential flexibility' policy but, having considered the documents submitted by the appellant and sponsor both in relation to the sponsor's income at the date of application and also the evidence of continuing contact shown in photographs and

Skype records, Mr Richards accepted that the appeal should be allowed under the Immigration Rules.

### **Discussion**

14. The two areas of dispute concern the sponsor's employment income and the genuineness of their marriage.
15. As regards the former, the appellant submitted the sponsor's P60 for the tax year ending in April 2012 and payslips covering the period September 2012 to February 2013 which covers a six month period up to the date of application. The bundle also contains a letter dated 15 January 2013 from the sponsor's employer, Mini Plant Oxford, which identifies the sponsor has having been employed since 2 April 2007 as an Assembly Associate which is a full-time and permanent position. The sponsor's salary is identified as £25,176 per annum. There is also a similar letter dated 29 May 2013 which was referred to by the judge in his determination. That, of course, could not have been submitted with the application as it postdates the ECO's decision. However, it is clear from the "Visa Application Submission Receipt" that the appellant submitted a "SPONSOR EMPL LTR" which must mean a letter from the sponsor's employer. The only letter that could refer to is the one dated 15 January 2013 which, for reasons unknown, did not find its way from the ECO to the judge. It was, undoubtedly, part of the appellant's submission to the ECO. In addition, there are bank statements from the Nationwide Building Society in the sponsor's name showing the payment in of her salary in the relevant period immediately preceding the appellant's application.
16. On this evidence, as Mr Richards acknowledged, the appellant has established on a balance of probabilities on the basis of the specified evidence under Appendix FM-SE that he met the financial requirement in E-ECP3.1 of demonstrating that the sponsor (and therefore the appellant) has available a gross annual income of £18,600.
17. As I have indicated, Mr Richards did not seek to disturb the judge's finding in para 14 that, on the basis of all the evidence before him, he was satisfied that the parties' relationship was a genuine and subsisting one and that they intended to live together permanently as husband and wife. I have no doubt that that finding was properly open to the judge and, on the basis of the evidence, I would make the same finding. The judge had the sponsor's evidence as to the genuineness of their relationship. There was evidence of continuing contact both in the form of photographs and Skype records and there was a post-marriage visit by the sponsor to see the appellant in the UEA between 18 August 2013 and 11 September 2013. The judge accepted the sponsor's explanation that it was her commitments in the UK which prevented more frequent visits. I am satisfied that the judge was entitled to make a positive finding in the appellant's favour on the genuineness and subsistence of the marriage and that the parties intended to live together permanently.
18. The finding in relation to the adequacy of accommodation is not challenged and it has never been suggested that the appellant cannot meet the other requirement of Appendix FM.

19. On the basis of the evidence, therefore, the judge was wrong in law to conclude that the appellant did not meet the requirements of Appendix FM. The appellant was entitled to entry clearance as a spouse under Appendix FM.
20. For these reasons, the judge was wrong in law to allow the appeal only on the limited basis that the decision of the ECO was not in accordance with the law. Although, contrary to what is said in the grounds of appeal, there is an evidential flexibility policy applicable under Appendix FM and it is set out at Appendix FM-SE para D. However, on the evidence before the judge, the judge should have allowed the appeal under the Immigration Rules on the basis that the appellant met the substance of the Rules.

**Decision**

21. For these reasons, the First-tier Tribunal's decision to allow the appeal as not being in accordance with the law involved the making of an error of law and that decision is set aside.
22. I remake the decision allowing the appellant's appeal under the Immigration Rules on the basis that the appellant meets the requirements of Appendix FM for entry clearance as a spouse.

Signed

A Grubb  
Judge of the Upper Tribunal

**TO THE RESPONDENT**  
**FEE AWARD**

The appellant has succeeded under the Immigration Rules largely on the basis of the material which was before the Entry Clearance Officer. In those circumstances, I make a whole fee award against the Respondent.

Signed

A Grubb  
Judge of the Upper Tribunal