

**LEVEL 3 IMMIGRATION PAPER**

**MAY 2019**

**INSTRUCTIONS TO CANDIDATES**

**Level 3 (85 Marks)**

This examination is open book. You may refer to materials such as the OISC exam resource book, published texts and your own notes.

Questions are numbered and the marks allocated to each are detailed in closed brackets after the relevant question.

You have 3 hours to complete this exam paper. You may begin reading as soon as the invigilators say so. You may begin writing whenever you have read the questions.

You may use bullet points to summarise your answers in non-drafting questions, and you may use reasonable abbreviations so long as their meaning is obvious.

### **Your instructions**

Precious is a 25 year old citizen of South Africa. Precious came to the UK in June 2015 with 6 months entry clearance as a visitor. She overstayed and remained living in the UK. She met Pedro in December 2017. Pedro is 30 years old, was born in Brazil and is settled in the UK. Precious and Pedro have been living together as a couple (in a home which Pedro inherited) since they met. Three months ago Precious got in contact with the Home Office and was placed on immigration bail. She and Pedro married a month ago after a Home Office investigation accepted they were in a genuine relationship. They have no children. Pedro has not worked for several years and the couple's sole source of financial resources is a £300 monthly inheritance received by Pedro. Neither Precious nor Pedro receives any benefits nor do they have any insurance or any criminal convictions.

Precious has already been properly advised by a Brazilian lawyer that an application to reside in Brazil as Pedro's wife would be straightforward but they both want to remain in the UK. She seeks advice from you about whether she might be able to remain in the UK as a result of the marriage.

### **Your instructions**

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Precious has already been properly advised by a Brazilian lawyer that an application to reside in Brazil as Pedro's wife would be straightforward but they both want to remain in the UK. She seeks advice from you about whether she might be able to remain in the UK as a result of the marriage.

### **Question 1**

Having advised Precious at your meeting, you must now write a letter to confirm your advice, explaining your answers by referring to any relevant rules. The letter should be structured to separately address the questions in a) to d) below.

- a) **Is there a paid application which Precious could now make?**  
(3 marks)
- b) **What requirements would Precious have to meet to be granted Leave?**  
(6 marks)
- c) **What is your assessment of her prospects of succeeding in her application? Please provide reasons.**  
(8 marks)
- d) **If an application were made and refused, would Precious have any legal remedy?**  
(3 marks)

### **Question 2**

Having received your advice, Precious decides not to make the application you have discussed. She attends your office again, this time with her husband Pedro. It transpires that Pedro is a dual Brazilian and Portuguese national. He describes himself as settled due to having worked in the UK and having been issued with a document certifying permanent residence in January 2014, which he shows to you. Between October 2014 and October 2017 Pedro left the UK and lived back in Brazil before returning to the UK on his Portuguese passport. He had thrown away all his other documents when he left the UK in 2014 and has been unable to obtain replacements. Pedro is anxious about the UK's withdrawal from the European Union and is anxious about his own position.

**Referring to relevant regulations, please explain Pedro's current immigration status.**

(5 marks)

### **Question 3**

- a) **Is there any application Pedro could now make which would address his anxieties and put him in a secure position?**  
(2 marks)
- b) **What status is available to applicants under this route?**  
(3 marks)

- c) **With reference to your instructions and relevant rules, what are Pedro's prospects of success?**

**(13 marks)**

**Question 4**

Precious has listened to the advice you have given to her husband and asks for advice about regularising her own situation.

**Could Precious make an application and what would be the likely outcome? Please explain your answer.**

**(6 marks)**

**Question 5**

Precious and Pedro make their applications. Precious is granted a temporary status and wants to know your view about whether she could challenge the decision and any likely result.

**With reference to relevant rules, how do you advise her?**

**(6 marks)**

**Question 6**

You are visited by Aneni, a Zimbabwean national with Indefinite Leave to Remain as a refugee. In 2017 Aneni had met Moses, a South African national who had overstayed his Tier 4 student Leave. Aneni and Moses had a child together, Tanaka, who was born in London in January 2019. Just before the birth, Moses was detained by immigration officers and removed from the UK. In February 2019 Aneni travelled to South Africa with Tanaka and married Moses. Moses subsequently made an application for entry clearance as Aneni's partner. The application was refused by an Entry Clearance Officer who decided that all the suitability and eligibility requirements were met except for the minimum income requirement. Furthermore, there were no exceptional circumstances because Aneni and Tanaka were not required to leave the UK and could live in South Africa if they chose. Aneni and Moses want to challenge the decision.

You review the decision and conclude that the ECO was correct about the minimum income requirement but arguably wrong about exceptional circumstances. You note that the decision was handed to Moses on 20 April 2019. Today is 28 May 2019.

**Considering any relevant rules, explain whether the decision can still be challenged. If so, what steps must be taken?**

**(6 marks)**

### **Question 7**

You are successful in lodging a challenge on behalf of Moses. You gather evidence, take witness statements and prepare the case. One day Moses' brother, Thabo, telephones you and says that he has seen the impact that separation is having on Moses and wants to know what you have advised so that he can help Moses with his case.

**How should you respond and why?**

**(4 marks)**

### **Question 8**

Your preparations are complete and the hearing is due to take place shortly.

**With reference to relevant statutory provisions, legal authorities and key facts, draft a skeleton argument to be submitted for the hearing.**

**(15 marks)**

### **Question 9**

Unfortunately, Moses' challenge is dismissed. You apply on his behalf for permission to appeal but permission is refused by the First-tier Tribunal. Moses wants to know whether the challenge can be pursued any further and what the timescale would be.

**With specific reference to relevant rules, how do you advise Moses?**

**(5 marks)**

## Model Answer

### Your instructions

Precious is a 25 year old citizen of South Africa. Precious came to the UK in June 2015 with 6 months entry clearance as a visitor. She overstayed and remained living in the UK. She met Pedro in December 2017. Pedro is 30 years old, was born in Brazil and is settled in the UK. Precious and Pedro have been living together as a couple (in a home which Pedro inherited) since they met. Three months ago Precious got in contact with the Home Office and was placed on immigration bail. She and Pedro married a month ago after a Home Office investigation accepted they were in a genuine relationship. They have no children. Pedro has not worked for several years and the couple's sole source of financial resources is a £300 monthly inheritance received by Pedro. Neither Precious nor Pedro receives any benefits nor do they have any insurance or any criminal convictions.

Precious has already been properly advised by a Brazilian lawyer that an application to reside in Brazil as Pedro's wife would be straightforward but they both want to remain in the UK. She seeks advice from you about whether she might be able to remain in the UK as a result of the marriage.

### **Question 1**

Having advised Precious at your meeting, you must now write a letter to confirm your advice, explaining your answers by referring to any relevant rules. The letter should be structured to separately address the questions in a) to d) below.

**a) Is there a paid application which Precious could now make?**

**(3 marks)**

**b) What requirements would Precious have to meet to be granted Leave?**

**(6 marks)**

**c) What is your assessment of her prospects of succeeding in her application? Please provide reasons.**

**(8 marks)**

**d) If an application were made and refused, would Precious have any legal remedy?**

**(3 marks)**

### **SAMPLE LETTER**

Firm's name and address

Firm's Ref No.

Date

Precious

Precious's address

Dear Precious

**Re: Your immigration matter**

Thank you for coming to see me yesterday about your immigration case. I am now writing to confirm the advice I gave you at our meeting.

**Your instructions**

[Although you would usually confirm the client's instructions, it is not necessary to do so for the purposes of this assessment.]

## **My advice**

I will now answer the specific questions which you have asked.

### **a) Is there a paid application which you could now make?**

Now that you are married, you meet the definition of a partner under Appendix FM of the government's immigration rules (para GEN.1.2). Pedro can sponsor you because he is present and settled in the UK (para E-LTRP.1.2.(b)). So it is possible to make an application under the immigration rules to stay in the UK as Pedro's partner. The application must be made online using the form 'FLR(FP)'. The application fee would be £1,033 and there would also be a mandatory Immigration Health Charge of £1000.

### **b) What requirements would you have to meet to be granted Leave?**

You would need to show that you meet the 'suitability' requirements of the rules (section S-LTR). Certain types of past behaviour such as criminal convictions, dishonesty or other conduct can justify refusal of an application by the Home Office.

There are also 'eligibility' requirements to meet. Regarding your relationship, the main requirements are that the relationship is genuine and subsisting and that you both intend to live together in the UK. You would also have to show that you and Pedro are at least 18 years old, have met in person, are legally married and any previous relationship has broken down permanently (paras E-LTRP.1.3-1.12)

Regarding immigration status, applicants must not be in the UK as a visitor or with leave granted for 6 months or less, nor can they be in breach of immigration laws or on immigration bail, unless they can show that an exception applies (para EX.1(b)). In your circumstances, you would need to show that there are 'insurmountable obstacles' to your family life with Pedro continuing outside the UK.

What the rules mean by insurmountable obstacles is that you and Pedro would face very significant difficulties in continuing your family life together outside the UK, difficulties which could not be overcome or would entail very serious hardship for you or Pedro (para EX.2).

If you could prove such insurmountable obstacles you would not have to meet the English language or financial requirements, such as having a minimum income of £18,600 per year.

### **c) What is my assessment of your prospects of succeeding in your application?**

Unfortunately, in my view your prospects of succeeding in an application as a partner are poor. The strengths of your case are that there appears to be no reason to refuse you on suitability grounds and the Home Office are very likely to accept that you meet the relationship requirements because they have already authorised your marriage.

But the major weakness of your case is that the Home Office is very unlikely to decide that there are insurmountable obstacles in your case as defined by para EX.2. The public interest in immigration control is believed to be so strong that where a person (like yourself) has begun what is called a 'precarious' family life because they have no leave to remain, it is only insurmountable obstacles which can outweigh the public interest. In your case there is



no legal or (as far as I am aware) practical barrier, to you and Pedro continuing your family life in Brazil. Nor is your desire to continue living in the UK enough to meet the high threshold of very significant difficulties leading to very serious hardship.

The strict approach adopted by the Home Office has been upheld by the courts, for example by the UK Supreme Court in the case of *Agyarko and Ikuga [2017] UKSC 11*.

Unless there are some other exceptional circumstances which would mean that a refusal would breach your rights to respect for your private and family life under Article 8 of the European Convention on Human Rights, the Home Office will refuse your application. In your case, there do not seem to be any factors which would mean that refusal would result in unjustifiably harsh consequences for you, Pedro or any other family members (para GEN.3.2).

For all these reasons, although you could make an application, it is very likely to be refused.

**d) If an application were made and refused, would you have any legal remedy?**

If you went ahead and made an application which was then refused, you would have a right to appeal to the First-tier Tribunal (Immigration and Asylum Chamber). This is because your application would be treated as a human rights claim the refusal of which triggers a right of appeal (s82(1)(b) Nationality, Immigration and Asylum Act 2002). Any appeal would have to be lodged with the Tribunal not later than 14 days after you are sent the notice of the Home Office decision. In my view, the appeal would be unlikely to succeed for the reasons I have already explained.

**Conclusion**

I am sorry that I am unable to be more positive in my advice. If you have any questions you would like to ask or if you wish to make an application anyway, please do not hesitate to contact me.

**Yours sincerely,**

**An Adviser**

**Question 2**

Having received your advice, Precious decides not to make the application you have discussed. She attends your office again, this time with her husband Pedro. It transpires that Pedro is a dual Brazilian and Portuguese national. He describes himself as settled due to having worked in the UK and having been issued with a document certifying permanent residence in January 2014, which he shows to you. Between October 2014 and October 2017 Pedro left the UK and lived back in Brazil before returning to the UK on his Portuguese passport. He had thrown away all his other documents when he left the UK in 2014 and has been unable to obtain replacements. Pedro is anxious about the UK's withdrawal from the European Union and is anxious about his own position.

**Referring to relevant regulations, please explain Pedro's current immigration status.**

**(5 marks)**

- He lost his right of permanent residence by his absence from the UK for more than 2 years [1]
- EEA Reg 15(3) [1]
- He had an initial right of residence for three months after his return to the UK [1]
- But since then, he has not met the definition of a qualified person [1]
- Discussion of EEA Regs 6 and 4 in light of instructions [bonus]
- Pedro currently has no right to reside in the UK and no leave to remain [1]

**Question 3**

**e) Is there any application Pedro could now make which would address his anxieties and put him in a secure position?**

**(2 marks)**

- He could apply for ILR / settled status [1]
- Under Appendix EU [1]

**f) What status is available to applicants under this route?**

**(3 marks)**

- An application under Appendix EU may result in either ILR or Limited Leave to Remain [1]
- Limited Leave to Remain would be granted for 5 years [1]
- Paras EU2 and EU3 [1]

**g) With reference to your instructions and relevant rules, what are Pedro's prospects of success?**

**(13 marks)**

- Pedro has very good prospects of being granted ILR [1]
- Under Para EU11, Condition 1 [1]
- As he is a relevant EU/EEA citizen [1]
- With a documented right of permanent residence [1]
- Who has resided in the UK for a continuous qualifying period [1]
- Beginning before the specified date (of 31 December 2020) assuming the UK withdraws with a withdrawal agreement [bonus]
- And there has been no supervening event [1]
- Because his absence from UK was less than 5 years [1]
- As defined in Annex 1 of Appendix EU [1]
- He should meet the suitability requirements [1]
- As he is not subject to a deportation order or exclusion decision [1]
- Under para EU15 [1]

- As long as he does not provide any false or misleading information etc [1]
- Para EU16(a) [1]
- Extremely unlikely that provisions at para EU16(b) will be applied simply for non-exercise of Treaty rights [bonus]

#### **Question 4**

Precious has listened to the advice you have given to her husband and asks for advice about regularising her own situation.

**Could Precious make an application and what would be the likely outcome? Please explain your answer.**

**(6 marks)**

- Precious could apply under Appendix EU [1]
- As a family member (spouse) of a relevant EU/EEA national [1]
- Her marriage certificate would count as the required evidence of relationship [1]
- There is nothing to suggest suitability requirements will not be met [1]
- She would receive limited leave / pre-settled status [1]
- Because she has completed a continuous qualifying period of less than five years in the category of family member [1]

#### **Question 5**

Precious and Pedro make their applications. Precious is granted a temporary status and wants to know your view about whether she could challenge the decision and any likely result.

**With reference to relevant rules, how do you advise her?**

**(6 marks)**

- She could apply for Administrative Review [1]
- Of the decision to grant her limited leave not ILR [1]
- Appendix AR(EU)1.1. (b) [1]
- But there does not appear to be any basis to argue the decision was incorrect [1]
- Appendix AR(EU)2.1. [1]
- Administrative Review would not succeed [1]

### **Question 6**

You are visited by Aneni, a Zimbabwean national with Indefinite Leave to Remain as a refugee. In 2017 Aneni had met Moses, a South African national who had overstayed his Tier 4 student Leave. Aneni and Moses had a child together, Tanaka, who was born in London in January 2019. Just before the birth, Moses was detained by immigration officers and removed from the UK. In February 2019 Aneni travelled to South Africa with Tanaka and married Moses. Moses subsequently made an application for entry clearance as Aneni's partner. The application was refused by an Entry Clearance Officer who decided that all the suitability and eligibility requirements were met except for the minimum income requirement. Furthermore, there were no exceptional circumstances because Aneni and Tanaka were not required to leave the UK and could live in South Africa if they chose. Aneni and Moses want to challenge the decision.

You review the decision and conclude that the ECO was correct about the minimum income requirement but arguably wrong about exceptional circumstances. You note that the decision was handed to Moses on 20 April 2019. Today is 28 May 2019.

**Considering any relevant rules, explain whether the decision can still be challenged. If so, what steps must be taken?**

**(6 marks)**

- Moses is out of time for a right of appeal to the FtT [1]
- Because notice must be provided no later than 28 days after receiving the decision [1]
- FtT Procedure Rule 19(3)(b) [1]
- But a Notice of Appeal can still be provided to the FtT with an application to extend time [1]
- Including reasons why the appeal is out of time [1]
- Preferably supported by evidence [bonus]
- FtT Procedure Rule 20 [1]

### **Question 7**

You are successful in lodging a challenge on behalf of Moses. You gather evidence, take witness statements and prepare the case. One day Moses' brother, Thabo, telephones you and says that he has seen the impact that separation is having on Moses and wants to know what you have advised so that he can help Moses with his case.

**How should you respond and why?**

**(4 marks)**

- You must not disclose the advice given to Moses without his consent [1]
- Because you have a duty to ensure discussions with clients are confidential [1]
- OISC Code of Standards 27-28 [bonus]
- You should not confirm that Moses is your client [1]
- You should inform Moses of Thabo's enquiry and seek his instructions [1]

## **Question 8**

Your preparations are complete and the hearing is due to take place shortly.

**With reference to relevant statutory provisions, legal authorities and key facts, draft a skeleton argument to be submitted for the hearing.**

**(15 marks)**

Model skeleton argument

**IN THE FIRST TIER TRIBUNAL**

**(IMMIGRATION AND ASYLUM CHAMBER)**

**APPEAL NO: HU/12345/2019**

**BETWEEN:**

**MOSES**

**APPELLANT**

**AND**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**RESPONDENT**

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**APPELLANT'S SKELETON ARGUMENT**

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### **Introduction**

1. The Appellant (A) is a South African national who applied for entry clearance as a partner under Section EC-P of Appendix FM of the immigration rules. The application was refused by the Respondent (R) on [DATE]. A submitted a late notice of appeal against the refusal of his human rights claim and the Tribunal extended time for appealing. The appeal is listed for hearing by the First-tier Tribunal ('the Tribunal') at Bradford on [DATE].

### **Relevant facts:**

2. A is married to Aneni, a Zimbabwean national who has indefinite leave to remain in the UK as a refugee. The couple have a child together, Tanaka, a British citizen born in London on [DATE]. A had previously lived in the UK with leave as a Tier 4 (General) Student until he was removed from the UK on [DATE] as an overstayer. A relies on his Appellant Bundle, lodged in accordance with directions on [DATE], to establish the above facts.

### **R's Reasons for Refusal**

3. R has considered A's application under Section EC-P of Appendix FM. It was accepted that A does not fall for refusal under Section S-EC: Suitability-entry clearance. It was also accepted that A met all the eligibility requirements under Section E-ECP: Eligibility for entry clearance as a partner – with one exception: R did not accept that A met the financial requirements under E-ECP.3.1 -3.3.

4. R concluded that there were no exceptional circumstances that would render refusal of entry clearance a breach of Article 8 ECHR because it is open to A's spouse and child to leave the UK and continue family life in South Africa.

### **Grounds of Appeal**

4. A contends that the refusal of his human rights claim is unlawful under **s6 HRA 1998 (s84(2) NIAA 2002)**.

### **Argument**

5. Applying the approach in **Razgar [2004] UKHL 27**, A has established a family life with his spouse and his minor child which attracts the protection of Article 8. Refusal of entry clearance plainly interferes with that family life. The separation of family members has consequences of such gravity that Article 8 is engaged (**VW (Uganda) v SSHD [2009] EWCA Civ 5**).

6. Assuming that the refusal has a proper basis in domestic law (the immigration rules) and has a justification under Article 8(2) ECHR, R's decision is nonetheless disproportionate to the public end sought to be achieved.

7. A concedes that he cannot meet the financial requirements under Appendix FM. Nonetheless R's refusal of entry clearance results in unjustifiably harsh consequences (GEN.3.2). In particular:

- R must have regard to the need to safeguard and promote the welfare of A's child (**s55 BCIA 2009**). The child's best interests are a primary consideration. Her British citizenship has an intrinsic importance and she will not be able to exercise her rights as a British citizen if she is required to move to and grow up in another country (**ZH (Tanzania) [2011] UKSC 4**).
- R has failed to properly consider the best interests of the child and has failed to recognise that in this case the child's best interests are plainly served by living with both parents in the country of her nationality, the UK.

8. In considering whether interference with A's family life is justified under Article 8(2) ECHR the Tribunal must have regard to s117B NIAA 2002. A contends that s117B(6) applies and, on the facts of this case, is determinative because:

- A's child is a qualifying child with whom he has a genuine and subsisting relationship; and
- It would not be reasonable to expect the child to leave the UK.

9. The Tribunal is required to hypothesise that the child in question would leave the United Kingdom, even if (as here) this is not likely to be the case (**JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 72 (IAC)**).

10. It would not be reasonable to expect A's child to leave the UK for the reasons given above. In addition, R proposes that the child would leave the UK with her mother (A's spouse) but has failed to recognise that:

- A's spouse has been recognised as a refugee in the UK and, as such, the UK has a duty to provide her with protection and any accompanying rights (**Refugee Qualification Directive 2004/83/EC**).
- Although A is a South African national, his spouse is a Zimbabwean national. R has provided no evidence that she would be admitted to South Africa as A's spouse nor evidence of any requirements she would have to meet.

11. In R's **Modernised Guidance: Family life (as a partner or parent), private life and exceptional circumstances (v3)** the starting point of the policy is that R would not normally expect a qualifying child to leave the UK.

12. Regarding the remainder of the considerations listed in **s117B NIAA 2002**, those factors do not weigh against A in the assessment of the public interest question. Nor is there anything in A's character or past conduct which significantly weighs against him, given that R has opted not to refuse his application under the suitability provisions of the immigration rules.

### **Conclusion**

13. The Tribunal is invited to allow A's appeal on the ground that R's refusal of entry clearance is in breach of Article 8 ECHR and hence unlawful under s6 HRA 1998.

### **An Adviser**

### **Question 9**

Unfortunately, Moses' challenge is dismissed. You apply on his behalf for permission to appeal but permission is refused by the First-tier Tribunal. Moses wants to know whether the challenge can be pursued any further and what the timescale would be.

**With specific reference to relevant rules, how do you advise Moses?**

**(5 marks)**

- A renewed application to the Upper Tribunal for permission to appeal can be made [1]
- Within 1 month of the FtT's decision to refuse permission [1]
- Being sent to the Appellant [1]
- Upper Tribunal Procedure Rules [1]
- Rule 21(3)(b) [1]
- To gain permission you must show an arguable material error of law [bonus]