Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/24636/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13th May, 2014	
Signed 20th May, 2014	On 23rd May 2014

Before

Upper Tribunal Judge Chalkley

Between

ENTRY CLEARANCE OFFICER - MANILA

Appellant

and

MRS TERESITA PIDGEON

Respondent

Representation:

For the Appellant: The Sponsor Mr A Pidgeon was in attendance
For the Respondent: Mr N Bramble, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Entry Clearance Officer, Manila, is the appellant in this appeal, but to avoid confusion I shall refer to the Entry Clearance Officer as "the claimant" and to Mrs Teresita Pidgeon as the "appellant" as she was before the First-tier Tribunal.

2. The appellant is a citizen of the Philippines, where she was born on 16th May, 1978. She is the wife of Mr Anthony Pidgeon, a British citizen settled in the United Kingdom to whom I shall refer as "the sponsor". The appellant made an online application submitted on 16th August, 2012 for settlement to the UK to join her spouse.

3. The appellant's application was refused by the Entry Clearance Officer on 16th November, 2012. In refusing the appellant's application the Entry Clearance Officer said this:-

> "You have applied to join your spouse Mr Anthony Pidgeon, a British citizen. It is a requirement under the Immigration Rules when settling in the United Kingdom as a partner that an applicant shows evidence of their English language ability in listening and speaking to a minimum level of A1. In order to show that you meet this requirement you submitted an IELTS certificate. From this document I note that you achieved a score of 3.5 in the listening component and a score of 5.0 in the speaking component. However, I have noted that only of [an] IELTS score of 4.0 can be considered as evidence of listening ability. Given your overall band score and your application as a whole, you were contacted by this office on 23rd October 2012 and requested to submit additional evidence of your English language ability and also provided the following link: [link omitted] which detailed the list of approved English providers. On 26th October 2012 additional information was received in support of your application. This included a TOEFL equivalency table and an email dated 10th February 2011 detailing that an IELTS score of 3.5 was equivalent to level B1 Whilst I noted that the TOEFL equivalency table only information from the approved list can be consider and furthermore, since the date of the email new requirements have been introduced, with the current list of approved English providers being introduced on 24th January 2012. However, given the information you provided you were again contacted by this office on 6th November 2012 and requested to submit evidence of your English language ability. On 14th and 15th November 2012 additional information was received in support of your application. However, no new English test was provided. Instead reference has been made to a Caregiver qualification and a Diploma in Fishery Technology. However, whilst I have noted these, they do not confirm that you have achieved the required level of English. Furthermore, you have submitted no evidence that these courses were taught in English and that the qualification is recognised by UK NARIC to be equivalent to a UK Bachelor's degree or above.
>
> Given the above, I am not satisfied that you meet the English language requirements of paragraph E-ECP.4.1.
>
> I have therefore refused your application because I am not satisfied, on the balance of probabilities, that you meet of the requirements (sic) of the relevant Paragraph of the UK Immigration Rules".

4. I should point out at this stage that Mr Pidgeon, and the appellant, feel extremely aggrieved because, before submitting the application online, the appellant relied on information published on the UK Border Agency website which indicated at the time that a score equivalent to level B1 would be accepted. That information was, it transpired, out of date.

5. Had the UK Border Agency website been up-to-date, the appellant would not have made her application and would not be frustrated and upset by the delay she has experienced in pursuit of this appeal.

6. On receipt of the Entry Clearance Officer's refusal the appellant appealed and her appeal was heard at Taylor House on 23rd January, 2014 by First-tier Tribunal Judge Del Fabbro. He found at paragraph 16 of his determination that the appellant had not demonstrated that she met the listening score in English having obtained a score of 3.5, as opposed to a score of 4.0 or higher, in the IELTS test results.

7. The First-tier Tribunal Judge very clearly felt a great deal of sympathy for the appellant. He went on to consider the application under Article 8 and purported to allow the appellant's appeal on human rights grounds.

8. The claimant challenged the decision and at the hearing before me Mr Bramble relied on the determination in *Sabir (Appendix FM – EX.1 not free standing)* [2014] UKUT 00063 (IAC) and on the decision of the Court of Appeal in *Bibi and Another* the *Secretary of State for the Home Department [*2013] EWCA Civ 322. He pointed out that since the appellant could not satisfy the English language test requirements of the Immigration Rules the judge had been wrong to allow the appeal on Article 8 grounds.

9. I explained the purpose of the hearing to Mr Pidgeon and indicated that I could not interfere with the judge's decision unless I was satisfied that an error of law had been made. I explained to him the significance of the decision of the Court of Appeal in *Bibi and Another* and Mr Bramble's submission and indicated that it did appear to me that the determination contained an error of law.

10. The sponsor told me that he had prepared a written statement that he wished to read. I permitted him to read it. Having read the statement the sponsor handed me a copy of the written statement which I have reproduced in the Appendix to this determination. I wish to assure him and the appellant that I have very carefully considered that statement.

11. I am satisfied that the First-tier Tribunal Judge did err in law in what he said at paragraph 20. He said:-

> "The English language requirements are in E-LTRP.4.1. If applicants do not satisfy the financial requirements and/or English language requirement in E-LTRP.3.4, they may qualify under Section EX:Exception. EX.1 applies where an applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen and there are insurmountable obstacles to family life with that partner continuing outside the UK. Section FM 1.0 of the October 2013 Immigration Directorate Instructions ('Partner and ECHR Article 8 guidance') is about family members applying after 9 July 2012 under Chapter 8 Appendix FM of the Immigration Rules. It sets out the guidance for caseworkers in their approach to decision-making under the new rules. …"

12. The judge went on at paragraph 21 to say:-

> "On the evidence before me I find that the appellant does meet the relationship requirement of Appendix FM. I find that there is family life within the meaning of Article 8(1) between the appellant and her spouse. They have been married for some time and have demonstrated a commitment to live together as husband and wife. I accept the sponsors evidence that he would not be able to settle with his wife in the Philippines. I find that there are serious practical possibilities of relocation for the sponsor. Having heard the sponsor give evidence before me I found that he was credible as a witness and in particular with regard to his commitment to his wife but the reality of living together outside the UK was not practically possible. He had no means of finding employment there, did not speak the language and there was no other source of financial support available to the couple. The Appellant had made repeated applications to join her husband in the UK and the couple have never abandoned their intentions to live together as husband and wife with a family of their own. In all the circumstances I do find that on the proper application of the Rules there would be a disproportionate interference with the rights of the Appellant and the sponsor to lead a married life together in the UK. Plus I allow this appeal."

13. The case of *Sabir* makes it clear that EX.1 was not intended to be a freestanding element. The Tribunal said at paragraphs 14, 15 and 16:- [Chalkley cut and paste].

14. I find that the First-tier Tribunal Judge erred in finding that EX.1 was freestanding and in allowing the appeal as he did. The judge also failed to have regard to the fact that having failed to demonstrate that she meets the English language test requirements that the judge purported to allow the appellant's Article 8 appeal notwithstanding the decision of the Court of Appeal in *Bibi and Another.*

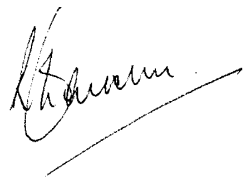
15. Like the First-tier Tribunal Judge, I have considerable sympathies for the appellant and the sponsor.

16. The sponsor told me that despite his love and feelings for his wife their separation is placing enormous strains on their relationship to the extent that he is now extremely concerned that the marriage can survive the continual setbacks in obtaining entry clearance for his wife.

17. In making the application the appellant relies on information published on the UK Borders Agency website. That information, it now transpires, was incorrect and out of date.

18. I hope that in considering any new application on behalf of the appellant the respondent will bear these comments in mind and ensure that any application is dealt with promptly to avoid further delays.

19. For all the reasons I have given above I find that I must set aside the decision of First-tier Tribunal Judge Del Fabbro. It contains errors on points of law. I remake the decision myself. The appellant's appeal is dismissed both on immigration grounds and on human rights grounds.



Upper Tribunal Judge Chalkley

The Appendix above referred to

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UPPER TRIBUNAL APPEAL.

The Longevity of this process from July 2012 till now has been extremely distressing both for me and my wife as our marriage has been on hold as such.
My wife and I have followed the legal process and had a solicitor fulfil the documentation and then he sent it off.
My wife did an IELTS course as was required,and when we applied the first time for her visa,the ECO failed her entrance on 3 points.
1:They did not feel she had a qualification that would help her gain employment into the UK.
2:Mr Pidgeon did not have enough savings.
3:The residence did not seem suitable according to the ECO.
Having taken legal advice it was advised to me to address those points and re apply.
This we did.
My Wife did a carer's 12 month course.This was because it suited her and also because there is a serous skill shortage in this area of health care in the UK.
At the time of the second application the website had not been updated and it clearly stated that the requirement was A1.Myself and my solicitor saw no reason to think otherwise, that this was going to be an issue as Mrs Pidgeon qualification had not be questioned on her first application into the UK.On the second application the border agency claimed that the language requirements had been changed.However at application there was no mention or information relating to this at the time.The website still stated that the requirement was a minimum of A1.
The Home office did admit to the failure of the updating of the website in the first appeal.
The certificate and the IELTS web site also state that the validity of the test is 2 years.If a validity of a certificate can be retrospectively overturned,through the introduction of a new requirement,then surely this would effect all existing certification also.Is the home office claiming that all such visa's in the UK will therefore be rescinded?
This must also bear some significance.
Additionally it was stated at the time,the ECO was able to take into account if a person had taken more then the required level,IE it was only required to take speaking and listening.
However if a person had chosen a more difficult course and done the reading and writing,this should have also been taken into account.

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This the ECO totally ignored As well.
I also would like to mention a error on section 10 on submissions made by the Judge .The error in his statement reads,that the listening grade was below A1 requirements.This is not the case,as stated above in previous mention.As stated Teresita Pidgeon had reached above A1 in all aspects as such.
Having looked on the IELTS website,they do mention borderline passes and advice organisation of this.3.5 is not a failure,it is not below A1,it is in fact borderline B1/A2.
But as stated above the reading and writing had not been taken into account,this should have been done.
The home office now wish to state that I can pack my bags and ship off to the Philippines and live there.I am 49 years of age.Please read attachment on Philippines.
The home office likes to use the word "insurmountable"
A more appropriate word for this situation is "overwhelming!".
I would like to mention some points from ECHR 8.
RESPECT FAMILY LIFE AND MARRIAGE.
There shall be no interference by public body except in cases of national security,public safety,or economic well being of the country,or for the prevention of crime,or disorder,for the protection of health or moral or for the freedom and rights of others.
{This must also apply to an individual as well?}
There is a positive obligation on public authorities to actively protect your rights in certain circumstances.

A)Personal autonomy.
Home office trying to enforce me out of the country I live in and have been for 45+ year to live in a country that I have less then a 10% chance of success of making same living standards as I have here in UK.

B)For interference to be justified it must be in accordance with the law.

C)Pursue a legitimate aim-which one of the 6 legitimate aims are the home office following?
D)Be necessary in a democratic society
E)There must be a good reason for the interference with the right and the interference must be proportionate,which means that it should be no more than necessary.
F)If there is an alternative,less intrusive way of achieving the same

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aim,then the alternative measure should be used.
To summarize and in response to the points above, I would like to raise the following observations and questions:

Can Teresita Pidgeon speak and Understand English?

Yes she can and can also read and write it.

Would there be any harm or security risk to the UK public if Teresita Pidgeon were allowed to join her husband in the UK

.
NO

Would the UK public possibly benefit from Teresita Pidgeon being in the UK

YES

.
Is there any valid reason why on the grounds of a borderline mark which was perfectly acceptable before now is critical to the well fare of the UK Public?

NO

Would the further chastisement of Mr and Mrs Pidgeon living in the UK be harmful to either party.

YES

WHY?

The stress levels are such now that there is a real risk of the marriage not surviving if it is not given the right it deserves to flourish!.A lot of time and money has been spent on following,fulfilling the legal obligation of the visa application with each stage taking the maximum and often longer length of time.Often the desire to spend time together in the Philippines was not fulfilled as so much money had to be spent on the process and requirements of the visa itself.
Therefore I would put to you that this would be a breach of article 8 of the right of marriage,where the state must not interfere in such a way

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as to damage the health of a married couple,who under this situation pose no threat,no harm,no risk in any manner to the UK public,and in fact would make a positive contribution to the economy and well being well of members of the UK in need of good carers, by addressing the skill's shortage in the UK.