Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number IA/34538/2013**

THE IMMIGRATION ACTS

Heard at Field House
On 27 January 2015

Decision and Reasons promulgated
On 11 September 2015

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Secretary of State for the Home Department

Appellant[1]

and

Jubilus Macalling Sain
(No anonymity order made)

Respondent

Representation

For the Appellant: Mr. P. Duffy, Home Office Presenting Officer.
For the Respondent: Ms. C. Physass of Counsel instructed by Time Solicitors.

DECISION AND REASONS

Background

1. This appeal comes before me in order to re-make the decision in the appeal pursuant to a decision finding an error of law following the hearing at Field House on 2

[1] Although the Secretary of State is the appellant and Ms Sain the respondent in the proceedings before the Upper Tribunal, for the sake of consistency with the proceedings before the First-tier Tribunal, and bearing in mind that following the 'error of law' hearing the decision in the appeal is being re-made, I shall hereafter refer to Ms Sain as the Appellant and the Secretary of State as the Respondent.

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December 2014. The error of law decision is a matter of record and should be read as part of the decision herein. (For ease of reference I have reproduced its text in an Annex set out at the end of this Decision.)

2. The appeal is against a decision of the Respondent dated 7 August 2013 to remove the Appellant following a refusal of an application for leave to remain based on family and private life – most particularly in respect of the Appellant's relationship to Mr Thomas Paul Williams, a British Citizen.

3. The Appellant's immigration history is summarised at paragraph 3 of the 'error of law' decision in these terms:

> "The Appellant is a national of the Philippines born on 14 September 1969. She entered the UK on 26 July 2010 with entry clearance as a domestic worker and was granted leave to remain until 8 January 2011. An out-of-time application for further leave to remain was refused with no right of appeal in March 2011. Thereafter the Appellant sought to regularise her status in the UK pursuant to her relationship with Mr Thomas Williams – initially on the basis of being his fiancée and subsequent to their marriage on 17 December 2011 as a spouse. Representations made in April 2011 were refused with no right of appeal in June 2011. Further representations were made in or about November 2012 (supplemented by further representations in July 2013), culminating in the removal decision that is the subject of this appeal."

4. In pursuing her appeal the Appellant now relies on section R-LTRP of Appendix FM, and in the alternative on a 'free-standing' application of Article 8 of the ECHR outside the Immigration Rules. Ms Physsas acknowledges that the Appellant does not now contend that she has 'no ties' with the Philippines, and accordingly paragraph 276ADE is not relied upon.

5. In respect of paragraph R-LTRP.1.1 it is uncontroversial that the Appellant and her partner are in the UK, and that the Appellant had made a valid application for leave to remain as a partner (R-LTRP1.1.(a) and (b)). Ms Physsas acknowledges in her Skeleton Argument (paragraph 11) that the Appellant had overstayed by more than 28 days and therefore did not meet the requirements under E–LTRP.2.2(b), and in consequence could not satisfy R-LTRP.1.1.(c). In respect of R-LTRP.1.1.(d) the ultimate focus in this appeal is on subsection (iii) – i.e. whether paragraph EX.1 applied. The relevant provision of the exception contained in paragraph EX.1(b) is "*the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK*".

6. The Respondent does not dispute that the Appellant is in a genuine and subsisting marital relationship with Mr Williams, who is a British citizen, (see RFRL at paragraph 22), and accordingly the issue in the appeal under the Rules is that of "*insurmountable obstacles to family life… continuing outside the UK*".

Evidence / Facts

7. Ms Physsas helpfully accepts that the summaries of the Appellant's evidence and of Mr Williams' evidence before the First-tier Tribunal set out at paragraphs 6-8 of the decision of Judge Newberry are accurate. So far as is relevant those paragraphs are in these terms:

> "6. [W]hilst working for her employer as a domestic worker, [the Appellant] met Mr Thomas Williams in or around August 2010. They married on 17 December 2011. … They are very happy together. They jointly attend the JIL Group which is a born again church group. They attend church together. The Appellant has many friends in the UK.
>
> 7. She says she cannot return to the Philippines. Both her parents have passed away and she has no property to return to. She says her husband would not be able to endure the long flight to the Philippines. She says that she has been married to husband for over two and a half years and that they have created a life for themselves during this period.
>
> 8. Mr Williams… is a British subject. He lives with the Appellant…. He owns [their home] subject to a small mortgage. He is a 'sorter' with the Post Office for whom he has worked for 34 years. He earns over £25,000. He explained that he has mobility problems which started to worsen following the passing of his parents. He says that the Appellant is a great help to him in managing what is in effect a disability."

8. However, Ms Physsas emphasises that the further witness statements of the Appellant and Mr Williams, both dated 19 December 2014 and contained in the bundle filed for the rehearing before the Upper Tribunal, add further detail - in particular regarding the financial dependence of the Appellant on Mr Williams, and the financial support given by Mr Williams to the Appellant's children in the Philippines; the statements also contain more detail concerning Mr Williams' medical circumstances.

9. Both the Appellant and Mr Williams adopted their witness statements - that is the statements before the First-tier Tribunal and the more recent statements dated 19 December 2014 – in examination-in-chief. There were no supplementary questions for either in examination-in-chief. They were each cross-examined by Mr Duffy. Each witness also answered a few questions by way of clarification from me. There were also some questions by way of re-examination of Mr Williams. I have made a note of the evidence in the Record of Proceedings which is on file and I have had regard to all that has been said at the hearing before reaching my decision.

10. I have also had regard to the supporting documentary evidence, both before the First-tier Tribunal and contained in the bundle before the Upper Tribunal

Consideration

11. The Appellant's case, both under the Rules and in respect of any freestanding consideration of Article 8, is necessarily based on the same factual matrix. It is essentially argued that a combination of circumstances make it "*not practically possible and/or unreasonable*" (Skeleton Argument at paragraph 17) for Mr Williams to relocate

to the Philippines, and that it would be disproportionate for the Appellant to quit the UK to make an application for entry clearance "*because of the impact on Mr Williams of the Appellant having to leave the UK*" (paragraph 18). The circumstances relied upon are: Mr Williams has a job and has been in the same employment for 34 years; he has a mortgage; he has lived in the UK since birth; he has mobility problems due to his size which do not permit him to travel long distances; the Appellant provides him with daily support; and the Appellant and her children are financially dependent on him.

12. In my judgement such matters as Mr Williams' residence and employment in the UK do not in themselves impact on the practicality of relocation of the couple to the Philippines. I consider that the concept of insurmountable obstacles necessarily relates to the practicalities of relocation: indeed inherent in paragraph EX.1 – save in respect of the more particular circumstances of a recognised refugee or a person with humanitarian protection - is the concept of a relevant partner being established in the UK by way of being a British citizen or a settled migrant. Nor, in the wider concept of an Article 8 consideration, do I consider that the circumstances of Mr Williams' residence and employment are in any way exceptional.

13. As regards Mr Williams' mobility problems I do not accept that there is anything in the supporting evidence to make good the assertion that there would be insurmountable practical difficulties in respect of travel to the Philippines. Whilst I accept that he has mobility problems by virtue of his weight and a diagnosis of osteo-arthritis, and also that he lacks flexibility such that he benefits from assistance in dressing his lower body, most particularly in respect of shoes and socks, there is nothing in the supporting evidence (see in particular Appellant's bundle at pages 22-39) to the effect that he is unfit to travel by aeroplane or otherwise. It is to be borne in mind that he is in full-time employment and is far from being housebound; in so far as it may be likely that lengthy periods of immobility may cause discomfort and/or stiffening of his lower limbs I bear in mind that it is possible to get up and move around on an international flight. Whilst I also note the history of concerns relating to raised blood pressure and a slightly enlarged heart, there is nothing to suggest that these matters render the Appellant unfit to fly.

14. Nor in my judgement has anything been shown to demonstrate that the Philippines is inherently a place which would present the Appellant – and more particularly Mr Williams – with insurmountable obstacles in settling. I accept that Mr Williams may face difficulties in the employment market (albeit no express evidence of the nature and conditions of the employment market were provided to me), but in the context of resettling I am not persuaded that the Appellant would be unable to find any employment and nothing has been provided to me by way of finances or in respect of the potential capital to be realised by the sale of Mr Williams' home. In the absence of such financial information I am not persuaded that the Appellant has demonstrated that the couple's relocation to the Philippines would face significant financial obstacles.

15. Moreover in this context it is to be noted that the Appellant has adult children in the Philippines. Whilst historically she has supported them through her employment I am not satisfied that it has been shown that they could not now return the favour by supporting their mother and her partner in the event that the Appellant was herself unable to find any source of income through employment.

16. In all such circumstances I am not persuaded that the Appellant has satisfied me on a balance of probabilities that there are insurmountable obstacles to family life with Mr Williams continuing outside the UK. In my judgement the Appellant does not satisfy the requirements of the Immigration Rules: the Respondent's decision was in accordance with the Rules.

17. For the avoidance of any doubt, and notwithstanding the further submissions submitted in writing by the Respondent in respect of the amendments to the Immigration Rules by way of definition of 'insurmountable obstacles' (new paragraph EX.2), further to my analysis in the 'error of law decision' I have applied the Rules as they stood prior to such an amendment.

18. I turn to a consideration of Article 8. I am not persuaded that there any exceptional features in this case that impact upon relocation to the Philippines. Mr Williams residence and employment are not unusual; his medical conditions are not unusual or particularly grave. In my judgement the Rules adequately and proportionately address the circumstances of the Appellant and Mr Williams. Accordingly, and in any event, in this context in my judgement the reality is that the Article 8 issue is to be considered on the premise that the couple will seek to establish a home in the UK and the effect of the Respondent's decision would be potentially to separate them for a period of time whilst the Appellant pursued an application for entry clearance from abroad; i.e. a situation analogous to that in **Chikwamba**.

19. In this context what is particularly relied upon is the daily support given to Mr Williams by the Appellant. I entirely accept given that their's is a genuine marital relationship that there is a significant element of mutual emotional support and love, and also that the Appellant provides practical assistance to her husband. I accept the consistent testimonies of the Appellant and her husband to the effect that she assists him with bathing and dressing, and also undertakes household chores including preparing meals.

20. I am not, however, satisfied that Mr Williams would be unable to cope pending any temporary separation from the Appellant. There is nothing in the medical evidence that supports the notion that he inevitably requires care and support in respect of daily living activities. In his oral evidence he told me that his regular treatment amounted to no more than over-the-counter analgesics (painkillers). He could get his own trousers on but his main problem was in respect of his socks and shoes; if he wore shoes with a Velcro fastening he could do this using an adapted stick, but the results might be loose; he also stated that he required help bathing his lower body. Told me that before his relationship with the appellant he had had nobody to help him in consequence he would go to work with no socks and his hygiene was poor. I

was not, however, satisfied that Mr Williams had made full exploration of the possibility of obtaining aids that would better assist with putting on socks and doing up his shoes. Adaptations at work had amounted to no more than swapping his locker and offering him advice on bending: in my judgement were the Appellant to be under a more significant disability such that he required the regular assistance of a third party it is reasonable to expect that more would have been done by way of adaptation and/or exploring aids.

21. In all the circumstances I find that it is more likely than not that Mr Williams would be able to manage his activities of daily living and continue his employment in the absence of the Appellant.

22. The Respondent provided supporting evidence of the processing times for visas in Manila. Most (98%) applications are processed within 60 days - and indeed 65% of processed within 30 days.

23. Although no such concerns were expressly articulated, I could readily understand if the Appellant and Mr Williams were to have concerns over possible delay and/or failure to secure entry clearance as a spouse were the Appellant to return to the Philippines for that purpose. However, on the face of it the Appellant appears to meet the requirements for entry clearance. Further, there is no evidence of any undue delay in processing applications from the Philippines. Indeed given the acceptance of the relationship by the Respondent – and indeed the findings in this regard made by the First-tier Tribunal – much of any entry clearance application should be processed readily and without controversy. Accordingly, any possible reluctance to submit themselves to the inherent uncertainty of an application process cannot in my judgement sound with any material significance – far less be a determinative factor – in the absence of any adequate evidence that the system does not operate fairly. Such uncertainty as is engendered – which is inherent in any system involving a process of application, evaluation, and decision - cannot in itself provide a justification for by-passing the established system of immigration control.

24. Nor do I find that there is any other feature of this case that justifies the relaxation of the established system of immigration control through the fair and consistent application of a published set of Rules.

25. In general terms, outside the concept of an arranged marriage, any couple in love seeking to marry will inevitably have discussions about their prospective married life, and such discussions will inevitably involve consideration of matters beyond the romantic and will include some consideration of where will be the marital home. If one or other or both of the prospective parties to the marriage is subject to immigration control then necessarily that will add a further dimension to such discussions - particularly in the context of where the couple may live. If they think they may like to live together in the UK, then necessarily with reference to the Immigration Rules this will add a particular further dimension. In this case the Appellant can have been under no illusion that the Rules would not favour her application: she had made an application based on Article 8 in April 2011 that was

refused in June 2011. In my judgement the Appellant and her husband went into the marriage, and made the current application, knowing full well the possible outcome. They must be taken to have married in that knowledge and to that extent to have factored in the possible adverse outcome, and therefore have resigned themselves to the possibility of dealing with it if it eventuated. (If not – they were reckless, and that should not now sound in their favour.)

26. Ultimately, this is essentially a couple who would prefer not to be apart for any time. That is not an exceptional feature, and in my judgement does not justify a relaxation of the system of immigration control such as to avoid the requirement for entry clearance.

27. During the course of the hearing Mr Duffy identified, and explored in his questions to the Appellant and Mr Williams, that were the Appellant to succeed in obtaining entry clearance from abroad she would be on a faster route to settlement than if she were to succeed in her appeal. This circumstance was not something that either the Appellant or Mr Williams had been aware of prior to the hearing. I mention it for completeness: it does not, in my judgement, directly impact upon the Article 8 balance that I must undertake. However the Appellant may take some succour from the fact that a temporary absence in order to secure entry clearance as a spouse may in due course lead to her acquiring settled status in the UK far quicker (in 5 years rather than 10 years) than by way of pursuing the instant application and appeal.

28. Be that as it may, in all of the circumstances of this particular case I do not consider that any exceptional or compelling factor has been shown as to why the Appellant's circumstances and those of her partner should be determined in a more generous way than the Rules would allow. Accordingly, whilst there is no particular controversy in respect if the first four **Razgar** questions, I find that the fifth question – proportionality, is not to be answered in the Appellant's favour bearing in mind the public interest in maintaining a fair and consistent system of immigration control primarily through the consistent application of a published body of Rules approved by Parliament.

29. For the avoidance of any doubt I have had regard to the public interest considerations in section 117B of the Nationality, Immigration and Asylum Act 2002, and have factored such matters into my overall consideration of proportionality. The maintenance of effective immigration control is in the public interest; there are no concerns in respect of the Appellant's ability to speak English or in respect of her partner's ability to ensure the couple's financial independence. I do note however that the relationship with Mr Williams has been established at a time when the Appellant had no extant leave.

30. There is present here nothing of comparable circumstance to the presence of a child of the couple or a difficult country situation that were identified in **Chikwamba** as favourable factors in an evaluation. I do not consider Mr Williams' mobility / care needs to be similarly compelling. The Respondent's decision is proportionate and does not breach the Appellant's or Mr Williams' or anybody else's human rights.

Notice of Decision

31. The appeal is dismissed.

Deputy Judge of the Upper Tribunal I. A. Lewis 4 September 2015

ANNEX:

TEXT OF 'ERROR OF LAW' DECISION

1. This is an appeal against the decision of First-tier Tribunal Judge Newberry promulgated on 4 September 2014 allowing Ms Sain's appeal against the decision of the Secretary of State dated 7 August 2013 to remove her from the UK.

2. Although before me the Secretary of State is the appellant and Ms Sain the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms Sain as the Appellant and the Secretary of State as the Respondent.

Background

3. The Appellant is a national of the Philippines born on 14 September 1969. She entered the UK on 26 July 2010 with entry clearance as a domestic worker and was granted leave to remain until 8 January 2011. An out-of-time application for further leave to remain was refused with no right of appeal in March 2011. Thereafter the Appellant sought to regularise her status in the UK pursuant to her relationship with Mr Thomas Williams – initially on the basis of being his fiancée and subsequent to their marriage on 17 December 2011 as a spouse. Representations made in April 2011 were refused with no right of appeal in June 2011. Further representations were made in or about November 2012 (supplemented by further representations in July 2013), culminating in the removal decision that is the subject of this appeal.

4. There was before me some initial confusion as to the application history. The papers currently available to me omit details of the representations made in or about November 2012; indeed the RFRL dated 7 August 2013 commences by thanking the Appellant for the application made on 12 April 2011 (which had already been rejected). Be that as it may, following a preliminary discussion with the representatives it was common ground before me that the relevant application post-dated the amendments to the Immigration Rules that came into force on 9 July 2012, and as such paragraphs 276ADE and Appendix FM were applicable.

5. The First-tier Tribunal Judge allowed the Appellant's appeal for reasons set out in his determination.

6. The Respondent sought permission to appeal which was granted by First-tier Tribunal Judge Simpson on 28 October 2014.

Application to Amend Grounds

7. Mr Jarvis sought leave to amend the Respondent's grounds of challenge to reflect amendments to the Immigration Rules introduced with effect from 28 July 2014, in particular in respect of paragraph 276ADE(1)(vi) and the addition of paragraph EX.2 in Appendix FM by way of explaining the meaning of 'insurmountable obstacles'. In this context it was noted that although the appeal had been heard on 30 June 2014,

and signed 27 July 2014, its promulgation date was 4 September 2014. The application was raised in general terms, and no specific written amended grounds were formulated or otherwise advanced.

8. Ms Physass objected to the application. She noted that no particular reason was advanced as to why the amendment was only being raised at this stage in the proceedings, and indicated that she was not prepared to deal with the substance of any as yet unformulated amendment, which would potentially occasion an adjournment and therefore unnecessary delay. More particularly, however, she directed my attention to the wording of HC532, by which the various amendments were introduced, emphasising the following under the heading 'Implementation' in respect of the particular changes to 276ADE and Appendix FM: "*The changes… take effect on 28 July 2014 and apply to all applications to which paragraph 276ADE to 276H and Appendix FM apply (or can be applied by virtue of the Immigration Rules), and to any other ECHR Article 8 claims (save for those from foreign criminals), and which are decided on or after that date*". Ms Physass submitted that such wording, whilst indicating that the changes would apply to applications still pending at the date of change, did not indicate that any applications already decided could be re-evaluated under the new Rules when on appeal. I agree with that submission.

9. Accordingly, in circumstances where the changes to the Rules were not relevant to the First-tier Tribunal's consideration of the case under the Rules, the proposed amendment served no purpose. I rejected the Respondent's application.

10. As regards Article 8 and the amendments by way of the addition of Part 5A to the Nationality, Immigration and Asylum 2002, I observe that it is not apparent that the First-tier Tribunal Judge undertook a 'freestanding' Article 8 assessment in the alternative to a consideration of the case under the Rules. There is, therefore, no necessity to amend the grounds in this respect.

Consideration: Error of Law

11. In my judgement the decision of the First-tier Tribunal Judge is materially flawed in a number of significant respects.

12. In the first instance, there is a lack of clarity as to whether the Judge favourably determined the appeal by reference to paragraph 276ADE or Appendix FM, or both. Whilst reference is made to both, it is impossible to discern any discreet clear analysis or discreet findings in respect of either.

13. In so far as the Judge gave consideration to the Appellant's case pursuant to paragraph 276ADE, he erred in failing to determine the case either with express reference to, or otherwise in substance in accordance with, the guidance in **Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 00060 (IAC)** in respect of the meaning of 'ties' in paragraph 276ADE(vi).

14. In **Ogundimu** the UT considered paragraph 399A of the Rules where the same wording – "*no ties (including social, cultural or family) with the country to which he would*

have to go" – appears. The use of the same wording in paragraph 276ADE of the Rules is expressly recognised in **Ogundimu**: see paragraph 122. The following passages from paragraphs 123 and 125 are key:

> "*The natural and ordinary meaning of the word 'ties' imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation or removal. It involves there being a continued connection to life in that country; something that ties a claimant to his or her country of origin. If this were not the case then it would appear that a person's nationality of the country of proposed deportation could of itself lead to a failure to meet the requirements of the rule. This would render the application of the rule, given the context within which it operates, entirely meaningless.*" And –

> "*Whilst each case turns on its own facts, circumstances relevant to the assessment of whether a person has ties to the country to which they would have to go if they were required to leave the United Kingdom must include, but are not limited to: the length of time a person has spent in the country to which he would have to go if he were required to leave the United Kingdom, the age that the person left that country, the exposure that person has had to the cultural norms of that country, whether that person speaks the language of the country, the extent of the family and friends that person has in the country to which he is being deported or removed and the quality of the relationships that person has with those friends and family members.*"

15. The Judge's analysis is wholly deficient. At paragraph 12, he lists the Respondent's reasons for concluding that the Appellant retained ties with the Philippines. At paragraph 13 the Judge does not address any of these matters, but instead refers to the strength of the Appellant's relationship with her British citizen partner. The Judge then states his conclusion – "*I do not consider that the Appellant has 'ties' to the Philippines which outweigh the marriage to a British subject*".

16. This appears, inappropriately, to introduce a comparative test. There is no such comparative test justified by the wording of the Rules. Moreover, there is otherwise a failure to evaluate, or make any clear findings in respect of, the issue of 'ties'. It is to be recalled that this is in the context of an Appellant who has five children living in the Philippines, two of whom are minors living with the Appellant's sister.

17. In so far as the Judge may have been considering Appendix FM there is an absence of any express reference to the relevant Rules in respect of leave to remain as a partner, and in particular an absence of any express reference to paragraph EX.1. This in itself need not be fatal if the Judge had otherwise conducted an analysis and made findings in substance congruent with EX.1(b). He has not done so.

18. The Judge plainly placed considerable weight on the fact of the Appellant's relationship with her British citizen partner: "*The Appellant's marriage to Mr Williams is a material and weighty factor in this case*" (paragraph 13). The fact of the marriage is not a 'weighty factor' when considering the question of insurmountable obstacles under EX.1: rather it is the precondition for embarking on a consideration of the question of insurmountable obstacles; it is the premise underlying EX.1(b) – "*This*

paragraph applies if the 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*" (my emphasis) - and therefore cannot in itself be a weighty consideration in determining the applicability of the further requirements of that paragraph of the Rules.

19. Further the Judge applies a test of reasonableness – "*I am not persuaded that it is reasonable…*" (paragraph 13) – which in my judgement, does not properly reflect the test of 'insurmountable obstacles', which whilst mitigated by the observations of the Court of Appeal in **MF (Nigeria) [2013] EWCA Civ 1192**, necessarily must involve something more than the mere concept of reasonableness.

20. The Judge did not apparently conduct a freestanding Article 8 analysis beyond the express requirements of the Rules.

21. In all such circumstances I find that the First-tier Tribunal Judge materially erred, and that the decision of the First-tier Tribunal must be set aside.

22. Both parties agreed that it was possible and appropriate for the decision in the appeal to be remade before the Upper Tribunal. After brief discussion with the representatives I decided that the appeal should be adjourned, reserved to me, permitting the Appellant 3 weeks to file and serve any further evidence upon which she wished to rely. I gave an oral Direction to this effect at the hearing.

23. I also indicated to the parties, and to the Respondent in particular that, notwithstanding my observations at paragraph 8 above, I would be prepared to hear further argument if any relevant case law or guidance could be produced as to the way in which the Tribunal should consider the amendments to the Rules in cases where the decision that was the subject of the appeal had been made prior to such amendments coming into force.

Notice of Decision

24. The decision of the First-tier Tribunal Judge contained a material error of law and is set aside.

25. The decision in the appeal is to be remade before the Upper Tribunal, reserved to me, on 27 January 2015.