Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01367/2020
HU/06274/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 April 2022	**On 8 July 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MR REYNALDO MAGBOO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr L. Magsino, Queen's Park Solicitors
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of the Secretary of State dated 30 June 2020 to refuse a human rights claim made by the appellant on 7 March 2020 in respect of his relationship with his partner, Jessica Cabralda ("the sponsor"), a British citizen of Philippine descent.

Procedural background

2. The appeal was originally heard and allowed by First-tier Tribunal Judge Adio in a decision dated 20 September 2021. The Secretary of State appealed to this tribunal. By a decision promulgated on 9 February 2022, Deputy Upper Tribunal Judge Parkes, having sat on a panel over which I presided, found that the decision of Judge Adio involved the making of an error of law, set it aside and directed that the appeal be reheard in this tribunal. It is in those circumstances that I remake

the decision, acting under section 12 of the Tribunals, Courts and Enforcement Act 2007, now sitting alone pursuant to a transfer order made by the Principal Resident Judge of the Upper Tribunal.

3. Judge Parkes' decision may be found in the **Annex** to this decision. I will refer to it as "the error of law decision".

Factual background

4. The appellant is a citizen of the Philippines. He entered the United Kingdom in January 2012 with leave as a dependent upon his spouse, Ana, which was renewed until 30 September 2016. The appellant's relationship with Ana broke down. On 20 December 2016, he was sentenced to a 12 month community order for common assault in respect of an incident of domestic violence against her.

5. The appellant's human rights claim of 7 March 2020 was made on the basis of his new relationship with the sponsor. Although he had not divorced Ana, he claimed to be in a genuine and subsisting relationship with the sponsor. Their relationship had commenced in tentative terms around the time of the collapse of his marriage and become serious in around June 2019, when the appellant moved in with her.

6. The Secretary of State refused the application as the appellant did not meet the suitability criteria on account of his conviction for common assault, and also in light of another conviction, dated 20 December 2018, for driving a vehicle with excess alcohol. She did not consider that he met the relationship eligibility requirement on account of his "polygamous" relationship with the sponsor. Nor did he meet the immigration status requirement, as his previous leave had expired a considerable period previously. He did not meet the English language requirement because he had not provided any evidence in the required form. In relation to EX. 1 of Appendix FM, since the appellant had not divorced his wife, his application was not capable of engaging those provisions, concerning whether the relationship with the sponsor would face "insurmountable obstacles" to continuing in the Philippines. He did not qualify under the private life provisions of the rules; he would not face "very significant obstacles" to his integration in the Philippines, and there were no exceptional circumstances. I should add that the Secretary of State accepted that the appellant met the financial requirement.

7. By the time the matter reached the First-tier Tribunal, the "Respondent's Review" ("the review") stated at [3] that the conviction for common assault "is now spent". The review was silent in relation to the 20 December 2018 conviction. It accepted that the appellant was not in a polygamous relationship, as there was no suggestion that he had married the sponsor while still married to his wife.

8. Judge Adio reached a number of findings of fact which were not challenged by the Secretary of State on appeal to this tribunal; her central challenge went to the judge's assessment of whether the appellant and sponsor would face "insurmountable obstacles" to their relationship continuing in the Philippines, for the purposes of paragraph EX.1(b) of Appendix FM. While those findings were not expressly preserved, it would be unjust to force the appellant to relitigate matters upon which he was successful below. The Secretary of State's appeal succeeded on the discrete basis that Judge Adio had made an error of fact in relation to the so-called Covid-19 "Red List", which he treated as a complete bar

to all travel between the UK and the Philippines, rather than being, at its highest, a temporary impairment. She did not seek to challenge the judge's remaining findings or apply to withdraw any of the concessions made in the review.

9. Judge Adio found that the appellant met the English language requirements of Appendix FM, paragraph E-LTRP.4.1 to E-LTRP 4.2 (see [23]). In light of the respondent's apparent concession at [3] of the review that the appellant's conviction for common assault was spent, the judge also accepted that the "suitability requirements of the Immigration Rules have now been satisfied." That was a reference to the requirements of paragraph S-LTR.1.6., as quoted at [3] of the decision, and relied upon under the heading 'Suitability' in the Secretary of State's decision. Neither the review nor the decision of Judge Adio mentioned the impact of the other conviction on the appellant's suitability, but judge proceeded on the basis that the suitability requirements for leave to remain were met, and there has been no challenge to that approach by the Secretary of State.

No jurisdiction to consider the protection claim

10. The appellant's grounds of appeal to the First-tier Tribunal raised, for the first time, protection-based issues arising from what was said to be a risk of serious harm from the family of his wife upon his return to the Philippines. The grounds of appeal set out the relevant provisions of Philippine law which was said to prohibit divorce and create a criminal offence of adultery ('concubinage'), of which the appellant claimed that he would be guilty, at the instigation of his wife's family. According to [9] of the Respondent's Review, the appellant was interviewed in connection with his protection claim on 13 January 2021.

11. The review correctly identified that the protection issue was a "new matter" and suggested that the correct course would be for the appellant to withdraw his appeal so that all matters could be considered within the confines of a single decision. The appellant has not withdrawn his appeal, and nor has the respondent withdrawn the underlying decision in this appeal, or consented to the new matter being considered within the confines of these proceedings. The upshot of this procedural state of affairs is that the existence of the parallel protection proceedings is not a matter that is capable of impacting my consideration of this appeal. Under section 85(5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") "the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so." The new matter regime applies to the Upper Tribunal: see *Hydar (s 120 response; s 85 "new matter": Birch)* [2021] UKUT 176 (IAC), at paragraph (3) of the Headnote. The jurisdictional bar erected by section 85(5) prohibits me from considering the impact of the protection grounds raised by the appellant; it also prevents me from considering the potential impact of the fact that the appellant has an outstanding claim for asylum on his removability. I therefore proceed on the footing that the appellant does not have a pending asylum claim and that the bars to removal otherwise imposed by sections 77 and 78 of the 2002 Act (no removal while claim for asylum pending; no removal while appeal pending) are to play no part in my assessment of whether the appellant and the sponsor face "insurmountable obstacles" to their relationship continuing in the Philippines, or on any other basis. That may seem like a legal fiction, but it is the reality of a combination of the consent regime established by section 85 of the 2002 Act, the fact that the appellant has not withdrawn his appeal, and the decision of the

Secretary of State neither to consent to the matter being considered, nor to withdraw her decision.

12. I clarified the above with the parties at the resumed hearing and gave a ruling to that effect.

The law

13. This is an appeal brought under Article 8 of the European Convention on Human Rights ("ECHR"). The essential issue for my consideration is whether it would be proportionate under the terms of Article 8(2) of the Convention for the appellant to be removed, in light of the private and, in particular, family life he claims to have established here. This issue is to be addressed primarily through the lens of the Immigration Rules, and also by reference to the requirements of Article 8 of the Convention directly (see *Razgar* [2004] UKHL 27 at [17]).

14. The following provisions of Appendix FM of the Immigration Rules are relevant to the disputed issues in this case. They concern applications for limited leave to remain made from within the UK in respect of claimed family life with a partner:

> **Section S-LTR: Suitability-leave to remain**
>
> S-LTR.1.1 The applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2. to 1.8. apply.
>
> […]
>
> S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.
>
> **Immigration status requirements**
>
> E-LTRP.2.1. The applicant must not be in the UK-
>
> (a) as a visitor; or
>
> (b) with valid leave granted for a period of 6 months or less, unless that leave is as a fiancé(e) or proposed civil partner, or was granted pending the outcome of family court or divorce proceedings
>
> E-LTRP.2.2. The applicant must not be in the UK –
>
> (a) on immigration bail, unless:
>
> (i) the Secretary of State is satisfied that the applicant arrived in the UK more than 6 months prior to the date of application; and
>
> (ii) paragraph EX.1. applies; or

> (b) in breach of immigration laws (except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded), unless paragraph EX.1. applies.
>
> **Paragraph EX.1**
>
> EX.1. This paragraph applies if:
>
> […]
>
> (b) 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, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), and there are insurmountable obstacles to family life with that partner continuing outside the UK.
>
> EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

15. Also relevant is paragraph 276ADE(1)(vi) (very significant obstacles to integration).

16. The burden lies on the appellant to demonstrate that Article 8(1) of the ECHR is engaged, to the balance of probabilities standard. Having done so, it is for the respondent to justify any interference with the rights guaranteed by Article 8(1) of the ECHR pursuant to paragraph (2). In practice, it is for the appellant to demonstrate that he meets the requirements of the rules, or that the requirements of Article 8 ECHR outside the rules are such that his continued presence must be permitted.

The hearing

17. The appellant and the sponsor gave evidence, in English, at a face to face resumed hearing at Field House on 26 April 2022. They adopted their statements dated 13 September 2021 and were cross-examined. I heard submissions and reserved my decision.

18. I do not propose to set out the entirety of the evidence and submissions. I will do so below to the extent necessary to reach and give reasons for my decision.

Discussion

19. In light of the unchallenged findings of Judge Adio, my analysis of this appeal takes place on the following bases. First, the appellant and the sponsor are in a genuine and subsisting relationship. The appellant remains married to his wife, Ana, but intends to divorce her. He began cohabiting with the sponsor in June 2019. Secondly, the appellant meets the financial requirements of the rules. Thirdly, he meets the English language requirements. Fourthly, Judge Adio found that there were no suitability concerns in relation to paragraph S-LTR.1.6 of

Appendix FM, that is, the appellant's conduct, character, associations or other reasons did not make it undesirable to allow him to remain in the UK, for the purposes of this appeal.

20. The main barrier to the appellant succeeding in demonstrating that he meets the requirements of the Immigration Rules, and thus establishing that it would be disproportionate to remove him, is that he cannot meet the immigration status requirements: see E-LTRP2.2. The appellant's leave as a dependent spouse ended on 30 September 2016. He has been present in the United Kingdom in breach of the Immigration Rules for a considerable period. Accordingly, he will only be able to demonstrate that he meets the requirements of the rules if paragraph EX.1 applies. The only applicable limb of paragraph EX.1 is sub-paragraph (b) which will apply if there will be "insurmountable obstacles" to family life between the appellant and the sponsor continuing in the Philippines.

No insurmountable obstacles to the relationship continuing in the Philippines

21. I have no hesitation in concluding that there are no "insurmountable obstacles" to the relationship between the appellant and the sponsor continuing in the Philippines. Both the appellant and the sponsor are citizens of the Philippines, and familiar with the language, culture and customs of the country. While the appellant maintains that he will face retribution from his wife and her family, that is a matter which primarily falls to be considered within the confines of the parallel protection proceedings. To the extent that the appellant claims that there will be tensions or difficulties arising from attempting to relocate with the sponsor to a location near his wife's family, he has provided no reasons why he would not be able to locate to another part of the country. The appellant has adult children in the Philippines. He will not be without assistance upon his return. The sponsor works for the NHS in this country and will have transferrable skills to work in the healthcare sector upon her return. While both maintained under cross-examination that the labour market is poor and jobs are scarce, neither has provided any evidence to substantiate those claims. In any event, mere difficulties in securing paid employment immediately upon return do not, in my judgment, amount to "insurmountable obstacles"; the sponsor is in a well-paid job in this country and will be able to arrive in the Philippines with savings and some initial funds to begin to resume life in the country of her nationality. The appellant has resided in this country unlawfully for a number of years, despite the many restrictions faced by unlawful migrants on many day-to-day activities. He will be able to use the resilience he has demonstrated while residing unlawfully in this country upon his return to the country of his nationality, where he will enjoy the full panoply of rights conferred on Philippine citizens by the state.

22. I find there are no insurmountable obstacles to the appellant and the sponsor continuing their relationship in the Philippines.

Very significant obstacles

23. For largely the same reasons, I consider that the appellant would not face "very significant obstacles" to his own integration in the Philippines, were he to return alone. Under this scenario, the appellant would be able to apply for entry clearance in order to seek his lawful return to the United Kingdom (I consider below whether it is "virtually certain", as submitted by Mr Magsino, that that application would be granted). If the appellant were to return to the Philippines

alone, he would be able to benefit from remitted financial support from the sponsor, who, as is common ground, meets the financial requirements of the rules by a considerable margin. In his application for leave to remain dated 7 March 2020, the appellant stated that the sponsor's salary was a total of £41,166. That is a comfortable income which will enable the sponsor to support the appellant, at least initially, while he determines whether he will be able to return. Even without that support, he would not face very significant obstacles to his integration, I find.

24. The appellant cannot, therefore, succeed "under the rules".

Whether refusal of leave would be a "fair balance" for the purposes of Article 8(2) ECHR

25. In light of the above findings, it is necessary to address whether there are exceptional circumstances meriting a grant of leave outside the rules, in order to avoid unjustifiably harsh consequences of the appellant and, in turn, a breach of Article 8(2). I will conduct my operative analysis under this heading by adopting a "balance-sheet" approach, in order to address whether the established public policy in immigration control is outweighed by the strength of the appellant's Article 8 claim.

26. By way of a preliminary observation, it is necessary to address Mr Magsino's submission concerning what he characterised as the *Chikwamba* point. Mr Magsino submitted that, in light of the fact the appellant meets the income, language, relationship and suitability criteria in the Immigration Rules pursuant to Judge Adio's unchallenged preserved findings, there would be no need to force the appellant to return to the Philippines in order to make an application for entry clearance that would be virtually certain to succeed.

27. For a summary of the jurisprudence arising from *Chikwamba v Secretary of State for the Home Department [2008] UKHL 40* see *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11 at [51]. Significantly, the *Chikwamba* principle is not a general dispensing power; *Chikwamba* itself concerned the removal of a failed asylum seeker to Zimbabwe shortly after a moratorium on removals to the country had been lifted. Her removal may well have been at taxpayers' expense and would have been to "harsh and unpalatable" conditions. She would have to have taken her minor daughter, leaving her Zimbabwean refugee husband (and the father of their child) behind, "with every prospect of succeeding" in an application for entry clearance, following what was likely to have been a delay of some months. It was under those circumstances that Ms Chikwamba's prospective removal was found to breach Article 8 ECHR. In *Younas (section 117B(6)(b); Chikwamba; Zambrano)* [2020] UKUT 129 (IAC), a presidential panel of this tribunal held:

> "83. Neither *Chikwamba* nor *Agyarko* support the contention that there cannot be a public interest in removing a person from the UK who would succeed in an entry clearance application. In *Agyarko*, a case in which the *Chikwamba* principle was not at issue, it is only said that that there "might" be no public interest in the removal of such a person."

28. The finding by Judge Adio was that, in light of the Secretary of State's apparent concession in the Respondent's Review, the appellant met the suitability

requirements of paragraph S-LTR.1.6. In the balance-sheet analysis that follows, I will proceed on the basis that the appellant meets the suitability requirements for this application for leave to remain. However, the mere fact that the respondent appeared to concede in these proceedings that the appellant met requirements of paragraph S-LTR.1.6 does not necessarily tie her hands into reaching the same conclusion in relation to paragraph S-EC.1.5, which is the applicable provision in an application for entry clearance, were the appellant to make a further application. That paragraph provides:

> "S-EC.1.5. The exclusion of the applicant from the UK is conducive to the public good because, for example, the applicant's conduct (including convictions which do not fall within paragraph S-EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance."

While the Secretary of State has not applied in these proceedings to resile from the apparent concession made in the course of the Respondent's Review before the First-tier Tribunal, it does not follow that, if she were seized of an application for entry clearance afresh, that she would be bound to reach the same conclusion on this point. Of course, she may do so. But equally, she may not. Whether she does so or not is a matter for her, and not for this tribunal; the institutional competence of the Entry Clearance Officer extends to making careful value judgments of precisely that nature. It is not for this tribunal to usurp that legitimate function of the Secretary of State. For that reason, while I will conduct the following proportionality assessment on the basis that, for the purposes of this appeal, the appellant meets the suitability requirements for the purposes of this human rights claim, but I consider that it would be inappropriate for me to approach that analysis on the basis that that assessment is a foregone conclusion in relation to all future immigration applications advanced by the appellant.

29. Factors militating in favour of the appellant's removal are as follows:

a. The public interest in the maintenance of effective immigration controls. This is codified as a statutory public interest consideration in section 117B(1) of the 2002 Act;

b. The appellant does not meet the requirements of the Immigration Rules. While he meets some of the criteria, pursuant to the unchallenged findings reached by Judge Adio, he does not meet the immigration status requirement;

c. The appellant's immigration status has only ever been, at best, precarious, thereby attracting little weight (see section 117B(5) of the 2002 Act);

d. The appellant's relationship with the sponsor was established at a time the appellant was in the United Kingdom unlawfully, and so attracts little weight (see section 117B(4) of the 2002 Act);

e. The appellant's last grant of leave to remain expired on 30 September 2016. The appellant was granted leave in his capacity as the spouse of his wife. That relationship has since broken down;

f. The appellant will not face very significant obstacles to his integration in the Philippines;

g. There are no insurmountable obstacles to the relationship between the appellant and the sponsor continuing in the Philippines.

30. Factors mitigating against the appellant's removal are as follows:

a. The appellant's removal would be a considerable disruption to the family life the appellant and the sponsor share together in this country, even if there would be no "insurmountable obstacles" to their relationship continuing in the Philippines;

b. The sponsor has settled here and established a life here, having naturalised as a British citizen. Her return to the Philippines with the appellant would be a major disruption;

c. Judge Adio found that the appellant met the requirements of paragraph S-LTR.1.6., in relation to his human rights claim concerning the instant application for leave to remain in the country. He also meets the language, financial and relationship requirements of the rules;

d. The appellant has resided here since 29 January 2012, a period of over ten years.

31. Drawing the above analysis together, I consider that the factors in favour of the removal of the appellant outweigh those mitigating against it. The maintenance of effective immigration controls is a weighty factor. As summarised by the Supreme Court in *Agyarko* at [57]:

> "In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control."

32. Nothing in the circumstances of this appellant, or his relationship with the sponsor, demonstrates a very strong or compelling claim sufficient to outweigh the public interest in immigration control. The appellant is an overstayer of some vintage. His relationship with the sponsor was formed at a time when his residence here was unlawful. While he has been here for some time, his private life attracts only little weight, as does his relationship with the sponsor. There are no insurmountable obstacles to the relationship they enjoy continuing in the Philippines, the country in which they were both born. The appellant himself would face no very significant obstacles to his integration in the country. While I am proceeding on the basis that the appellant meets the suitability requirements for this application for leave to remain, there remains a legitimate role for the Entry Clearance Officer to assess a future application, taking all factors into account. While that may well result in a grant of entry clearance to the appellant, the mere fact of the Entry Clearance Officer being able to subject the appellant's application to that process is itself a facet of the public interest in the maintenance of effective immigration controls. It is not an empty formality, rather it ensures that the primary decision maker in an application for leave to remain is the Secretary of State through the Entry Clearance Officer, and that all relevant factors are taken into consideration, by the institutionally competent person in whom Parliament has entrusted the function.

33. The appeal is dismissed.

Notice of Decision

This appeal is dismissed on human rights grounds.

No anonymity direction is made.

Signed Stephen H Smith Date 6 June 2022

Upper Tribunal Judge Stephen Smith

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Stephen H Smith Date 6 June 2022

Upper Tribunal Judge Stephen Smith

Annex – Error of Law Decision

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number HU/06274/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 21st January 2022	**9th February 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

REYNALDO MAGBOO
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr L Magsino (Solicitor)
For the Respondent: Ms T Everett (Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal by the Respondent against the decision of Judge Adio to allow the Appellant's appeal against the Secretary of State's refusal of his human rights application. The application was made on the 7th of March 2020, the Refusal Letter was dated the 30th of June 2020, the Notice and Grounds of Appeal were dated the 2nd of July 2020. Judge Adio's decision was promulgated on the 20th of September 2021.

2. The application and the appeal were on the basis of the Appellant's relationship with his partner. The background is set out in full in the decision of Judge Adio, there is no complaint about the Judge's recitation of the facts and there is no need to repeat it here. So far as the Appellant's family life is concerned against a complicated background, the Appellant is not divorced from his wife, the Judge found that the Appellant's relationship with his partner properly started in June 2019, paragraph 26.

3. The appeal was allowed as the Judge found that there were insurmountable obstacles to family life between the appellant and his partner being continued in the Philippines having regard to paragraphs EX.1 and EX.2 of Appendix FM of the Immigration Rules. The reasons are set out in full in paragraphs 28 to 31. The Judge considered that the because the Philippines was on the so-called “Red List” for travel at that time that was relevant and prevented the Appellant and his partner from entering that country. The Judge went on to find that there would be a lengthy separation, the Sponsor's work would be jeopardised and quarantining on return would be expensive. If the Appellant returned and applied from there then there would not reasonable time in which the application would be resolved.

4. The Respondent's grounds of appeal of the 27th of September 2021 argue that the Judge had failed to appreciate that the effect of a country being on the Red List affected return from a country, not travel to one. There was no reason why the Appellant and Sponsor could not travel to the Philippines and there were no insurmountable obstacles to family life continuing in that country. There was no evidence to show that there were any delays in visa processing times in the Philippines. Permission was granted by Judge Aziz on the 13th of October 2021.

5. In addition to the Respondent's grounds of application the Appellant's representatives submitted a skeleton argument for the hearing which we have considered in addition to the oral submissions.

6. The Appellant remains married to his estranged wife despite having separated some time before June 2019, it is not clear why divorce proceedings have not been finalised. In our judgment the Respondent was correct in the submission that there was no evidence to show that application times in Manilla had been affected

7. We also consider that the Judge did not point to any evidence that could rationally support a finding that they could not live together in the Philippines. The observation at the end of paragraph 28 that their inability to travel to the Philippines was exceptional showed they could not live together there at this juncture and the finding in paragraph 29 of the difficulty in travelling to the country was not open to the Judge on the evidence. The evidence related solely to the issue of return and that was not complete either.

8. In our judgment, we do not consider the ‘Red List’ quarantine arrangements that were in force at the time could rationally have amounted to barriers of the sort concluded by the judge. The judge appears to have treated the Philippines’ presence on the ‘Red List’ as a complete bar to all travel between the UK and the Philippines at the time, rather than being the temporary impairment that it was. While we are mindful that appeals to this tribunal are on the basis of errors of law, rather than disagreements of fact, we consider that a mistake of fact of this magnitude may properly be categorised as an error of law, consistent with paragraph 9(vii) of *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982.

9. Similarly, the evidence did not show that there would be a significant delay in the processing of an out-of-country application for entry clearance as a partner. The Judge’s findings on this issue were entirely speculative and without support.

10. The primary findings on which the Judge’s reasoning was based were fundamentally flawed and did not support the conclusions that followed, whether under paragraphs EX.1 and EX.2 or under article 8 outside the Immigration Rules.

On that basis the decision of Judge Adio is set aside. The decision will be remade in the Upper Tribunal.

Notice of Decision

11. The appeal of the Respondent is allowed. The decision of the First-tier Tribunal is set aside.

12. The decision will be remade in the Upper Tribunal at a Face to Face hearing (No interpreter required, time estimate 2 hours)

We give the following directions:

1. Within 21 days of being sent this decision the Appellant:

   (a) May file and serve an application to rely on additional evidence to be considered at the resumed hearing, together with the additional evidence;

   (b) Must file and serve a skeleton argument.

2. Within 35 days of being sent this decision the Secretary of State must file and serve a skeleton argument (responding, if appropriate, to the further evidence provided by the Appellant pursuant to paragraph (1))

Signed  Date 31st January 2022

Deputy Upper Tribunal Judge Parkes