Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27153/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 June 2014	**On 23 June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

BEATRIZ NUEVO WALLACE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Symes, Counsel
For the Respondent: Mr P Nath, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of the Philippines born on 13 April 1975, who has appealed with the permission of the Upper Tribunal against a decision of Judge of the First-tier Tribunal Callow, who dismissed her appeal against a decision of the respondent to refuse to vary her leave to remain.

2. The appellant came to the UK on 29 January 2009 in order to study. She was granted an extension of stay in that capacity until 4 February 2013. On 28 January 2013 she made an in-time application to vary her leave by filing form FLR(O). She provided evidence that she had married Mr Jack Wallace, a British citizen born on 9

December 1958 ("the sponsor") on 26 July 2012. In the covering letter sent with the application, the appellant's legal representatives acknowledged the appellant did not meet the financial or English language requirements of E-LTRP of Appendix FM of the Immigration Rules, HC395. Reliance was placed on paragraph EX.1(b) that there were insurmountable obstacles to family life continuing outside the UK. The sponsor has two children from his previous marriage whom he sees regularly. He has lived in the UK all his life. His friends and siblings are in the UK. He requires regular and specialist treatment for his heart condition. Furthermore, the appellant is an orphan and has very few ties with the Philippines.

3. The respondent refused the application because family life could continue outside the UK. The appellant appealed.

4. Judge Callow heard evidence from the appellant and the sponsor. The respondent was not represented at the hearing. The judge noted that it was common ground the appellant could not meet the financial and English language requirements of Appendix FM (paragraph 10). He turned to the question of whether there were insurmountable obstacles to family life outside the UK. He found the appellant was fit and competent to work and had lived most of her life in the Philippines, where she had a brother and sister (paragraph 14). She had only been in the UK a relatively short time. He found the sponsor had suffered a number of heart attacks over the years, the last of which was in July 2013. He was undoubtedly in a subsisting relationship with the appellant. He was born and bred in the UK and was in close touch with his three adult children and grandchildren. It was perfectly understandable he would wish to continue to live in the UK with the appellant. However, it had not been shown that his propensity to heart attacks was an obstacle impossible to surmount. The appellant had accepted there were suitable medical facilities and treatment in the Philippines. The appellant could, possibly with some hardship, secure employment to provide for the sponsor in the Philippines. In sum, he found the appellant did not meet the requirements of paragraph EX.1.

5. Judge Callow then considered the claim that removing the appellant in consequence of the decision would breach her and the sponsor's right to family life on article 8 principles outside the rules. On the issue of proportionality he concluded in paragraph 26, that the appellant could return to the Philippines to make an application for entry clearance. The hypothetical removal of the appellant was proportionate.

6. Three grounds were submitted arguing the judge had erred in law. Firstly, the judge erred by applying the insurmountable obstacles test rather than the correct legal test which was one of reasonableness. Secondly, the judge erred by failing to identify a sensible reason for requiring the appellant to return to the Philippines to make an application for entry clearance (*Secretary of State for the Home Department v Hayat* [2012] EWCA Civ 1054). Thirdly, he failed to take into consideration when assessing proportionality, relevant matters such as the extent of the sponsor's heart

problems, the deterioration in the sponsor's mental health, the nature and extent of his relationships with his children, the ability of the appellant and sponsor to work in the UK to avoid recourse to public funds (*MM, R (On the application of) v Secretary of State for the Home Department* [2013] EWHC 1900 (Admin)) and the lack of available accommodation in the Philippines.

7. Permission to appeal was refused by the First-tier Tribunal but granted on renewal by the Upper Tribunal.

8. The respondent has not filed a response opposing the appeal.

9. I heard submissions on the question of whether the judge made a material error of law requiring his decision to be set aside. Mr Symes built on his written grounds. He argued the judge misdirected himself in law in his application of an "ultra-high" test of whether there were 'insurmountable obstacles' to family life continuing outside the UK. The correct test was whether there were serious obstacles and, in a case in which the appellant had an impeccable immigration history, the test was closer to one of reasonableness. The judge erred by applying too high a threshold and viewing the evidence through the wrong lens. Mr Nath argued the judge had directed himself correctly and had looked at all the relevant factors in assessing whether the possibility of relocation was practical.

10. I announced my decision to set aside the determination of Judge Callow. My reasons were as follows.

11. Paragraph EX.1 of Appendix FM of the rules reads as follows:

> "EX.1. This paragraph applies if
> …
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> (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, and there are insurmountable obstacles to family life with that partner continuing outside the UK."

12. The key issue is the correct meaning of "insurmountable obstacles". The guidance provided in the IDIs is set out in paragraph 11 of Judge Callow's determination and summarised in paragraph 13 of *Gulshan (Article 8 – new Rules – correct approach)* [2013] UKUT 00640 (IAC)as follows:

> "Insurmountable obstacles" are dealt with in paragraph 3.2.7c of the Guidance. This states that the decision-maker should consider the seriousness of the difficulties which the applicant and their partner would face in continuing their family life outside the United Kingdom, and whether they entail something that could not (or could not be expected to) be overcome, even with a degree of hardship for one or more of the individuals concerned. It is said to be a different and more stringent assessment than whether it would be "reasonable to expect" the applicant's partner to join them overseas. For example, a British Citizen partner who has lived in the UK all their life

and speaks only English may not wish to uproot and relocate halfway across the world, "but a significant degree of hardship or inconvenience does not amount to an insurmountable obstacle". The decision-maker is advised to look at whether there is an inability to live in the country concerned. The focus should also be on the family life which would be enjoyed in the country to which the applicant would be returned, not a comparison to the life they would enjoy were they to remain here. As to cultural barriers, the guidance explains that these might be relevant in situations where the partner would be so disadvantaged that they could not be expected to live in that country. "It must be a barrier which either cannot be overcome or would present a very high degree of hardship to the partner such that it amounts to an insurmountable obstacle."

13. I was directed to the following judicial guidance. Firstly, in *Izuazu (Article 8 – new rules)* [2013] UKUT 00045 (IAC) the Upper Tribunal explained the need for a two-stage approach. The case predated the Court of Appeal's guidance in *MF (Nigeria)* [2013] EWCA Civ 1192. However, the question of the meaning of insurmountable obstacles and the use of the phrase by the Strasbourg Court was discussed in detail as follows:

> "54. The Secretary of State … submits that "insurmountable obstacles" is the test clearly established in the Strasbourg case law. Mr Nath referred us to Rodrigues da Silva and Hoogkamer v Netherlands (2006) 4th Section [2006] ECHR at [39]:
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> > "The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation. Moreover, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see *Gül v. Switzerland*, judgment of 19 February 1996, *Reports* 1996-I, pp. 174-75, § 38). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000). Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (*Mitchell v. the United Kingdom* (dec.), no. 40447/98, 24 November 1998, and *Ajayi and Others v. the United Kingdom* (dec.), no. 27663/95, 22 June 1999)."

55. Similar statements have been made recently in Nunez v Norway [2011] ECHR 1047 at [70] and Antwi v Norway [2012] ECHR 259 at [89] to [103]; we understand that the case is to be heard in the Grand Chamber.

56. We acknowledge that in a number of Strasbourg decisions, different sections of the European Court of Human Rights have stressed that where initial entry has been unlawful or whether family life has been established at a time where status was precarious, it will only be exceptionally or where there are insurmountable obstacles to the family life being transferred abroad that removal will be a violation. We note that there is, therefore, some tension between those cases where these criteria are used and some of the decisions of senior courts in the United Kingdom. However, whereas the Strasbourg Court refers to this being one of several factors to consider (and others that were decisive in Nunez included the best interests of the child) HC 194 imposes a test that has to be met for leave to be granted. This turns a factor in the case into a minimum requirement to be always met. We do not read the Strasbourg cases as doing this.

57. Further, where family life was established through lawful residence, the Grand Chamber in Boultif v Switzerland [2001] did not refer to insurmountable obstacles but posed a different question in its guidance at [48]:

> "The Court has only a limited number of decided cases where the main obstacle to expulsion was that it would entail difficulties for the spouses to stay together and, in particular, for one of them and/or the children to live in the other's country of origin. It is therefore called upon to establish guiding principles in order to examine whether the measure in question was necessary in a democratic society.
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> In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion."

It is thus the degree of difficulty the couple face rather than the 'surmountability' of the obstacle that is the focus of judicial assessment but again as a factor rather than a test.

58. It has been repeatedly stated in national jurisprudence laid down by the higher courts in the UK that in none of these cases was Strasbourg laying down a test for engagement of Article 8 as opposed to reaching a decision on proportionality in the particular case. The requirement for exceptional circumstances or insurmountable

> obstacles has been authoritatively declared to be an erroneous one in the Article 8 immigration context by the House of Lords in Huang [2007] UKHL 11 at [20], EB Kosovo [2008] UKHL 41 at [8] [12] [18] [20] [21] and by the Court of Appeal on innumerable occasions including LM (DRC) [2008] EWCA Civ 325 at [11] and [13]; VW (Uganda) [2009] EWCA Civ 5 at [19] and [24]; JO Uganda [2010] EWCA Civ 10 at [14] to [15] and [23] to [26]."

14. Mr Symes built his submissions about the lesser test being applicable in cases where the appellant has a good immigration history on these passages. The reasoning of the Upper Tribunal received support from the Court of Appeal in *obiter dicta* in *MF (Nigeria)*, a case involving deportation:

> "47. Before we come to the decision that was made on the facts of this case, we need to say something about "insurmountable obstacles". It will be recalled that one of the situations in which para 399 applies is where the person 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 the partner satisfies the condition stated in para 399(b)(i) and "there are insurmountable obstacles to family life with that partner continuing outside the UK".
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> 48. At para 38 of their determination, the UT said that they were bound by authority to hold that the proper test for article 8 purposes is "reasonableness". It is not in dispute that MF has a genuine and subsisting relationship with SB and that SB satisfies the condition stated in para 399(b)(i). As already noted, it was conceded on behalf of the Secretary of State before the UT that it would not be "a reasonable option" for SB and F to be relocated with MF to Nigeria and that there were "insurmountable obstacles" to family life with SB and F continuing outside the UK.
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> 49. In view of the concession made before the UT, the question of the meaning of "insurmountable obstacles" does not arise. We did, however, hear argument on the point. We would observe that, if "insurmountable" obstacles are literally obstacles which it is *impossible* to surmount, their scope is very limited indeed. We shall confine ourselves to saying that we incline to the view that, for the reasons stated in detail by the UT in *Izuazu* at paras 53 to 59, such a stringent approach would be contrary to article 8."

15. Finally, succinct guidance is to be found in *Gulshan*. In paragraph 24, the Upper Tribunal drew out some principles from the existing case law, including as follows:

> "(c) the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Nigeria); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, if removal is to be disproportionate it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre."

16. After reviewing the authorities, at paragraph 14, Judge Callow asked himself whether the appellant had succeeded in showing there were insurmountable obstacles to family life continuing in the Philippines and he focused attention on the sponsor's ill-health. He said this:

> "He is undoubtedly in a subsisting relationship with the appellant wherein they wish to live together permanently with one another. As he was born and bred in the UK and is in close contact with his three adult children (and grandchildren) it is perfectly understandable that the sponsor would wish to continue to live in his home country with the appellant by his side. Notwithstanding this, it has not been shown that his propensity to heart attacks amounts to an obstacle impossible to surmount. For her part the appellant has accepted that there are suitable medical facilities and treatment in the Philippines." (emphasis added)

17. At the heart of this reasoning is the imposition of a test of whether the obstacles are impossible to surmount. Given the care with which the judge has set out the available guidance, including a reference to this very point from *Gulshan* in the preceding paragraph, I have asked myself whether the judge is simply paraphrasing the rule without straying into error by applying too high a threshold. However, nowhere in paragraph 14 is there any indication that the judge has applied a lower threshold than one of impossibility. I have therefore concluded that, despite the judge's thorough consideration of the issue, he erred in the manner complained of in the first of Mr Symes's grounds. The error is plainly material because it cannot be excluded that the judge might have reached another view if he had applied a less demanding test to the facts. His decision must be set aside.

18. I decided to remake the decision myself. I heard brief oral evidence from the appellant. She adopted her witness statements. In the latest one she goes into detail about the sponsor's health situation and the unaffordability of treatment and accommodation in the Philippines, as well as the environmental factors in the Philippines which make it unsuitable for the sponsor. Cross-examined, she explained she has two younger half-siblings. One is soon to be married. The other is a student. She contacts them but not frequently. Sometimes she sends them money. It would not be possible to live with them permanently. She has no home of her own in the Philippines. She also described the anxiety disorder affecting the sponsor's daughter, Jessica. His son, Benjamin, has MS.

19. It is for the appellant to establish matters of fact on the civil standard of a balance of probabilities. As this is an in-country appeal I may consider evidence about any matter which I think relevant to the substance of the decision, including evidence which concerns a matter arising after the date of decision. No challenge was made to the credibility of the evidence. I found the appellant to be a straightforward and reliable witness and I accept the evidence she gave as true. Her evidence has been supported in large measure by documents from independent sources.

20. There is no reason to disturb the findings of fact made by Judge Callow in paragraphs 4 and 7 of his determination. In those paragraphs he records the background facts and the up to date situation as at the date of hearing before him, which was 16 January 2014.

21. In assessing the key issue of whether insurmountable obstacles have been shown so as to bring the appellant within paragraph EX.1(b), I would add the following:

(1) The appellant has always resided in the UK lawfully. She arrived on 29 January 2009 for the purpose of studies, which she has pursued. Having made an application for further leave before the expiry of her last grant of leave, she currently has statutory leave. There is no reason to believe she has ever breached the terms of her leave. She has never breached the law. She works in a care home.

(2) There has never been any challenge to the genuineness and subsistence of her relationship with the sponsor. The couple met in 2011 and married on 26 July 2012. They have lived together since their marriage, which is now a period approaching two years.

(3) The sponsor is a British citizen. He has lived here his whole life and all his relatives are here. His first marriage to the mother of his children broke up in 2006. His children are: Benjamin, born on 21 April 1987, Christopher, born on 10 February 1991, and Jessica, born on 7 June 1994. They all live in the UK. The sponsor's children have accepted the appellant into the family and speak highly of the strength of the relationship between the appellant and their father. Their statements express serious concern about the prospect of the appellant not being permitted to remain in the UK. For a time after the break-up of his first marriage, the sponsor describes himself as "hitting rock bottom". For a while he was homeless and was eventually accommodated in a hostel alongside drug and alcohol users.

(4) The appellant had a difficult life in the Philippines. Her mother and step-father died in an accident when she was 19. She separated from her half-siblings at that time as they went to live with relatives of their father. In her statements she talks about the joy and stability which marriage to the sponsor has brought to her life.

(5) The sponsor's health is deteriorating. He is no longer able to work as a driver and he receives ESA. His family doctor, Dr Sinha, wrote on 17 December 2013 that the sponsor had angioplasty after his heart attack on 17 July 2013. He needs regular check-ups and medication. He also takes anti-depressants. Dr Sinha provided an updated letter on 30 May 2014 explaining that the sponsor is now very weak and he cannot manage by himself. He strongly supports the appellant's application. A report by Dr Zemmouri from the Department of Neurology at West Middlesex University, dated 8 April 2014, states that the appellant has experienced numbness and loss of feeling on one side of his body and his wife reported periods of confusion. Investigations were in hand to pursue the possibility of partial complex seizures. The appellant's recent statement describes the sponsor's conditions. In April she found him with a handful of tablets, saying he could not longer take the stress of their situation. An urgent referral was made to mental health services. His medication has been changed and he has been referred for counselling.

(6) The sponsor's children have medical problems of their own. Jessica has anxiety disorder and the appellant described how even a trip to the dentist becomes difficult due to her fears. She is not able, for example, to travel on buses due to anxiety. Benjamin has psychological problems believed to stem from witnessing the break-up of his parents' marriage. He was recently diagnosed with MS.

(7) The appellant accepts there are good doctors and treatment available for the sponsor's conditions in the Philippines. However, she has undertaken research into the cost and found that the cost of the sponsor's current medication would account for around 60% of an average person's monthly salary in the Philippines. If the sponsor required hospital treatment or another cardiac procedure, the costs would be prohibitive. Having no home, the appellant would have to rent accommodation. The cost of this in addition to day to day expenses would mean they could not afford the appellant's basic treatment.

(8) There are other practical concerns regarding the prospect of the sponsor relocating with the appellant to the Philippines, such as the heat and pollution.

22. I announced at the hearing my decision to substitute a decision allowing the appeal. My reasons are as follows.

23. I have set out above the test of insurmountable obstacles. I am satisfied that, if the appellant returned to the Philippines, the sponsor would not be able to countenance accompanying her with the consequence that the family life they now enjoy together would be destroyed. The particular circumstances of the sponsor mean that he cannot and cannot be expected to live in the Philippines. He is only 55 years of age but his health is fragile, both physically and mentally. He is unable to work. He depends on the treatment now provided by the NHS, as he is entitled to do, for his heart disease and depression, on top of which he is now experiencing neurological symptoms. His GP describes him as "very weak". I am satisfied the sponsor could not receive the treatment he requires to live a reasonably satisfactory life. He would suffer complete isolation while the appellant goes out to work which would inevitably have severe consequences for his already significant mental health difficulties. He would lose regular contact with his children, which he obviously values enormously. They, in turn, benefit from having their father nearby. In my judgment, the facts of this case take it beyond a situation in which the couple could maintain family life in the Philippines, albeit with some hardship. The hardship which would result would make it wholly impractical and it is unreasonable to expect them to uproot themselves and attempt to start a new life in the Philippines.

24. The appellant meets the requirements of paragraph EX.1(b) so as to benefit from exemption from the other elements of Appendix FM which she cannot meet. I therefore allow her appeal under the rules.

25. It follows that removing the appellant in consequence of the decision would also breach article 8 outside the rules for which the test is not whether there are insurmountable obstacles to family life outside the UK but whether it is reasonable to expect the couple to do so.

DECISION

The Judge of the First-tier Tribunal made a material error on a point of law and his decision dismissing the appellant's appeal is set aside.

The following decision is substituted:

The appeal brought under Appendix FM of the Immigration Rules is allowed.

The appeal is allowed on article 8 grounds.

No anonymity direction has been made.

Signed **Date 20 June 2014**

Neil Froom, sitting as a Deputy Judge of the Upper Tribunal

Fee Award Note: this is **not** part of the determination.

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make a fee award of £140.

Reasons: The appeal has been allowed.

Signed **Date 20 June 2014**

Neil Froom, sitting as a Deputy Judge of the Upper Tribunal