



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/51343/2013

THE IMMIGRATION ACTS

Heard at Field House
On 5 February 2016

Decision and Reasons Promulgated
On 22 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

CHERISH MARIE GONZALEZ
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Herself and her Sponsor Peter Hogan
For the Respondent: Ms A Everett (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Cherish Marie Gonzalez, a citizen of the Philippines born 23 February 1988, against the decision of the Secretary of State of 19 November 2013. That appeal having been dismissed by the First-tier Tribunal, she now appeals to the Upper Tribunal with permission.
2. The application giving rise to these proceedings was for further leave to remain as the unmarried partner of a British citizen, Peter Hogan. The application was refused on 19 November 2013 because absent evidence of two years of cohabitation they could not satisfy the "partner" definition that was the gateway to consideration under Appendix FM (though it was accepted there was a genuine and subsisting relationship), and she could be expected to integrate back in her

country of origin and so her private life application under Rule 276ADE also failed.

3. There was material sent to the First-tier Tribunal before the hearing, by way of an adjournment application because of the late stage of the Appellant's pregnancy, and via copies of the birth certificate and British passport (the originals having been sent to the Home Office) for A H born in 2014, sent on 12 March 2015.
4. The First-tier Tribunal dismissed the appeal, from which the Appellant and Mr Hogan were absent, because it was not persuaded that there was adequate evidence of cohabitation and as to whether the relationship still subsisted (alighting on the evidence of pregnancy but without addressing the material confirming the birth), additionally finding that the Appellant's presence in the United Kingdom had been precarious, and that as she spoke Tagalog and could work in the Philippines given her experience as a nurse, there was no reason to think that she would face any difficulties in reintegrating there.
5. Grounds of appeal alleged that relevant considerations had not been taken into account by the First-tier Tribunal, particularly as the birth of the child strongly pointed towards the relationship being a genuine and subsisting one; additionally the evidence that Mr Hogan was unwilling to relocate to the Philippines because of his strong family and social ties in the United Kingdom, lack of knowledge of the culture and language of the Philippines, and his family history of skin cancer that was indicative of risks to life in the Tropics, had been given inadequate attention.
6. Permission to appeal was granted by Judge Jordan for the Upper Tribunal on 22 October 2015, taking what to his mind was a *Robinson*-obvious point based on the *Zambrano* principle that, whether or not Peter Hogan would leave the United Kingdom, on the facts there was a real possibility that the Appellant would take the child from the United Kingdom so violating its rights as a Union citizen.
7. Before me the Appellant represented herself, accompanied by her Sponsor. It quickly became clear that they may well have been seriously let down by their representative at the First-tier Tribunal level, who they told me to whom they had paid very significant sums of money to secure their interests and yet who had failed to inform them of the date of hearing. The matter was being pursued by complaint to the relevant regulator.
8. Ms Everett, whose pragmatic stance may well have been influenced by the concern expressed by the Upper Tribunal as to that development, accepted that the decision of the First-tier Tribunal did indeed appear defective for overlooking the evidence of the child's birth that was on the court file by the time of the hearing before it.

Findings and reasons

9. I find that the decision of the First-tier Tribunal is flawed by a material error of law. Patently the existence of a British citizen child is a material consideration and the correspondence on the Tribunal's file included a letter apparently sent several days before the appeal hearing which enclosed a copy birth certificate and passport, demonstrating that the Appellant and her partner were now the parents of a British citizen child. Even were that evidence not before the First-tier Tribunal (contrary to the ordinary course of the postal system), it may be admitted, as one of the exceptions to the general prohibition on considering fresh evidence at the error of law stage, as demonstrating a material error of fact for which the Appellant was not responsible. The existence of such a child was highly relevant to the disposition of the appeal as it brought into play the need for a "best interests" assessment. Additionally the First-tier Tribunal appears to have overlooked the fact that the Respondent had in fact not put the genuineness of the relationship in issue.
10. Unfortunately neither party engaged with the directions made by Judge Jordan. They will need to be given attention on any re-hearing of this appeal. I encouraged the Appellant and her Sponsor to seek legal representation, notwithstanding their bad experiences so far. Doubtless they will take account of that advice if it is within their means to do so.

Decision:

The decision of the First-tier Tribunal contains a material error of law and the appeal is remitted for hearing to the First-tier Tribunal.

Signed:

Date: 5 February 2016



A handwritten signature in blue ink, appearing to read 'MAS', with a long, sweeping underline that extends across the width of the signature area.

Deputy Upper Tribunal Judge Symes