



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/12756/2018

THE IMMIGRATION ACTS

**Heard at Field House
On the papers**

**Decision & Reasons Promulgated
On 04 November 2019**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

DONNABEL [M]

(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

BACKGROUND TO THE APPEAL

ED TO FIND ERROR OF LAW AND THEN REMAKE

1. The Appellant is a national of The Philippines. She entered the United Kingdom, as a Tier 4 (General) Student, on 14 February 2010 and her leave to remain was extended on the same basis until 31 December 2012. On 29 December 2012 she applied for leave to remain on the basis of her family and private life rights but her application was refused on 22 April 2013. She appealed against this decision but her appeal was dismissed and she had exhausted her

appeal rights by 22 July 2015. She has had no further leave to remain in the United Kingdom since that date.

2. She made a further application for leave to remain on family and private life grounds on 5 December 2015 but on 24 October 2016 the Respondent found that this did not amount to a fresh human rights claim. On 11 December 2017 she made a further human rights claim on the basis that she had been living with her British partner since November 2015 and that his two British children stayed with them on a regular basis. Her application was refused on 4 June 2018.
3. The Appellant appealed against this decision but First-tier Tribunal Judge Anthony dismissed her appeal in a decision promulgated on 14 January 2019. First-tier Tribunal Judge Buchanan granted her permission to appeal on 7 February 2019. The matter initially came before me on 11 March 2019 for an error of law hearing. At that hearing the Respondent filed and served a copy of a PNC record which purported to show that the Appellant had been convicted on one count of theft by employee on 18 April 2017 and had been ordered to pay costs, compensation, a fine and a victim surcharge. As the Appellant did not accept that this conviction related to her and had not previously been served with a copy of this record, I adjourned the hearing and directed that the Appellant provide further evidence.
4. I also vacated the hearing set down for 28 June 2019, as the Appellant was still awaiting further evidence from the Metropolitan Police. At that hearing, the Home Office Presenting Officer indicated that, if the evidence being sought by the Appellant indicated that she was not someone who had been convicted of theft by employee, he would write to me asking me to decide the appeal on the papers.
5. I have now received a letter from Tony Melvin, Specialist Appeals Team, dated 18 October 2019, which stated:

“I can confirm that Ms [M’s] finger prints have been checked against the police records which verify that Ms [M] who was convicted on 18 April 201[7] is not the same person as this Appellant”.
6. The letter continued “in the light of this information the Respondent seeks to withdraw the suitability aspect of the refusal decision and invite the Upper Tribunal to decide the appeal on the papers”.

ERROR OF LAW DECISION

7. The Appellant was relying her family and private life rights and the First-tier Tribunal Judge was correct to consider whether she was able to meet the requirements contained in Appendix FM to the Immigration Rules.
8. In paragraph 11 of her decision, First-tier Tribunal Judge Anthony recorded that the Appellant was married to a British national and, in paragraph 4 of her decision, she said that the Respondent accepted that the Appellant met the relationship requirements contained in Appendix FM. The Judge also noted, in paragraph 9 of her decision, that the Respondent accepted that the Appellant and her husband were enjoying a family life with each other. In paragraph 27, the Judge also stated that the oral evidence before her was that the Appellant's husband worked and earned above the minimum income threshold.
9. However, the Appellant was an overstayer at the date of the decision and, therefore, her case was one which had to be considered in the light of paragraph EX.1. (b) of Appendix FM. Section EX, which is entitled **Exceptions to certain eligibility requirements for leave to remain as a partner or parent**, states:

“This paragraph applies if

(a)(i) 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 status or humanitarian protection and there are insurmountable obstacles to family life with that person continuing outside the UK”.
10. In paragraph 21 of her decision First-tier Tribunal Judge Anthony found that “the appellant's partner could not move abroad to the Philippines with the appellant because of his family life with his children”. The Judge did not consider whether this meant that EX.1. applied in the Appellant's case because she had previously found in paragraph 7 of her decision that it could not apply as the Appellant could not meet the suitability requirements.
11. She then went on to consider whether the Appellant was entitled to leave to remain outside the Immigration Rules. When doing so she failed to apply a cogent balancing exercise as to whether leave should be granted before proceeding to consider whether it would be proportionate to expect the Appellant to leave the United Kingdom and apply for entry clearance. This arguably amounted to a *Robinson* obvious error of law.

12. It is also arguable for the reasons identified by First-tier Tribunal Judge Buchanan, when he granted permission, that too much weight was placed on the Appellant's failure to provide evidence to rebut the assertion that she had been convicted of theft by employee.
13. For these reasons, I find that there were errors of law in First-tier Tribunal Judge Anthony's decision and set it aside, apart from the findings which I retain below.
14. I have retained the appeal in the Upper Tribunal.

RE-HEARING

15. For the purposes of paragraph EX.1.1 the Respondent accepted that the Appellant had a genuine and subsisting relationship with her partner, who is in the United Kingdom and who is a British citizen. It was also not disputed that the Appellant's partner's children live with him every alternate weekend. I adopt First-tier Tribunal Judge Anthony's findings in paragraph 20 which accepted by implication that it was in these children's best interests for their father to remain in the United Kingdom so that their family life with him could continue.
16. I also adopt the Judge's findings in paragraph 21 that it would not be possible for the children and their mother to move to the Philippines. Therefore, I find that there would be insurmountable obstacles to the Appellant's partner moving with her to the Philippines.
17. I have also taken into account that the Respondent now accepts that the Appellant does meet the suitability requirements detailed in Appendix FM to the Immigration Rules.
18. Therefore, I allow the Appellant's appeal on the basis that she meets the requirements for leave under paragraph EX.1. of Appendix FM to the Immigration Rules.

DECISION

- (1) The Appellant's appeal is allowed.

Nadine Finch

Signed

Date 31 October 2019

Upper Tribunal Judge Finch