**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/35173/2015

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 22nd September 2017** | **On 29th September 2017** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ZUCKER**

**Between**

**MS JONA LLABAN**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr S Kerr, Counsel instructed by Karis Solicitors Limited
For the Respondent: Mr P Armstrong, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of the Philippines whose date of birth is recorded as 3rd March 1974. She first arrived in the United Kingdom on 31st October 2010 with entry clearance until 7th June 2012. She subsequently applied for leave to remain on 2nd April 2014 and that was refused. However, on 10th February 2014 she had made a human rights application for leave to remain in the United Kingdom on the basis of a long-term relationship with

a person living but not settled in the United Kingdom. On 16th December 2015, a decision was made to refuse the application. She appealed to the First-tier Tribunal. Her appeal was heard on 2nd December 2016 by Judge of the First-tier Tribunal Ross sitting at Hatton Cross.

2. The material facts in the case were not in dispute. The Appellant and her partner, Mr Cala, an Albanian national, lived together and eventually had a child who at the time of the hearing was 3 years old. Mr Cala had leave to remain in the United Kingdom but as I have said not so the Appellant.

3. Before the First-tier Tribunal, the Appellant, and Mr Cala sought to persuade the judge that he being Albanian and she being Filipino meant that it would not be reasonable for them as a family now with a child to return to either the Philippines or Albania. The issue of racial discrimination was raised before the judge with respect to any return to Albania. Ultimately the judge accepted the primary facts but dismissed the appeal finding:

> "In all the circumstances... it would not be unreasonable to expect the family to go and live in the Philippines."

4. Not content with that decision by Notice dated 23rd January 2017 the Appellant made application for permission to appeal to the Upper Tribunal. On 28th July 2017 permission was granted by Judge Brunnen. In granting permission, he said:

> *"The grounds on which permission to appeal is sought submit that although the Judge found that the best interests of the Appellant's child lay in remaining with both his parents, he failed to make any assessment of the impact on the child of going with his parents either to the Philippines or to Albania and that in the absence of any such assessment his assessment of the proportionality of the Respondent's decision was necessarily defective. This is arguable."*

5. Before me Mr Khan crystallised his grounds and drew my attention to the latter part of paragraph 16 of the decision in which the judge said:

> *"I consider that it is in the best interests of the child that he remain with his parents..."*

which was in contrast to what appeared in the next paragraph which was:

> *"I also consider that it will be very difficult for the parties to return to either Albania or the Philippines as a family."*

There was in Mr Kerr's submission an element of irrationality there to be found.

6. The second ground is the one that was essentially the one upon which permission was granted, that there was no real assessment of what weight was given to the family's interest with regard to private life because no

real distinction was made between the parents and the child and in particular here I was invited to have regard to paragraph 19 in which the judge said:

> *"I consider that I can give little weight to the private or family life which has been established by the parties at a time when the Appellant was an overstayer in the United Kingdom."*

When speaking of the parties there in the plural, the point is taken by Mr Kerr that the child should have been considered separately from the parents.

7. I remind myself of the guidance given by McCombe in the case of **VW (Sri Lanka) [2013] EWCA Civ 522** in which at paragraph 12 he said:

> *"Regrettably, there is an increasing tendency in immigration cases, when a First-tier Tribunal Judge has given a judgment explaining why he has reached a particular decision, of seeking to burrow out industriously errors of evidence that had been less fully dealt with than others and then to use this as a basis for saying the judge's decision is legally flawed because it did not deal with a particular matter more fully."*

8. I ought to mention one other matter which I raised in the course of the submissions in order to get some assistance from both representatives and that was that the Appellant's partner, Mr Cala, might be entitled in the early part of 2018 to make application for British nationality and at the same time, so too the child. The question then was whether that factor was so material that it should have been in the mind of the judge in considering the issue of proportionality given that any relief given to the Appellant would have been discretionary leave rather that indefinite leave.

9. Despite the submissions of Mr Kerr, I come to the view that the eventual finding of the judge was open to him. The Reasons are to be read as a piece. It is clear that the judge has approached the case overall in the correct way.

10. The reasoning begins with recognition of the need to assess the best interests of the child in the latter part of pargraph 3. But more particularly dealt with at paragraph 16. Not only did the judge recognise that the best interests of the child were to be a primary consideration but recognised that they were to be considered first. That means the judge was aware that the interests of the child were to be considered before considering the interest of the parents within the context of the family as a whole. In other words, the judge met the very objection raised in the grounds because the judge properly directed himself to deal with the interests of the child separate from those of the parents.

11. The judge also recognised that a child does not produce a "trump card" and reference was properly made to the case of **Zoumbas [2013] UKSC**

**74**. Mr Kerr drew my attention to the case of **Kaur [2017] UKUT 00014** which adds a gloss to the case of **Zoumbas** and reminds judges that the balancing exercise in the proportionality assessment requires the best interests of the child to be assessed in isolation from other factors such as parental misconduct. It has become trite law that generally speaking the best interest of the child is to be with both parents and it was not suggested by the judge that that should not the case here.

12. It is of note, and I think it important, that the judge did not come to the conclusion that it would be reasonable for the child to return with both parents to either the Philippines or Albania but only made a finding in respect of the Philippines. I note that the Judge considered separately at paragraphs 8 and 9 prejudice which might face the Appellant and the child in Albania. That points to the fact that the judge clearly took into account the evidence that was being laid before him with respect to the concerns of the Appellant with respect to the competing countries to which the child might be returned with whichever parent or parents the eventual decision was made following the appeal.

13. In simple terms, what the judge was required to do was to look to the public interest, have regard to those factors in Section 117B of the Immigration Nationality and Asylum Act 2002 which though not referred to were clearly considered. In event, no point is taken about that in respect of this decision. Once the public interest was considered the question then was what are the competing factors? Of course, the first place to start was with the child but the judge recognised that and in my judgment did that sufficiently.

14. The judge then came to a view having regard to the totality of the evidence that this Appellant was not entitled to succeed. That was a finding of fact which was open to him. I do not see that the fact that the judge recognised that it would be difficult, indeed very difficult for the parties to return to either Albania or the Philippines meant that the other factors which weighted in favour of the Secretary of State were not sufficient such that the Appellant was not able to demonstrate to the requisite standard that the particular circumstances which she advocated outweighed the public interest.

15. In stating at paragraph 18:

> *"I do not consider that it would be unreasonable to expect the family to go and live in the Philippines."*

and at paragraph 19:

> *"I consider that I can give little weight to the private or family life which has been established by the parties at a time when the appellant was an overstayer in the United Kingdom."*

I do not come to the view reading the Reasons as a whole that the judge was holding "the sins" of the parents upon the child. When using the term "parties" the judge was speaking of the parents. That is clear from what follows in the paragraph. That was a relevant consideration in the overall assessment. However, the judge had already dealt with the interests of the child. Each and every point did not need to be set out.

16. I would also observe that the witness statements of the parents, which I have read, say very little about the child other than to say that his best interest would be to remain in the United Kingdom with both parents where he had started socialising.

17. In respect of the nationality point that I raised, the fact that there was the opportunity for the child to acquire, or at least apply for, British nationality in 2018, and for the father to make his application, was clearly in the mind of the judge because the matter is raised in the body of the decision. The point was not, however raised in the grounds, though if it had been, I would have come to the same view overall in this appeal.

**Notice of Decision**

The appeal to the Upper Tribunal is dismissed. The decision of the First-tier Tribunal is affirmed.

No anonymity direction is made.

**Signed** **Date:** 28 September 2017

**Deputy Upper Tribunal Judge Zucker**