Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10347/2016

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice Belfast	**Decision & Reasons Promulgated**
On 26 November 2018	**On 21 December 2018**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

PARAMJIT KAUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Barr, Solicitor
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge S P Fox promulgated on 12 February 2018, dismissing her appeal against a decision of the Secretary of State made on 30 March 2016 to refuse her further leave to remain and to refuse her human rights claim.

2. The appellant is a citizen of India who entered the United Kingdom on 24 January 2014 with leave as a Tier 4 Student. Leave in that capacity was later extended until 31 December 2015 and, on the day before that, she

applied for further leave to remain in the United Kingdom on a human rights basis using form FLR.

3. The appellant's case is that she is married to an Indian national and that they have a child. The application was put forward on a private life basis and that removal would be in breach of her Article 8 rights.

4. The Secretary of State did not accept that the appellant was married although noted that no evidence of marriage had been provided and in any event her claimed partner was neither a British citizen nor settled and accordingly she did not meet the requirements of E-LTRP.1.2 of Appendix FM.

5. The Secretary of State considered also that the appellant did not fulfil the requirements of paragraph EX.1 given the absence of obstacles to family life continuing overseas or of insurmountable obstacles that the family would face in continuing family life outside the United Kingdom in India.

6. The respondent considered also that the appellant did not meet the requirements of paragraph 276ADE(1) of the Immigration Rules given her age and the short length of time she had spent in the United Kingdom. He was not satisfied either that there were very significant obstacles to the appellant's integration into India to where she would have to go if she left the United Kingdom, noting that her parents lived there and she had lived most of her life there.

7. The respondent stated also that there were not in this case exceptional circumstances, there being no reason for her partner who does not have leave to remain in the United Kingdom could not return to India with her and their son.

8. By the time the appeal was heard the appellant's child had acquired Irish nationality. Proof of that was supplied to the Secretary of State. It was also drawn to the Secretary of State's attention that the appellant's husband had on 24 November 2017 been refused a derivative residence card under the Immigration (European Economic Area) Regulations 2016 on the basis that the appellant and her husband were the primary carers of an EEA national child. That refusal was on the basis that the child was not sufficient that there was a right of appeal against that decision. A further point raised was that leave had been granted outside the Rules to avoid a conflict with the terms of the Good Friday Agreement as otherwise there would be conflict with the terms of the Good Friday Agreement and discrimination against an Irish national child born in comparison to a British born child in Northern Ireland.

9. When the matter came before the First-tier Tribunal, the judge concluded [8], [9], and [12] that this was a new matter and that consent of the Secretary of State was required before he could consider it. The Secretary of State refused consent as is confirmed in the decision at [18].

10. The judge then considered the position with regard to Article 8 noting that the appellant's husband did not have legal status in the United Kingdom and, it appeared, that an appeal had not been lodged against the decision refusing him (and for that matter the appellant) had been brought against the decision of November 2017 to refuse derivative residence cards.

11. The judge found that:

    (i) the best interests of the child would be considered first and are a primary considerations [23]; that the child has not been in the United Kingdom for a significant period and any rights he may have should be exercised in the country of his nationality, or the Republic of Ireland; his parents are responsible for all the decisions relating to his life and he was of an age where he had not been separated from his parents, the primary remedy being an application to the Irish authorities and it was significant that the child's father did not come forward to give evidence;

    (ii) the appellant had overstayed, she was not aware that her husband did not have legal status when they married [24];

    (iii) there were no insurmountable obstacles or exceptional circumstances and having had regards to Section 117 of the Nationality, Immigration and Asylum Act 2002 (sic) [33] the need to control the entry of non-nationals into the territory, of removal was proportionate.

12. The appellant sought permission to appeal on the grounds that the judge had erred:-

    (i) in failing to have regard to Section 3C of the Immigration Act 1971 plus failing to note that the appellant's presence in the United Kingdom was lawful;

    (ii) in wrongly stating [11] that the refusal of the husband's application had not been appealed; and [19] failing to note that the appellant's husband had permission to work; and [23] wrongly stating that the appellant had no legal status in the United Kingdom nor could she establish any;

    (iii) the repeated failure by the judge to assess the appellant's correct lawful status in the United Kingdom tainted the decision to such an extent that he had failed to carry out a proper assessment of the Article 8 position.

13. On 3 May 2018 Upper Tribunal Judge Plimmer granted permission on all grounds.

14. On 19 October 2018 I issued directions stating as follows:-

> "It appears that the issue of the child now holding Irish Citizenship may have been a "new matter" within the meaning of section 85 (5) of the Nationality, Immigration and Asylum Act 2002 (as amended by the

> Immigration Act 2014), irrespective of whether the First-tier Tribunal erred in refusing to accept evidence as to that citizenship.
>
> The parties are directed to provide skeleton arguments addressing this issue and whether it falls within the grounds of appeal."

15. In response to that both parties had provided skeleton arguments for which I am grateful.

16. Mr Barr submitted that in response to Mr Duffy's observation that the judge had made a number of errors, that these were in fact material. He sought permission to amend his grounds to include a challenge to that the child's Irish nationality was "a new matter". He submitted also that it would not be possible for the family to go to live in India as the child would not be an Indian citizen in the light of **MK (a child by her litigation friend CAE) v SSHD** [2017] EWHC 1365.

17. Mr Duffy accepted that had the judge erred with respect to whether or not the child's Irish nationality amounted to a "new matter", then the matter would need to be remitted to the First-tier. He submitted, however, that the judge had been correct to conclude that this was a new matter and the errors were therefore not material. He submitted further that it had not been put to the judge there were difficulties over the child acquiring Indian nationality.

18. I turn first to the issue of the late request to amend the grounds. I am, however, under the particular circumstances of this case prepared to admit this as a new ground given that, as Mr Duffy said, he was not taken by surprise this matter having been dealt with in skeleton arguments.

19. I do not, however, consider that the judge erred in concluding that the new contentions of the child was an Irish citizen and the arguments that flowed from that including the submission that the child faced discrimination in that he would be treated differently from a British citizen child born in Northern Ireland, could not be raised.

20. I am satisfied that the judge was correct to describe the acquisition of Irish nationality as being a new matter given that, following Mahmud (S.85 NIAA 2002 – "new matters": Iran) [2017] UKUT 488, this was clearly a new factual matrix as the facts of Irish nationality gave rise to a number of issues including a discrimination claim based on the Good Friday Agreement and different treatment from a British citizen child; it also gave rise to matters which form the subject of the appeal brought by the appellant's father on the basis of him being a derivative child. Further, the issue of the child's nationality does go to the issue of proportionality.

21. That said, it does not appear to have been raised in the First-tier Tribunal that the child was not in fact an Indian citizen, as appears from MK to be the case, this was not put to the judge. Whether or not the child is an Indian citizen is a matter of foreign law and therefore a question of fact. It cannot therefore have been in error for the judge not to take that into

account nor is it possible to raise this issue now on appeal. The basic factual matrix has been known for some time and there was no attempt by Mr Barr to address the tests set out in **Ladd v Marshall** as to why, exceptionally, this material should be admitted in an appeal. There was no explanation as to why this could not have been done with proper diligence prior to the appeal before the First-tier Tribunal nor is there evidence that the child would not be able to go and live in India with his parents. In that sense it cannot be said to be material. Further, unlike in **MK**, the child here is not stateless.

22. It cannot be argued, as Mr Barr sought to submit, that the judge took into account the new matter only in an EEA Regulations sense as opposed to an Article 8 sense. The issue of new matter is not qualified; as noted in **Mahmud** it is simply a factual matrix. That is not a test circumscribed either by whether it goes to an Article 8 ground or for that matter a European Economic Area ground.

23. I do, however, note that the judge appears to have considered that the child is an Irish national when assessing proportionality. That was clearly in error. Having concluded that the Irish nationality was a new matter, this should simply not have been factored into account.

24. Pausing there, I conclude that although the grounds should be amended, on further consideration it cannot be said that the judge erred in law in concluding that this was a new matter. As was pointed out in Quaidoo (new matter: procedure/process) Ghana [2018] UKUT 87 (IAC), the means for challenging a decision of the respondent not to consent to a new matter is by way of bringing an action for judicial review.

25. Returning to the errors made by the judge, I accept that he failed to note that the appellant does in fact have leave to remain in the United Kingdom and she benefits from the operation of Section 3C of the Immigration Act 1971. That was, however just one factor which a judge took into account. The appellant's presence is clearly precarious (see **Ruppiah v SSHD [2018] UKSC 58)**. The judge clearly directed himself properly that the best interests of the child were the primary consideration and a matter to which he turned first.

26. Further, there is no challenge to the judge's finding that the child's best interests were served by being with his parents but that is expressed in terms of the child, as an Irish national, seeking to have indicated status there. At [30] the judge contemplates that the appellant should be removed and would be able to be in contact with her husband and, unfortunately, her child using "modern means of communication". That is not a material consideration, but the judge also found, for adequate and sustainable reasons that he had considered whether there were insurmountable obstacles to the child going to live in India and at [30] that there was no basis on which the family could not all return to India. That was a decision properly open to him on the evidence, and thus, any error in concluding that the mother could return alone was not material.

27. Taking all of these factors into account I conclude that although the judge erred, it was not material. The error was only as to the length of time that the appellant had spent in the United Kingdom with leave. Given that her leave had been here precarious, little weight could have been attached to it in any event. Bearing in mind the restricted evidence which the judge could have taken into account and given the absence of evidence relating to the difficulties they would face the appellant and her child on return to India, I conclude that the error was not such as to affect the outcome of her decision given that there was only one answer to which the judge could have come and that was to dismiss the appeal.

28. For these reasons, I conclude that the decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Summary of Conclusions

(1) The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

(2) No anonymity direction is made.

Signed Date 13 December 2018

Upper Tribunal Judge Rintoul