Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/18115/2013**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly	**Determination Promulgated**
On 6 October 2014	**14 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

RUIZ MIRABEL

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hussain of Lei Dat Baig Solicitors

For the Respondent: Mr G Harrison Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not deem it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Alis promulgated on 11 February 2014 which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 10 August 1985 and is a citizen of Cuba.

4. On 28 March 2013 the Appellant applied for leave to remain in the United Kingdom outside the Immigration Rules on the basis that removal would breach his right to family and private life under Article 8 ECHR.

5. The background to the case was that the Appellant met his now wife a British citizen Lucy Radcliffe in September 2010 when she was on holiday in Cuba. She returned to Cuba on two further occasions and they married on 9 December 2011 in Cuba. Mrs Mirabel stayed for two weeks then returned to the United Kingdom. In June 2012 Mrs Mirabel went to Cuba again and stayed for 5 months and discovered she was pregnant. The Appellant then came to the United Kingdom as a visitor on 19 October 2012 and lived with his wife and her family. He returned to Cuba in January 2013. He then decided to apply for permanent residence in the United Kingdom but stated that as he was told this would take 3 months he would miss his first child's birth he therefore applied for a further visit visa but this was refused. He then returned to the United Kingdom on 22 February 2013 in the knowledge that his current leave expired on 3 April 2013.

6. On 7 May 2013 the Secretary of State refused the Appellant's application and at the same time issued directions for his removal under s 47 of the Immigration, Asylum and Nationality Act 2006. The refusal letter considered the application by reference to Appendix FM and paragraph 276ADE of the Rules and found that the Appellant could

not meet the requirements of either. The letter also found that the Appellant could not meet the requirements of EX.1.

The Judge's Decision

7. The Appellant appealed to the First-tier Tribunal and the case came before First-tier Tribunal Judge Alis (hereinafter called "the Judge"). At the hearing the Respondent withdrew the removal directions and although the Judge expressed concerns as to the basis of the argument as to how Article 8 was engaged in those circumstances nevertheless heard Mr Hussain's argument in relation to why the Appellant's circumstances warranted a grant of leave outside the Rules. He concluded that the Appellant's circumstances were not such as to warrant a grant of leave outside the Rules and dismissed the appeal.

8. Grounds of appeal were lodged and on 31 March 2014 Upper Tribunal Judge Macleman gave permission to appeal.

9. At the hearing I heard submissions from Mr Hussain on behalf of the Appellant that in essence the Appellant's wife's difficult first pregnancy, her current pregnancy and her mother's heart attack has not been properly taken into account in determining whether a grant of leave outside the Rules was warranted.; he accepted that the Appellant could not meet Appendix FM and paragraph 276ADE of the Rules but the matters that were put forward were compelling factors; the Judge placed too much weight on the fact that there were no removal directions in making his decision.

10. On behalf of the Respondent Mr Harrison relied on the Rule 24 response which submitted that the Judge had taken into account all relevant factors.

The Law

11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is

alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue under argument. Disagreement with an Immigrations Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence that was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration judge concludes that the story told is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Finding on Material Error

12. Having heard those submissions I/we reached the conclusion that the Tribunal made no material errors of law.

13. In this case it was properly conceded that the Appellant could not meet the requirements of the Rules that address Article 8, that is Appendix FM or paragraph 276 ADE of the Rules. The Judge in his determination recognised that application of the Rules and guidance ordinarily mean that Article 8 considerations have been catered for taking into account Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) which makes clear that the Immigration Rules are Article 8 compliant and as such if a claimant cannot meet the requirements of Article 8 under the rules there have to be circumstances in the case to warrant consideration of Article 8 outside the Rules.

14. The Appellant's representative properly acknowledged before the Judge that his only hope of success was in persuading the Judge that the particular circumstances of this Appellant's case were such that refusal of leave would lead to unjustifiably harsh consequences for the Appellant and his family in the United Kingdom such that refusal of the application would not be proportionate.

15. The Judge set out the background to the case as set out above and additionally noted that at the date of hearing the child referred to had been born after an emergency caesarean. Mrs Mirabel had suffered an infection and pneumonia which led to her spending a short period in intensive care. Mrs Mirabel was at the time of hearing 5 months pregnant with her second child and was anticipating a caesarean again. Although she had worked she had lost her job when she stayed in Cuba for 5 months so was in receipt of benefits. Her parents did not work and her mother had a heart attack in January 2012 but had recovered with no evidence of any lasting issues.

16. The Judge found that the Appellant did not meet the requirements of Appendix FM and paragraph 276ADE and indeed this was conceded by Mr Hussain. Although the Judge had indicated that he 'struggled to see how Article 8 would be engaged in the light of the fact that there was no removal decision' he nevertheless went on to hear arguments and did indeed consider whether the case should be looked at under Article 8 outside the Rules.

17. I am satisfied that it cannot be argued that the Judge did not consider all of the information that was determinative of that decision even when the argument was supported by little objective evidence. Although there was no medical evidence provided in relation to Mrs Mirabel he was prepared to accept that she had suffered complications in her first pregnancy. In relation to her latest pregnancy he was

entitled to note that there was no medical evidence to suggest that she was in any way considered a higher risk pregnancy or required any kind of special treatment to ensure a safe birth or there were any special issues arising in relation to the care of her as yet unborn child. He accepted that Mrs Mirabel's mother had had a heart attack but she was no longer at any risk.

18. He also took into account that the Appellant's wife and child are British citizens. He noted as part of the factual matrix underpinning the case that there were no longer removal directions in place in relation to the Appellant. While it was argued that he place too much weight on this fact I am satisfied that on any reading of the decision the facts relating to the Appellant's wife's health and that of her mother were the determinative issues in the case and the Judge was entitled to conclude as he did that this did not entitle the Appellant to leave outside the Rules.

19. I am therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

20. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

DECISION

21. **The appeal is dismissed.**

Signed Date 12.10.2014

Deputy Upper Tribunal Judge Birrell