Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/24262/2014**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly	**Decision and Reasons Promulgated**
On 10 March 2015	**On 24 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

MANUEL DE JESUS MURILLO

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Sharkey of Medivisas
For the Respondent: Ms C Johnstone Senior Home Office Presenting Officer

DECISION 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 consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge A K Simpson promulgated on 16 December 2014 which allowed the Appellant's appeal against a refusal of leave to remain as a spouse and held that it was disproportionate and unlawful under Article 8 of the European Convention on Human Rights to remove him to the United States of America.

Background

3. The Appellant was born on 10 August 1985 and is a national of the United States of America.

4. The Appellant first entered the United Kingdom as a visitor on 2 October 2013 and was given leave to remain until 2 April 2014. On 31 March 2014 he applied to vary his leave to remain in the United Kingdom as the spouse of Sarah Pamela Knowles a British citizen but his application was refused on 22 May 2014 on the basis that the Appellant could not meet the immigration status requirements of the Rules as he was in the United Kingdom as a visitor; he did not meet the requirements for leave to remain as a parent; the Appellant did not meet the eligibility requirements of the Rules and therefore could not benefit from EX.1 ; he did not meet the private life requirements of the Rules; there were no exceptional circumstances to warrant a grant of leave outside the Rules as there were no insurmountable obstacles to them enjoying family life together in the USA.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Simpson heard oral evidence from the Appellant and his wife and dismissed the appeal under the Rules but allowed the appeal against the Respondent's decision under Article 8. The Judge found :

   (a) Contrary to the assertion of the Respondent in the refusal letter the Appellant's child was a British citizen as her mother is British by birth so although she was born in the USA she was British by descent. She was also an American citizen.

(b) It was accepted by both sides that the Appellant could not meet the requirements of the Rules.

(c) There were good reasons to consider a grant of leave outside the Rules as the Appellant is the father of a British child.

(d) She considered the case under Article 8 outside the Rules and determined that the issue came down to one of proportionality and whether it would be proportional to expect the Appellant to return to the USA alone and re establish his domicile before his wife could rejoin him there.

(e) The Appellant would have to return alone as there were problems for the Appellant's wife relating to domicile and green cards and returning residents. These were discussed during the hearing and confirmed in written submissions that were received in September 2014 and served on the Respondent and not challenged. The Judge concluded she would be refused re entry to the US as her green card had lapsed and would not be readmitted as a returning resident. She found that the sponsor would have to reapply for a green card and the Appellant would have to meet the criteria for domicile which she set out.

(f) The judge took into account the best interests of the Appellant's child . She found that she was entitled to remain with her mother and could not realistically join her father in the US as she was too young to be separated from her mother. Therefore family life could not continue in the US

(g) The Judge took into account that the Appellant's did not meet the requirements of the Rules.

(h) The Judge concluded that in the light of all the circumstances the decision to remove was disproportionate.

6. Grounds of appeal were lodged arguing that the Judge had demonstrated bias in the way she dealt with the case; there was a procedural impropriety in relation to the internet research carried out by the Judge and the Judge failed to identify non standard features in this case that would justify consideration of the case outside the Rules .On 6 February 2015 First-tier Tribunal Judge Kamara gave permission to appeal.

7. At the hearing I heard submissions from Ms Johnstone on behalf of the Respondent that :

(a) There was a procedural impropriety in that the Judge demonstrated bias.

(b) The assessment of proportionality was inadequate as there was no consideration of section 117B of the Immigration Act 2014 and the public interest factors set out there.

8. On behalf of the Respondent Ms Sharkey submitted that :

(a) The suggestion that the Judge had exhibited bias was bewildering given the number of issues where she found against the Appellant .

(b) In relation to the internet research carried out by the Judge she had given both parties the opportunity to address it .The submissions made by the Appellant were sent to the Respondent and there was evidence produced to show that. There was no suggestion that the HOPO in court objected to this course of action being taken.

(c) The Judge's Article 8 assessment was adequate. She addressed the relavant caselaw and acknowledged that the Appellant could not meet the maintenance requirements.

(d) While the public interest was not explicitly referred to in the findings that would have made no difference to the outcome of the decision.

Finding on Material Error

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

10. This was an application by the Appellant for leave to remain as the spouse of a British Citizen Sarah Knowles with whom he had a child who at the time of the hearing was 3 years old. The Appellant and his wife had met and married in the USA and their child was born there and was therefore a dual citizen of the USA and the United Kingdom.. It was not disputed that for a number of reasons the Appellant could not meet the requirements of Appendix FM or paragraph 276ADE.

11. The grounds of appeal to the Upper Tribunal contend that the Judge erred in two respects. It is firstly contended that the Judge's decision was procedurally unfair

as she had demonstrated bias. I have no witness statement from the HOPO Mr Archbald simply a copy of his attendance note which while note providing any verbatim note of remarks that are considered to show bias attributes motives to the Judges behaviour that reflect adversely on her conduct of the hearing. A witness statement should have been provided as there is clearly a distinction between legal submissions and arguments and evidence about events at the hearing.

12. Therefore the only 'evidence' that I am provided with to suggest that there is bias is the HOPOs attendance note which I must read in the context of the decision before me. The note records:

"*The IJ then started to try and find a way to make it unreasonable for the app to return to the US and be separated from his wife and child, she clearly stated in court that she would get evidence of what the wife would need to do to return and live in the US..... It is quite clear that she was doing the reps job as the rep had provided nothing about US citizenship, and therefore that she was not being independent. It should be noted that she did this whilst it was unclear what status the wife had in the US, and whether or not the status had been lost or revoked."*

13. The test for judicial bias relied on by the Respondent is set out in Porter and Magill 2001 UKHL 67 at paragraphs 102 and 103 as follows:
"*The Court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility the tribunal was bias"*

14. In this case the Judge carried out an assessment of the Appellant's case by reference to Article 8. In the refusal letter at page 3 when addressing the issue of whether there were exceptional circumstances to warrant a grant of leave outside the Rules the Respondent asserted in essence that there was nothing to stop the Appellant and his wife and child relocating to the US and enjoying family life there and the same argument underpinned their views on Article 8.

15. This was a live issue in the case before the Judge given that while she found as a fact that the child was a dual national and therefore entitled to live in the US the Appellant's wife gave evidence (paragraph 10) that

her green card had expired in 2011 and therefore was disputing that she could simply return to live there. In her assessment of the proportionality of the Respondent's decision the Judge was therefore inevitably bound to consider whether the family life could reasonably be expected to continue in the US and that involved an assessment of whether the Appellant's wife was entitled to live there. It appears that the Judge identified that neither party had provided adequate evidence on this issue although she records that there was a 'discussion' and Mr Archbold's attendance note agrees, in relation to this in court (paragraph 21). Identification of the important issues in a case is a common feature of the work of Tribunal Judges and underpins the overriding objective as set out in the Procedure Rules and there can be nothing about such an attempt to identify the live issues in discussions between the parties which would suggest that the Judge was not approaching the case with an open mind.

16. It appears that she retired to ascertain if this could be clarified and researched the matter on the internet. She presented her findings in court and then gave the parties the opportunity to make written submissions before deciding the case. I note that the submissions made by the Appellant were received by the court on 25 September 2014. The Appellant has produced evidence that this was served on the HOPO unit and signed for by them so while Ms Johnstone and the grounds suggest they did not see these submissions that is clearly the fault of their unit in linking post to files. The decision was not written until 15 December 2014 so it is clear that the Judge did not write the decision until these submissions were received and the Respondent was given an opportunity to respond. Mr Archbold I am satisfied drew adverse inferences from the Judge's indication that she required more evidence about an issue in the case which is not supported by her actions.

17. Given that there had been a discussion of the issue in court and the parties had been given the opportunity to make further submissions after the hearing and the Judge did not decide the case until they had

had the opportunity to do so I can see no basis on which it could be reasonably argued that the Judge had been biased or had not approached this case with an open mind.

18. In relation to the Judges assessment under Article 8 it is contended in the grounds that the Judge misdirected herself at paragraphs 18-19 in failing to identify non standard features of a compelling nature that show that removal would be unjustifiably harsh. I am satisfied however that if that is the correct test to apply the Judge applied it: at paragraph 18 she identified that the refusal letter had failed to correctly identify the nationality of the Appellant's child as British and that this would in the circumstances not be a factor recognised by the Rules in the Appellant's case. The Judge found in her Article 8 assessment that it was a relevant factor and explained in clear terms why she found it was important.

19. Ms Johnstone argued in more general terms that the Judge's Article 8 was 'inadequate' although this was not specifically identified as an error of law in the grounds nor was permission granted on that basis. She specifically suggested that it was an inadequate assessment because the Judge had failed to refer to the statutory public interest considerations as required by the Immigration Act 2014. However even had that been the basis of the grant of permission I am satisfied that although not referred to the Judge took into account that the Appellant did not meet the requirements of the Rules as she said that this was part of the balancing exercise that she carried out in paragraph 24. She had also heard evidence from the Appellant in English, she had heard evidence that while the sponsor did not meet the financial requirements of Appendix FM she was in full time employment with John Lewis and there was nothing therefore to suggest the family were a burden on United Kingdom society or unable to integrate.

20. Finally in failing to address paragraph 117B Ms Johnstone failed to note that the Appellant would in fact on the basis of the findings made by the Judge have benefited from the application of paragraph 117B(6) which provides that:

"In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

21. The Judge having found that there were barriers to the Appellant's wife relocating to the US it could not be argued that it was reasonable to expect his child to leave the United Kingdom.

22. In failing to refer to section 117B I have reminded myself of the recent Court of Appeal decision in SSHD – v – AJ (Angola) [2014] EWCA Civ 1636 that an error of law by the First-tier Tribunal may be considered immaterial –

" … if it is clear that on the materials before the Tribunal any rational Tribunal must have come to the same conclusion or if it is clear that, despite its failure to refer to the relevant legal instruments, the Tribunal has in fact applied the test which it was supposed to apply according to those instruments."

23. I was 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. While it may be categorised as generous and not a conclusion that other Judges would have reached I am satisfied that this is not the test and therefore I uphold the decision.

CONCLUSION

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

DECISION

25. **The appeal is dismissed.**

Signed Date 22.3.2015

Deputy Upper Tribunal Judge Birrell