



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

Appeal Number: AA/11696/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 12th August 2015**

**Decision & Reasons Promulgated
On 11th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOSE EDISON HERNANDEZ

Claimant

Representation:

For the Appellant: Ms E Savage, Senior Presenting Officer

For the Claimant: Ms R Akther, Counsel instructed by Thoree & Co Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Beach allowing the Claimant's appeal on human rights grounds pursuant to Article 8 ECHR.
2. In a Refusal Letter, dated 5 December 2014, the Secretary of State refused the Claimant's human rights application in relation to his right to private and family life under the Immigration Rules and outwith the Rules pursuant to Article 8 ECHR and under rule 353B and Articles 2 and 3 ECHR, and further issued removal directions dated 5 December 2014 (IS151B) set for the Claimant's country of origin, Colombia. The First-tier Tribunal

promulgated its decision allowing the Claimant's appeal against that decision on 15 May 2015.

3. The Appellant appealed against that decision and was granted permission to appeal by First-tier Tribunal Judge Ford on two out of three grounds, the first being a disagreement with the findings of fact. The grounds upon which permission was granted may be summarised as follows:
 - (i) The judge erred in failing to correctly apply section 117B(4) of the Nationality, Immigration and Asylum Act 2002 in relation to the status of the Appellant and his partner when they entered into a relationship; and
 - (ii) The judge erred in failing to consider fully the issue of whether there were insurmountable obstacles to the couple returning to Colombia together.
4. I was not provided with a Rule 24 response from the Claimant but was addressed in oral submissions by her counsel.

Error of Law

5. At the close of submissions, I indicated that I would reserve my decision, which I shall now give. I find that there was an error of law in the decision such that it should be set aside. My reasons for so finding are as follows.
6. In relation to the first ground, I find that the Secretary of State's appeal is just made out in relation to the judge having failed to consider section 117B(4). Whilst the judge clearly states in her decision that she has taken account of the statutory public interest when assessing Article 8. Pursuant to *Dube (ss.117A-117D)* [2015] UKUT 90 (IAC), Judges are duty-bound to "have regard" to the specified considerations; however it is not an error of law to fail to refer to ss.117A-117D considerations if the judge has applied the test he or she was supposed to apply; as what matters is substance, not form. The difficulty the Claimant faces is that unfortunately the judge has not explicitly considered the amount of weight to be given to the Claimant's private life and family life in light of his status.
7. In relation to the Claimant's partner's status a further complication arose during the course of submissions, namely that the judge misconstrued what status the partner actually held at certain points in recent history (it transpired that she did not hold indefinite leave to remain when the judge stated she did). I should remark that it is not the fault of the judge at the First-tier Tribunal that neither of the representatives brought the precise status of the partner to her attention given its importance under section 117B(4).
8. Whilst this error may have occurred inadvertently it has nonetheless given rise to a material factual error in relation to the consideration of section 117B(4) as it is unclear whether the Claimant's partner met the statutory definition of a "qualifying partner" or not and whether the Claimant should

be afforded less weight to his relationship as a consequence or not which is crucial for the statutory application of section 117B. This consideration is an unavoidable one owing to its statutory inception and must be accurately considered if the public interest is to be given its appropriate measure, be that great or small against the facts of the particular case.

9. The findings made upon the relationship with the Claimant's partner are inextricably linked to the assessment of his human rights and consequently, those findings are tainted and must be set aside. Despite Ms Akther's valiant submissions, I therefore find that there is an error and that the appeal will need to be re-made.

Decision

10. The appeal to the Upper Tribunal is allowed.
11. The decision of the First-tier Tribunal is set aside.
12. The appeal is remitted to the First-tier Tribunal, to be heard by a differently constituted tribunal.

Anonymity

13. The First-tier Tribunal did not make an anonymity order. I was not invited to make any such order and in any event I see no reason to make such an order.

Fee Award

14. The First-tier Tribunal did not make any fee award and no further order is necessary at present.

Signed

Date

Deputy Upper Tribunal Judge Saini