



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

Appeal Number: IA/24122/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 10 March 2015**

**Determination**

**Promulgated**

**On 17 March 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE G A BLACK**

**Between**

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

**and**

**CONSTANCIA UATARAPI KAROKOHE  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Claimant

**Representation:**

For the Appellant: Mr L Tarlow, Home Office Presenting Officer

For the Respondent: Miss O Momoh, Counsel, instructed by Shan & Co

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal (Judge McWilliam) who, in a determination promulgated on 26 November 2014, allowed the claimant's appeal against the

Secretary of State's decision to refuse her application for leave to remain in the UK on the basis of her relationship with a British citizen.

2. For ease of convenience I shall refer to the parties as the "Secretary of State", who is the appellant in this matter, and to the appellant from the First-tier Tribunal as "the Claimant".

### **Background**

3. The Claimant whose date of birth is 14 December 1976 and is a citizen of Namibia. She entered the UK in March 2003 in order to pursue studies. She has two children who are living in Namibia and who are being cared for by her mother, who is a farmer. The Secretary of State considered that there was insufficient evidence to show that the Claimant had been in a relationship with Mr Waterhouse for a period of two years or more. In any event she could not satisfy the eligibility criteria of Appendix FM and there were no insurmountable obstacles to family life outside of the UK.
4. In a determination the Tribunal found the Claimant and her husband to be entirely credible and believable witnesses. By the time of the hearing the Claimant had married Mr Waterhouse, a British citizen. The first limb of the refusal was not pursued. The Tribunal took into account the sponsor's specific circumstances, placing particular weight on his fragile mental health, his need to provide for his family, his obvious work ethic, his lack of familiarity with Africa, specifically Namibia and his difficulties in finding work and establishing a life there. She concluded that there were insurmountable obstacles in the context of EX.1. The Tribunal also considered issues relevant to the public interest at [30], [31] and [36]. The appeal was allowed under the Rules and under Article 8 ECHR.

### **Grounds of Application for permission**

5. In lengthy grounds it was contended by the Secretary of State that the Tribunal made a material misdirection of law. As an overstayer the Claimant could not satisfy the mandatory eligibility requirements. The Tribunal erred by failing to properly consider the existence of insurmountable obstacles under EX1. The Tribunal erred by concluding that the Claimant's return to Namibia would be disproportionate and a breach of Article 8 ECHR. There were no exceptional circumstances for the case to be considered outside of the Rules. The Tribunal failed to take into account the considerations under Section 117 as regards public interest.

### **Permission to Appeal**

6. Permission was granted by First-tier Tribunal Judge Colyer. Judge Colyer took the view that the majority of the grounds put forward by the Secretary of State were nothing more than a disagreement with the findings of the Tribunal which were properly open to her on the evidence

before her. The only basis on which an arguable error of law was discerned was the failure to have regard to the public interest and apply the Part 5 of Nationality, Immigration and Asylum Act 2002 ( as amended).

### **Error of Law Hearing**

7. At the hearing before me I indicated to Mr Tarlow that I agreed with the position taken by the permitting judge. I was satisfied that the majority of the grounds of application in reality amounted to a disagreement with the Tribunal's decision.
8. Mr Tarlow submitted that the Tribunal failed to take into consideration the public interest issues which had now been incorporated into statute under Section 117 of the Nationality, Immigration and Asylum Act 2002 (as amended).
9. Miss Momoh submitted that whilst the Tribunal had not specifically referred to Section 117, it had referred to all of the relevant points included in the statutory provisions with regard to the public interest. The Tribunal considered the Claimant's immigration history, the precarious nature of the establishment of the relationship and the finances available. The Tribunal also considered fully the issue of insurmountable obstacles and in particular placed weight on the sponsor's specific circumstances at [29].

### **Discussion and Decision**

10. At the end of the hearing I confirmed that the Secretary of State's appeal was dismissed. I found no material error of law in the Tribunal decision. I am satisfied that the Tribunal, whilst not explicitly referring to Section 117, did in fact consider the aspects of public interest set out in statute and reached a decision that was clearly sustainable on the evidence before her. The Tribunal gave careful consideration to the documents and oral evidence and provided a clear and well reasoned explanation for finding the Claimants account to be credible and genuine. As has been concluded in the recent decision of **Dube (SS 117A-117D) [2015] UKUT 90** "It is not an error of law to fail to refer to subsections 117A-117D considerations if the judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form".

### **Decision**

11. The Decision and Reasons shall stand. There is no material error of law. The Secretary of State's appeal is dismissed.

### **Notice of Decision**

The appeal is dismissed.

There is no error of law in the decision and reasons, which shall stand.

No anonymity direction is made.

Signed

Date 16.3.2015

Deputy Upper Tribunal Judge G A Black

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award. It was necessary for the parties to give evidence which formed the basis of the Tribunal's decision.

Signed

Date 16.3.2015

Deputy Upper Tribunal Judge G A Black