Neutral Citation Number: [2016] EWCA Civ 803

Case No: C5/2015/1934

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
IA238852013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/08/2016

Before:
LORD JUSTICE MOORE-BICK
LORD JUSTICE SALES
and
SIR STEPHEN RICHARDS
- -

Between:

	RHUPPIAH	**Appellant**
	- and -	
	SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Hugh Southey QC and David Sellwood (instructed by **Wilsons Solicitors LLP**) for the **Appellant**

Andrew Byass (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 21st July 2016
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Judgment Approved

Lord Justice Sales:

1. The appellant entered the UK on a student visa in 1997 and has been resident here since then, but as an overstayer since her leave to remain as a student (extended from time to time) expired in November 2009 and her appeal rights were exhausted on 11 October 2010. She sought leave to remain from the Secretary of State outside the Immigration Rules, relying on her rights under Article 8 of the European Convention of Human Rights as applied by the Human Rights Act 1998, but this was refused in June 2013 and removal directions were set. The appellant appealed to the First-tier Tribunal ("FTT") which dismissed her appeal by a decision promulgated in August 2014 (FTT Judge Blundell). She appealed to the Upper Tribunal (Deputy Upper Tribunal Judge E.B. Grant), which by a decision of December 2014 found no error of law on the part of the FTT and

dismissed her appeal. She now appeals to this court.

2. Since the FTT's decision was upheld by the Upper Tribunal, the operative decision in issue on the appeal is that of the FTT, the question being whether it made a material error of law.

3. The appeal gives rise to issues of interpretation of the new provisions at sections 117A to 117D in Part 5A of the Nationality, Immigration and Asylum Act 2002 (as inserted by the Immigration Act 2014).

4. Part 5A provides in relevant part as follows:

> **"PART 5A**
>
> ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS
>
> **117A Application of this Part**
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> **117B Article 8: public interest considerations applicable in all cases**
>
> (1)The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,
that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) 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.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a

qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7)The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1) In this Part—
"Article 8" means Article 8 of the European Convention on Human Rights;
"qualifying child" means a person who is under the age of 18 and who—
(a) is a British citizen, or
(b) has lived in the United Kingdom for a continuous period of seven years or more;
"qualifying partner" means a partner who—
(a) is a British citizen, or
(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

5.The appellant is not a foreign criminal and section 117C has no application in her case. But it is relevant to refer to section 117C when addressing the issues of interpretation which we have to consider.

The factual background

6.The facts of the case can be summarised as follows. The appellant is a national of Tanzania born on 26 October 1973. She entered the UK in September 1997 with entry clearance as a student. She was granted further periods of leave to remain as a student until the end of November 2009.

7.In accordance with the Immigration Rules in force at the times of each application for leave to enter or remain in the UK as a student, in her applications the appellant had to demonstrate that she was pursuing a course of study in the UK and had to state her intention in each case to leave the UK at the end of her studies.

8.From about 2001 the appellant has lived with her friend from college, Ms Charles, in London. Like the appellant, Ms Charles was in the UK as a student at that time. Ms Charles is now employed as a systems engineer for Ministry of Defence Projects.

9.Ms Charles became ill with ulcerative colitis and from about 2005 has experienced difficult symptoms requiring multiple admissions to hospital. Ms Charles is now heavily

dependent on the appellant, who provides a range of care for her to support her in her daily life, including travelling with her to job assignments out of London, preparing food for her carefully managed diet, helping to manage her financial affairs and looking after her when she is seriously unwell. The appellant does this out of friendship and by reason of her faith as a committed Seventh Day Adventist. Ms Charles is terrified at the prospect of the appellant's removal from the UK, and fears that she would be unable to continue working if the appellant was no longer looking after her.

10. The appellant has a significant commitment to helping with charitable activities for her church.

11. The appellant's brother and his wife and daughter, McKenya, live in Basingstoke. McKenya was born on 6 May 2009. The appellant visits the family in Basingstoke regularly and speaks to them on the telephone. Her brother described her as a "hands on aunt".

12. The appellant speaks fluent English. Although she has had some periods of employment in the UK, the FTT found that she is not financially independent: she receives her board and lodging free from Ms Charles and her father pays her a maintenance allowance; the appellant "depends on others for all of her funds": FTT para. [57].

13. On 28 November 2009 the appellant applied for Indefinite Leave to Remain ("ILR") on the basis of her length of residence in the UK. That application was refused on 12 February 2010; her appeal was dismissed on 16 August 2010; permission to appeal was refused; and her statutory appeal rights became exhausted on 11 October 2010.

14. The appellant has been an overstayer in the UK, and her presence here unlawful, since 11 October 2010.

15. On 1 July 2012, the appellant made an application for ILR on grounds of long residence which was invalid, by reason of being made on the wrong form as a result of the ineptitude of the college on which she relied to make the application on her behalf. On 8 August 2012 she applied again, this time using the correct form. But in the intervening period new Immigration Rules had come into effect on 9 July 2012, and she was unable to show that she was entitled to leave to remain or ILR under those new rules. It may well be that her application could have succeeded, if the previous version of the Immigration Rules had continued to apply, but nothing turns on this.

16. By a decision letter dated 5 June 2013, the Secretary of State dismissed the appellant's application. The appellant had no basis under the new Immigration Rules for claiming ILR or leave to remain. The appellant had no relevant family life in the UK for Article 8 purposes. Nor did the Secretary of State consider that she had a good claim for leave to remain outside the Rules based on the right to respect for her private life under Article 8. The appellant had spent more of her life in Tanzania than in the UK and the Secretary of State considered that she would be able to re-adapt to life there, while she could maintain any relationships she had formed in the UK through modern methods of communication.

17. The appellant appealed in proper time to the FTT, claiming that she should be granted leave to remain outside the Immigration Rules on the basis of her private life. In support of that claim the appellant relied in particular on her relationships with Ms Charles and with her niece (and on the importance of the best interests of her niece, as a young child) and on her charitable work. She also emphasised her fluency in English and that she was not a financial burden on the state.

The FTT's decision

18. The appeal was heard by the FTT on 4 August 2014. The FTT was obliged to apply Part 5A of the 2002 Act in assessing the appellant's claim under Article 8. Since the appellant could not show that she was entitled to leave to remain under the Immigration Rules, she had to show that there was a compelling reason to require the grant of leave outside the Rules: see *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin), [29]; *SS (Congo) v Secretary of State for the Home Department* [2015] EWCA Civ 387; [2016] 1 All ER 706, [33].

19. The FTT assessed the Article 8 position in relation to the interests of the appellant's niece in the light of relevant authorities including *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74; [2013] 1 WLR 3690 and *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874. Given the limited role of the appellant in McKenya's life, it is entirely unsurprising that the FTT assessed that although the appellant's removal from the UK would be contrary to McKenya's best interests in the very limited sense that she would prefer to continue to see her aunt regularly, this was a very marginal factor in favour of the grant of leave to remain: FTT paras. [45]-[48].

20. The FTT found that there would be a very real impact on Ms Charles if the appellant were removed, and that her health and continued employment would be likely to be detrimentally affected; alternative arrangements would have to be made for Ms Charles, with the cost likely falling on the public purse; "Ms Charles' life would be turned upside down if the appellant was removed from the UK" (FTT para. [49]). The FTT also gave weight in the proportionality assessment to the fact that the appellant's local community would lose a person committed to charitable work: FTT para. [50].

21. However, the FTT found these factors to be outweighed in the proportionality assessment by a series of factors pointing in favour of removal, as seen through the lens of the new statutory framework in Part 5A of the 2002 Act, namely that the maintenance of immigration control is in the public interest, as declared in section 117B(1); that the appellant could not be regarded as financially independent, within section 117B(3); and that little weight should be given to private life established by a person at a time when her immigration status is "precarious", as set out in section 117B(5).

22. On this last point, the appellant's representative submitted that the appellant's immigration status was not precarious from her entry to the UK in 1997 until the latter half of 2010, when her presence here became unlawful (see FTT para. [59]). The FTT dismissed that

submission at para. [60], saying this:

> "… I cannot see how the appellant's status since her arrival to the UK can be described as anything other than precarious. The only type of leave which the appellant has ever had was as a student. That fact led [counsel for the Secretary of State] to ask the appellant, during cross-examination, whether she expected that she would have to leave the UK at some point. She replied in the affirmative. The fact is that the appellant has only ever held a type of leave … which required her to demonstrate an intention to return. Her immigration status was precarious throughout; she had no expectation that she would be allowed to remain indefinitely, and leave to remain as a student would not have been granted if she had suggested otherwise. I find that s. 117B(5) requires me to attach little weight to the private life established by the appellant."

23. This was an important part of the FTT's decision, because it noted that although the appellant's presence in the UK had been unlawful since late 2010, the main features of her private life here had already been established before then; therefore, the FTT considered that section 117B(4) was of questionable relevance in the appellant's case: FTT para. [58].

24. The FTT rejected a submission on behalf of the appellant that section 117B(2) meant that her proficiency in English should be treated a matter which militated positively in her favour in the proportionality assessment. In the FTT's view, under that provision it was just a neutral factor: FTT paras. [54]-[55]. "[Section 117B(2)] does not provide that the public interest is served by permitting those who speak English to remain in the UK. It provides that it is in the public interest for those seeking to remain in the UK to be able to speak English. An inability to speak English is therefore a matter to be weighed against an individual, whereas an ability to do so seems to be a neutral factor …" (FTT para. [55]).

25. At para. [56] the FTT also reached a similar conclusion in principle in relation to financial independence under section 117B(3): "It is in the public interest that those who seek to remain in the UK are financially independent, but it is not necessarily in the public interest that financially independent persons are permitted to remain in the UK." In the event, however, as explained above, the FTT found that the appellant was not financially independent, so section 117B(3) meant this was a negative factor in her case.

26. At paras. [61]-[63] the FTT correctly rejected a "near miss" argument for the appellant that if her application for ILR of 1 July 2012 had been submitted on the correct form she would probably have proceeded to obtain ILR under the old version of the Immigration Rules. The error was unfortunate, but this was not a factor entitled to be given weight in the proportionality assessment.

27. At para. [63], the FTT made a proportionality assessment in favour of the maintenance of immigration controls and the removal of the appellant from the UK in this way:

> "… I accept that Ms Charles will be particularly badly affected by the appellant's removal; that the appellant's family members will be deeply upset; and that the local community will lose a woman who has been committed to charitable activity for many years. I am required by statute to attach little weight to all of those relationships, however. I am also required to weigh against the appellant her financial dependency on Ms Charles and her father. I am also required to weigh against her the fact that she cannot meet the new Immigration Rules introduced by HC194. As a result of the legislative changes, and the current state of the authorities regarding the new Rules, I consider that I am bound to conclude that the harsh consequences which will flow from the appellant's removal are justified and proportionate to the legitimate aim pursued by the appellant."

Discussion

28. Mr Southey QC for the appellant puts forward three grounds of appeal:

i) The FTT erred in law in holding that the appellant's immigration status was "precarious" from the outset of her presence in the UK for the purposes of section 117B(5);

ii) On its proper construction, section 117A(2) read with section 117B(5) means that a court or tribunal has a discretion in an appropriate case to attach substantially more than "little weight" to private life established in the UK at a time when the person's immigration status was precarious. In this case, the FTT erred by treating itself as obliged by the statute to give only little weight to the appellant's private life in the UK, even if her immigration status between 1997 and 2010 was "precarious" in the requisite sense; and

iii) The FTT erred in its interpretation of section 117B(2) (proficiency in English) and section 117B(3) (financial independence). It should have found that the proper meaning of "financially independent" in section 117B(3) is that the person has a sustainable source of income or means of living which does not involve dependency on the state, and that the appellant was financially independent in this sense. The FTT should have treated both that factor and the appellant's proficiency in English as positive factors in her favour under section 117B(2) and (3), rather than just being neutral.

29. The second of these grounds is in substitution for an original ground (ii) which sought to contend that section 117B(5) is incompatible with Article 8. Mr Southey needs permission to substitute his new ground (ii) and for permission to appeal in respect of it. He has given ample notice of it to the Secretary of State. The court is agreed that permission should be granted in relation to this new ground. The fact that this is a new ground needs to be borne in mind, however, when we come to Mr Southey's criticism of the FTT's reasoning on this point. It was not suggested in argument before the FTT or in

the Upper Tribunal that section 117A(2) has the effect for which Mr Southey now contends; nor was it suggested that there was any special feature of the appellant's case which could justify the FTT in declining to apply section 117B(5) in accordance with its terms.

Ground (i): the meaning of "the person's immigration status is precarious" in section 117B(5)

30. "Precarious" is not a term of art with a clearly defined meaning in relation to immigration status. It seems close to, although not precisely the same as, an idea used as an important aspect of guidance given by the European Court of Human Rights ("ECtHR") in relation to the effect of Article 8 in immigration cases. See the summary of applicable principles set out by the Grand Chamber in *Jeunesse v Netherlands* (2015) 60 EHRR 17 at paras. [106]-[109], in particular at para. [108]:

> "Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. It is the Court's well-established case-law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of art. 8."

31. It is noticeable that on the ECtHR's formulation in para. [108] the idea of precariousness in relation to the persistence of family life does not depend upon the presence of the family member in the host state being unlawful. A person would know from the outset that there would be precariousness in relation to the persistence of family life if he was given limited leave to enter or remain in the host state, where it was clear that he would have to leave at the end of a set period of time in the not far distant future.

32. A similar point may be made on the basis of a comparison of the concepts used in sub-sections 117B(4) and (5) in the domestic legislation. The concept of precariousness in immigration status in subsection (5) is distinct from the concept of unlawful presence in the UK in subsection (4). Even if the two concepts could be said to overlap, subsection (5) would be redundant if they were the same. Clearly the concept of precariousness in immigration status extends more widely, to include people who have leave to enter or remain which is qualified to a degree such that they know from the outset that their permission to be in the UK can be described as precarious.

33. The parties on this appeal made opposing extreme submissions about the meaning of precariousness in this context. Mr Southey submitted that a person who is granted some form of limited leave to remain but who might, if that leave is extended and re-extended, eventually be in a position to claim ILR under the Immigration Rules (as he put it, was on a route to settlement), could not be regarded as having a precarious immigration status. Mr Southey was driven to put the submission in this way in order to take the appellant's case outside the scope of section 117B(5). Mr Byass for the Secretary of State, on the other hand, submitted that if there was any temporal limit whatever on the leave granted to enter or remain (i.e. if the leave granted was anything less than ILR),

that would qualify as a precarious immigration status for the purposes of section 117B(5).

34.I cannot accept Mr Southey's submission. In the context of section 117B, the relevance of precariousness of immigration status is the effect it has on the extent of protection which should be afforded to private life for the purposes of the Article 8 proportionality balancing exercise. The more that an immigrant should be taken to have understood that their time in the host country would be comparatively short or would be liable to termination, the more the host state is able to say that a fair balance between the rights of the individual and the general public interest in the firm and fair enforcement of immigration controls should come down in favour of removal when the leave expires. Assessed in this light, the appellant's leave to be in the UK down to late 2010 (when she became an unlawful overstayer) constituted an immigration status that in my opinion was clearly precarious in the relevant sense.

35.For each individual grant to the appellant of leave to enter or remain, the period of the grant was specifically limited to the comparatively short and clearly delimited period required for the completion of a course of study on each occasion. When each grant of leave was made, the appellant specifically stated that her intention was to leave at the end of her period of study. On the occasion of her application in each case, she may have had a hope that her leave might be extended when it came to an end if she could find another study course, but she had no guarantee that she would be able to do so and no guarantee that the same Immigration Rules would be in place when she made her further application. The hope, if she had one, of possibly eventually being in a position to apply for ILR was still more remote and tenuous. The position, therefore, in respect of each application for leave to enter or for an extension of her leave to remain was that the appellant had a stated intention to leave the UK at the end of the comparatively short period of leave requested, and only a speculative hope that she might be permitted to stay for longer at that point.

36.On any proper interpretation of section 117B(5) this was an immigration status which was precarious, and the FTT was correct so to hold. This view also accords with that of McCloskey J sitting in the Upper Tribunal in *Deelah and others (section 117B – ambit)* [2015] UKUT 00515 (IAC) at para. [33].

37.It is relevant to mention here that the general public interest in maintaining effective immigration controls in relation to persons granted limited leave to enter as a student is not simply to keep immigration within manageable bounds so far as the burden on taxpayers and the impact on social cohesion is concerned. There is also a dimension of the interests of other prospective students wishing to come to the UK to study: if it proves to be unduly difficult to remove a student at the end of their period of study, there is a real prospect that leave to enter as a student will be granted less readily and in fewer cases, contrary to those interests. In the light of the general public interest in the maintenance of effective immigration controls (section 117B(1)) and these particular aspects of that public interest, it is not unreasonable to expect a person who obtains leave to remain in the UK as a student to be prepared to leave at the end of their period of study, as they have said they intend to do, and to organise their private life accordingly.

38. Mr Southey sought to derive support for his submission from *Jeunesse v Netherlands*, but in fact that judgment undermines the appellant's contention. Mr Southey pointed out that the ECtHR distinguished the position of the applicant in that case from that of a "settled migrant" in the sense of someone with a formal right of residence in the host country: see paras. [101]-[105]. The applicant in *Jeunesse* had made numerous applications for a residence permit, though none was granted, and despite this had in practice been allowed by the authorities actually to reside in the Netherlands for more than 16 years with her husband and children (all of whom had Netherlands nationality). By contrast, Mr Southey submitted that the appellant in the present case should be regarded as a "settled migrant" for the purposes of analysis under Article 8, and hence entitled to a fuller degree of protection.

39. I do not agree with this analysis. We were not shown any Strasbourg case-law which supports the contention that a person in the position of the appellant would be regarded by the ECtHR as a "settled migrant" for the purposes of its jurisprudence. The discussion in *Jeunesse* indicates that something a good deal more solid and long-lasting would be required: see para. [102] (the applicant's position could not "be equated with a lawful stay where the authorities have granted an alien permission to settle in their country" – the word "settle" indicates permission to live in the host country for the long term); para. [104] (settled migrants are persons who have been granted formally a right of residence in a host country, of a kind which may be liable to withdrawal where the person has been convicted of a criminal offence – which again implies a right of residence for the long term, subject only to the possibility of removal if the person commits a crime); and para. [108], set out above.

40. The judgment in *Jeunesse* shows that it may be possible to find in an exceptional case that even a non-settled migrant has a sufficiently strong right to remain under Article 8 such that it would be disproportionate to remove them: see para. [108] and the ECtHR's assessment on the facts at paras. [113]-[123] that this was such an exceptional case. But it was a case in which, among other things, the applicant's husband and children had Netherlands nationality and she herself had originally held Netherlands nationality [115], the state authorities had tolerated her presence in the Netherlands for 16 years when it was open to the authorities to remove them [116], the applicant, her husband and young children would experience hardship if removed and the children's interests required special consideration [117]-[120]. None of these factors apply in the present case.

41. For the period during which the appellant held a series of grants of limited leave to remain as a student, it cannot be said that the Secretary of State tolerated her presence at a time when she could have been removed: contrast *Jeunesse* at para. [116]. The Secretary of State had granted her leave to remain in the expectation, and with her assurance, that she would leave at the end of it, so the question of removal in that period did not arise.

42. This also answers a further submission by Mr Southey based on *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2009] 1 AC 1159. At para. [15] Lord Bingham noted that "An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time", and that any relationship formed in such circumstances is likely to be imbued with a sense of impermanence; "But if months pass without a decision to remove being made, and months become years, and

year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so". The weight to be given to a person's relationships formed in those circumstances will be correspondingly greater. This reasoning is similar to that in relation to toleration of unlawful presence in *Jeunesse*. But in the present case, as I have explained, in the period when the appellant held a series of grants of leave to remain as a student, the question of removal by the Secretary of State did not arise and so this reasoning does not apply.

43. In 2010, the Secretary of State and then the Tribunal made it very clear by their decisions that the appellant could no longer stay in the UK and should leave. There was no question of the state authorities giving her the impression that they acquiesced in her staying in the UK. Mr Southey has rightly not sought to suggest that the appellant could say in relation to the period from late 2010 when her presence in the UK has been unlawful (in relation to which section 117B(4) is applicable) that her case is to be regarded as an exceptional one falling within the guidance in *Jeunesse* and the other Strasbourg authorities relevant to an immigrant unlawfully present in the host country (see *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin), [38]-[41]; *SS (Congo) v Secretary of State for the Home Department* [2015] EWCA Civ 387; [2016] 1 All ER 706, [29]).

44. This discussion is sufficient to dispose of the appellant's argument about whether her own immigration status was "precarious" at the relevant time, i.e. between 1997 and late 2010. I would wish to reserve my opinion about the submission of the Secretary of State that any grant of limited leave to enter or remain short of ILR qualifies as "precarious" for the purposes of section 117B(5). I have to say that I am doubtful that this is correct. If that had been intended, the drafter of section 117B(5) could have expressed the idea more clearly and precisely in other ways. There is a very wide range of cases in which some form of leave to remain short of ILR may have been granted, and the word "precarious" seems to me to convey a more evaluative concept, the opposite of the idea that a person could be regarded as a settled migrant for Article 8 purposes, which is to be applied having regard to the overall circumstances in which an immigrant finds himself in the host country. Some immigrants with leave to remain falling short of ILR could be regarded as being very settled indeed and as having an immigration status which is not properly to be described as "precarious". The Article 8 context could be taken to support this interpretation. However, it is not necessary to decide in this case whether the Secretary of State is correct in her submission or not, since whichever view is correct the appellant clearly loses on this point.

Ground (ii): the interaction of section 117A(2) and section 117B(5)

45. It is common ground that the starting point for consideration of the proper construction of Part 5A of the 2002 Act is that sections 117A-117D, taken together, are intended to provide for a structured approach to the application of Article 8 which produces in all cases a final result which is compatible with, and not in violation of, Article 8. In that regard, both sides affirmed the approach to interpretation of Part 5A to ensure compliance with Article 8 as explained by this court in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662, in particular at [26] and [31].

46. This is an important point when considering the interaction of section 117A(2) and sections 117B and 117C. It is possible to conceive of cases falling within section 117B(4) (unlawful presence in the UK) or section 117B(5) (precarious immigration status in the UK) in which private or family life (as appropriate) of an especially strong kind has been established in the host country such that it should be accorded great weight for the purpose of analysis under Article 8: *Jeunesse v Netherlands* is a prime example. Mr Southey correctly submitted that the provisions in Part 5A had to be construed in such a way as to accommodate this sort of case. Mr Byass accepted that this is so. However, Mr Southey and Mr Byass proposed different ways to interpret the statute to ensure that this objective is satisfied.

47. Mr Southey submitted that in section 117A(2) the use of the formula, "the court or tribunal must … have regard [to]" the considerations listed in section 117B or in section 117C, as the case may be, in considering the public interest question - that is to say, the question whether an interference with a person's right to respect for private and family life is justified under Article 8(2): see section 117A(3) - means that the court or tribunal is not bound in all cases to follow what Parliament says in those provisions. He submitted that this was the effect of the use of this formula in other statutory contexts, such as where a statute provides that a decision-maker must have regard to guidance or a code of practice: see *R (London Oratory School) v The Schools Adjudicator* [2015] EWHC 1155 (Admin); [2015] ELR 335, in particular at [58].

48. In that case Cobb J held that the Schools Adjudicator had a discretion whether to follow certain guidance issued by the relevant Roman Catholic Diocese, to which he was required to have regard; had acted correctly to the extent that he looked to see if there were good and proper reasons for declining to act in accordance with that guidance; but had applied too high a threshold when he had decided he should follow the guidance unless there was "a compelling reason" not to do so: see [58] and [62]-[64]. At para. [64], Cobb J said that a "compelling reason" test would be apposite in relation to a context requiring regard to be had to statutory guidance, as in *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58; [2006] 2 AC 148. In *Munjaz* it was said that there should be "cogent reasons" or "cogent reasons … spelled out clearly, logically and convincingly" to depart from such guidance: see at [20] and [68]-[69] per Lord Bingham and Lord Hope, respectively.

49. In my judgment, Mr Southey's general submission goes too far. One needs to ask with clarity and precision, to what does section 117A(2) require regard to be had? Section 117A(2) does not have the effect that, for example, a court or tribunal has a discretion to say that the maintenance of effective immigration control is *not* in the public interest, in direct contradiction of the statement of public policy by Parliament in section 117B(1). Where Parliament has itself declared that something is in the public interest – see sections 117B(1), (2) and (3) and section 117C(1) – that is definitive as to that aspect of the public interest. But it should be noted that having regard to such considerations does not mandate any particular outcome in an Article 8 balancing exercise: a court or tribunal has to take these considerations into account and give them considerable weight, as is appropriate for a definitive statement by Parliament about a particular aspect of the public interest, but they are in principle capable of being outweighed by other relevant considerations which may make it disproportionate under Article 8 for an individual to

be removed from the UK.

50. Another type of consideration identified in Part 5A to which regard must be had under section 117A(2) is the statement in section 117C(6) that "the public interest *requires* deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2" (my emphasis). There is a similar requirement in section 117C(3), on its proper construction: see *NA (Pakistan) v Secretary of State for the Home Department* at [23]-[27]. In these provisions, Parliament has actually specified what the outcome should be of a structured consideration of Article 8 in relation to foreign criminals as set out in section 117C, namely that under the conditions identified there the public interest requires deportation. The "very compelling circumstances" test in section 117C(3) and (6) provides a safety valve, with an appropriately high threshold of application, for those exceptional cases involving foreign criminals in which the private and family life considerations are so strong that it would be disproportionate and in violation of Article 8 to remove them. If, after working through the decision-making framework in section 117C, a court or tribunal concludes that it is a case in which section 117C(3) or (6) says that the public interest "requires" deportation, it is not open to the court or tribunal to deny this and to hold that the public interest does *not* require deportation.

51. A similar point arises in relation to section 117B(6). Where this subsection applies, Parliament has stated that "the public interest does *not* require the person's removal" (my emphasis). This court has held that by this provision Parliament has again specified what the outcome should be (i.e. non-removal): see *R (MA (Pakistan)) v Secretary of State for the Home Department* [2016] EWCA Civ 705, [17]-[20]. It would not be open to a court or tribunal to hold that, contrary to the statement in this subsection, the public interest does require removal.

52. Finally, in a third and distinct category are the considerations identified in section 117B(4) and (5), which state that "little weight should be given to" private and family life in certain circumstances. These are considerations which do not amount to a definitive statement of the public interest, unlike section 117B(1), (2) and (3), and which do not involve a substantive conclusion regarding what the public interest requires when applying Article 8, unlike section 117B(6) and section 117C(3) and (6).

53. Reading section 117A(2)(a) in conjunction with section 117B(5) produces this: "In considering the public interest question, the court or tribunal must have regard to the consideration that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious". That is a normative statement which is less definitive than those given by the other sub-sections in section 117B and section 117C. Although a court or tribunal should have regard to the consideration that little weight should be given to private life established in such circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question, where it is not appropriate in Article 8 terms to attach only little weight to private life. That is to say, for a case falling within section 117B(5) little weight should be given to private life established in the circumstances specified, but that approach may be overridden where the private life in question has a

special and compelling character. Such an interpretation is also necessary to prevent section 117B(5) being applied in a manner which would produce results in some cases which would be incompatible with Article 8, i.e. is necessary to give proper effect to Parliament's intention in Part 5A; and a similar interpretation of section 117B(4) is required, for same reasons. (Mr Byass' own suggestion, that the words "Little weight" in sub-sections 117B(4) and (5) should be read so as to mean "great weight" should be attached to private or family life in an appropriate case seemed to me to be linguistically untenable, although directed to the same outcome of achieving compatibility with Article 8).

54. In my view, reading section 117A(2) and section 117B(5) together in this way, as is appropriate, means that considerable weight should be given to Parliament's statement in section 117B(5) regarding the approach which should normally be adopted. In order to identify an exceptional case in which a departure from that approach would be justified, compelling reasons would have to be shown why it was not appropriate. That is a significantly higher threshold than was urged upon us by Mr Southey by reference to the *London Oratory School* case. There is a considerable difference between a statement by Parliament itself as to what the usual approach should be and the Diocesan guidance at issue in that case. The threshold to displace the ordinary rule in section 117B(5) in the present context cannot be less than that to justify a decision not to follow statutory guidance as in the *Munjaz* case. Identification of the test as one of compelling circumstances differentiates the position in an appropriate way from that applicable in relation to foreign criminals, in relation to which a test of "very compelling circumstances" applies.

55. I turn from this discussion of the proper interpretation of sections 117A(2) and 117B(5) to consider whether the FTT erred in law in adopting the approach it did at paras. [60] and [63] of its decision, set out above, in saying that it was required by statute to attach little weight to the appellant's private life established in the period when she was the beneficiary of a series of grants of leave to enter or remain as a student, and hence had a precarious immigration status for the purposes of section 117B(5). In my judgment, the FTT did not err in its approach.

56. Here it is important to remember that before the FTT the appellant's then representative (not Mr Southey) did not propose the interpretation of sections 117A(2) and 117B(5) urged by Mr Southey on the appeal and which to a material degree I have found to be correct, as explained above. Before the FTT, the appellant did not contend that her case was one involving special circumstances to justify a departure from the approach set out in section 117B(5). Rather, her argument was that her immigration status at the relevant time was not "precarious", which argument the FTT correctly dismissed. In the absence of any argument that if the appellant's immigration status was precarious, there were nonetheless special reasons why the guidance in section 117B(5) should be treated as overridden, the FTT was left with a situation in which section 117B(5) did indeed require it to give little weight to the private life factors relied on by the appellant, as it said. The FTT cannot be criticised for failing to identify for itself and address the completely different argument now advanced by the appellant for the first time on this appeal.

57.I think it is appropriate to say, however, that even if the FTT had committed an error of law by omitting to consider whether there were compelling circumstances to warrant a departure from the approach set out in section 117B(5), in my view that would not have been a material error of law. I consider that on the facts of this case, set out very clearly by the FTT, there was only one possible answer to that question, i.e. that there were no such compelling circumstances in this case.

Ground (iii): section 117B(2) (proficiency in English) and section 117B(3) (financial independence)

58.I begin this section by considering the effect of section 117B(2) and (3) if proficiency in English or financial independence, respectively, are established. I will then consider whether the FTT erred in its finding that the appellant was not "financially independent" in the relevant sense.

59.In my view, the FTT was right to regard the appellant's proficiency in English as a neutral factor. I agree with the FTT's reasoning.

60.If the appellant had not been able to speak English, that would have been a negative factor under section 117B(2) to be brought into account in considering the public interest question of whether an interference with the appellant's private life was justified under Article 8(2) (see section 117A(2) and (3)). That is for the reason stated in section 117B(2), namely that it is in the public interest that persons who seek to enter or remain in the UK are able to speak English, because they are less of a burden on taxpayers and are better able to integrate into society. Those are factors relevant to the grounds on which interference with the right to respect for private life can be justified under Article 8(2) ("in the interests of … the economic well-being of the country …", highlighted in section 117B(2) itself), which again underlines that an absence of the ability to speak English is a negative factor.

61.However, as the FTT observed, it does not follow that because a person is able to speak English that it is in the public interest that they should be given leave to enter or remain. Section 117B(2) simply does not say that. Therefore the FTT was correct to reject the appellant's argument that section 117B(2) meant that it was in the public interest that she should be admitted. Within the scheme of Part 5A, her ability to speak English was only a neutral factor.

62.The same reasoning applies in relation to section 117B(3). Contrary to the appellant's argument, it does not provide that if she were financially independent it is in the public interest that she be granted leave to remain. It only indicates that it is a negative factor, potentially capable of justifying her removal from the UK compatibly with Article 8, if she is not financially independent. Again, under the scheme of Part 5A, the fact that a person is financially independent is a neutral factor.

63.Finally, I turn to consider the meaning of the phrase "financially independent" in section 117B(3). This is an ordinary English phrase, and the FTT gave it its natural meaning, as indicating someone who is financially independent of others. This is the correct

interpretation. The FTT was also entitled on the evidence to find that the appellant was not financially independent in this sense, and that this was a factor which counted against her in the Article 8 balancing exercise.

64. There is no incompatibility with Article 8 to construe section 117B(3) in this way. In the context of an examination of the public interest question under Article 8(2) it is legitimate for Parliament to state that it is in the public interest that persons who seek to enter or remain in the UK are financially independent, for the reasons given. Being financially independent of others and able to support oneself is a matter which tends to minimise the risk that an immigrant might need to have resort to public funds. In the appellant's case, for example, if her father and Ms Charles ceased to support her she would probably seek to have recourse to public funds, whereas if she were financially independent she would not need to do so.

65. I do not accept Mr Southey's proposed alternative construction of "financially independent", which in effect involved an attempt to introduce an unwarranted gloss to make it mean "financially independent of the state". That is not the natural meaning of the phrase. Moreover, if the phrase meant "financially independent of the state", the stated reason why this is desirable – "because such persons … are not a burden on taxpayers" – would be close to being tautological and redundant.

Conclusion

66. For the reasons given above, I would dismiss this appeal. The Upper Tribunal was correct to conclude that there was no error of law in the decision of the FTT.

Sir Stephen Richards:

67. I agree.

Lord Justice Moore-Bick:

68. I also agree.