PART 5A NATIONALITY IMMIGRATION AND ASYLUM ACT 2002 CASE LAW OVERVIEW (VERSION 5, 24 MARCH 2017) BY BEN AMUNWA

Case	Notes
YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292 10 October 2014	• Where a decision on whether a deportation order breaches a person's Article 8 rights is being re-made by a Court or Tribunal post-28 July 2014, it should apply the Immigration Rules in force at the date of the hearing and Part 5A NIAA 2002, even if the Secretary of State's deportation decision was taken before Part 5A was introduced or if the decision was made under a previous version of the Rules (§§ 38 to 39).
Chege (section 117D – Article 8 – approach) [2015] UKUT 00165 (IAC) 15 January 2015	• Mr Chege's appeal against a deportation order was allowed by the F-tT on the basis that his risk of suicide constituted very compelling circumstances sufficient to outweigh the public interest in deportation. • The UT noted that the explanatory memorandum to HC532 at 3.4 and 3.5 refers to the purpose of Part 5A being the "harmonisation of the Rules with Immigration Act 2014" (§ 13). • The UT allowed the Secretary of State's appeal, and held that the correct approach in deportation cases is to: 1. ask whether deportation would be in breach of Article 8 "through the lens of the Rules and Part 5A"; 2. If **not**, then where removal would not result in a breach of the UK's obligations under Article 8, ask whether there are nevertheless "exceptional circumstances" in accordance with paragraph 397 of the Rules (§§ 23-25) 3. This test only bites if Exceptions 1 and 2 in section 117C(4) or (5) do not apply, or if the person is a persistent offender or their offending has caused serious harm (§ 27). • Where an appeal is on human rights grounds, first consider whether the Appellant is a 'foreign criminal' as defined in section 117D(2)(a), (b) or (c). If so, then ask whether the person falls within paragraphs 399 and 399A of the Rules. If not, then consider whether there are very compelling circumstances over and above paragraphs 399 and 399A, "such identification to be informed by the seriousness of the criminality and taking into account the factors set out in s117B" (§ 33).
Dube (ss.117A-117D) [2015] UKUT 90 (IAC) 24 February 2015	• *Dube* concerned a decision by the Secretary of State to remove an over-stayer. • UTJ Storey made six observations on how Part 5A should be interpreted. In summary: 1. Part 5A is binding on Judges (§ 21); 2. It is good practice for caseworkers to consider these provisions (§ 22); 3. Part 5A contains non-exhaustive, mandatory considerations (§ 23); 4. Section 117B applies to all cases, 117C only to deportation cases (§ 24); 5. These provisions do not override previous Article 8 case-law (§ 25) and are a further

	elaboration of the proportionality test from *Razgar* at question 5; 6. In its application, it is the substance, not the form that counts (§§ 26-27).
AM (S 117B) Malawi [2015] UKUT 0260 (IAC) 17 April 2015	• AM appealed against a decision to remove him on the basis of protection and human rights grounds, arguing before the UT that the First-tier Tribunal Judge failed to consider properly Part 5A, in particular section 117B(2), (3) and (5). • Section 117B(2) and (3) re-enforce the weight to be attached to the financial and language requirements in the Immigration Rules (*R (Khairdin) v Secretary of State for the Home Department (NIAA 2002 - Part 5A) (IJR)* [2014] UKUT 566 (IAC) not followed) (§ 15). • Fluency or financial independence cannot assist a Claimant unless they meet the relevant language and financial requirements in the Rules (§ 18). • On section 117B(5), the UT concluded that: *"a person's immigration status is "precarious" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave"* (§ 32). • This may include a person with ILR or citizenship obtained by deception or undermined by criminal conduct (§ 33). • The length of a person's immigration status is immaterial (§ 24). • NB. This case should be read with *EB (Kosovo) v Secretary of State for the Home Department* [2008] 3 W.L.R. 178 at §§ 14 to 16 which offers practical guidance on the effect of delay on precarious family and private life cases.
Bossade (ss. 117A-D – interrelationship with Rules) [2015] UKUT 00415 (IAC) Heard on 20 April 2015	• In an appeal against a deportation order based on Article 8: 1. The first stage is to consider whether the applicant meets paragraphs 399 or 399A of the Immigration Rules. 2. The second stage is to assess proportionality under the Rules. 3. Part 5A considerations only have direct application at the second stage (§§ 45 and 51). • However, the UT noted at § 43 that Part 5A may be seen to "underpin the Rules or to be overarching." • Discrepancies between section 117(4)(a) and the Rules highlight the fact that the two systems are complimentary but different in kind (§ 44).
BS (Congo) v Secretary of State for the Home Department [2015] EWCA Civ 639 21 May 2015	• The Claimants in four conjoined cases had successfully appealed against their deportation orders on the basis of Article 8. • The Court of Appeal rejected the SSHD's oral application for permission to appeal, holding that in appeals to the Court of Appeal, where the Tribunal determinations were made prior to the implementation of Part 5A NIAA 2002 (ie. pre-28 July 2014), the Court should not consider Part 5A when deciding whether to remit the case or remake the decision (§§ 13 to 14).

	• NB. Where the UT or Court of Appeal decide (post-28 July 2014) to remake a decision in an Article 8-based appeal, Part 5A does apply (see *YM (Uganda)* above at §§ 38 to 39).
Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) 29 May 2015	• Dr Forman was a talented percussionist who came to the UK on a Tier 2 (highly skilled) work permit. He applied to vary his leave on Article 8 grounds. His application was refused. He was successful at the F-tT and the Secretary of State appealed to the UT. • The UT considered the trajectory of domestic case law on Article 8, in particular that recent cases have tried to re-focus on the core areas of protection as opposed to the ambitions of qualified students (§ 11). • At § 17, the UT summarised the correct approach to Part 5A. • The UT then added that additional factors must be relevant, in that they must properly bear on the public interest question (§ 17). In other words, the other factors must be material for the Tribunal to avoid making a public law error by taking them into account. • The UT encouraged the F-tT to list each of the obligatory statutory considerations and the Tribunal's evaluation of the same to show that Part 5A has been given effect in order to avoid error/s of law (§ 20).
Badewa (ss 117A-D and EEA Regulations) [2015] UKUT 329 11 June 2015	• The 2006 EEA Regulations are a self-contained system of rules. Article 8 and/or Part 5A NIAA 2002 cannot be applied to the task of determining whether a person meets the requirements of the EEA Regulations (§ 20). • Part 5A applies to decisions taken under the Immigration Acts. It also applies to appeals against EEA decisions that raise human rights grounds because EEA decisions are made by reference to the Immigration Acts (§ 18 to 19). • The correct approach to Part 5A in EEA removal cases is: (i) decide if a person satisfies requirements of the Immigration (European Economic Area) Regulations 2006; (ii) if a person has raised Article 8 as a ground of appeal, sections 117A-D apply (§ 24). • Note: for guidance on whether a person may raise Article 8 in an appeal against an EEA refusal / removal decision, see *TY (Sri Lanka) v SSHD* [2015] EWCA 1233 at §§ 27 to 35 and *Amirteymour and others (EEA appeals; human rights)* [2015] UKUT 00466 (IAC) at §§70 to 74, and contrast with *Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs)* [2013] UKUT 00089 (IAC) at §§ 43 and 79 and *Granovski v SSHD [2015]* EWHC 1478 (Admin) at § 81.
Deelah and others (section 117B – ambit) [2015] UKUT 00515 (IAC)	• The F-tT dismissed the appellants' private and family life appeals on grounds that the removal decision was proportionate and it was reasonable to expect the family to return to Mauritius.

10 July 2015	• Mr Malik for the appellants raised various arguments as to the inapplicability of Part 5A that were dismissed by the UT as "strained and distorted" (§ 11). Several of the provisions that the Appellants based their arguments on did not arise on the facts. • The UT held that Part 5A is not confined to appeals under section 84(1)(c) NIAA 2002, but also applies to appeals under section 84(1)(g) (see § 10). • Although the wording of section 117A and 117B was "far from felicitous", the underlying intention is clear: section 117B(4) and (5) obliges Judges to give little weight to those considerations. This does not contravene any constitutional norm (§§ 23 to 24) • Although the point did not arise at the F-tT, private life "established" under section 117B(4) and (5) is not limited to the initiation or creation of the private life but applies also to its continuation or development (§§ 26 to 27). • 'Precarious' in section 117B(5) is not limited to temporary admission or a grant of leave which permits no expectation of a further grant (*AM (Malawi)* applied, § 29 to 30). • "In deciding whether a person's immigration status is "precarious", the application by the court or tribunal concerned of this ordinary and natural meaning will focus on the nature, quality and reality of such status." (§ 32) • On students, the UT observed generally: " a person who is granted limited leave to enter and remain in the United Kingdom as a student is possessed of an immigration status which is precarious" (§ 33).
Treebhawon and others (section 117B(6)) [2015] UKUT 674 (IAC) 7 November 2015	• Sections 117B(4) and (5) focus on lifestyle choices made by the persons concerned. They are not statements of the public interest but Parliamentary instruction to Judges that apply where relevant. Judges must not only have regard to these factors but also must give them little weight (§ 17). • Section 117B(6) reflects the distinction between persons who are liable to deportation and those who are not. Where the conditions are met, the public interest in granting leave will prevail over the public interest in removal / refusal (§§ 18 to 22). • Note: the section 117B(6) point must now be read in light of *MA (Pakistan) and others v Secretary of State for the Home Department* [2016] EWCA Civ 705 at §§ 17, 45 and 49 (see below).
R (on the application of RK) v Secretary of State for the Home Department (s.117B(6); "parental relationship") IJR [2016] UKUT 00031 (IAC)	• This judicial review application concerned the definition of 'parental relationship' in section 117B(6). • UTJ Grubb concluded as follows: "What is important is that the individual can establish that they have taken on the role that a "parent" usually plays in the life of their child." (§ 42) • "an individual must "step into the shoes of a parent" in order to establish a "parental relationship". If the role they play, whether as a relative or friend of the family, is as a caring relative or friend but not so as to take on the role of a parent then it cannot be said that they have a "parental

	relationship" with the child." (§ 43) • " If a non-biological parent ("third party") caring for a child claims such a relationship, its existence will depend upon all the circumstances including whether or not there are others (usually the biologically parents) who have such a relationship with the child also. It is unlikely, in my judgment, that a person will be able to establish they have taken on the role of a parent when the biological parents continue to be involved in the child's life as the child's parents… It will be difficult, if not impossible, to say that a third party has "stepped into the shoes" of a parent." (§ 44)
Rajendran (s117B – family life) [2016] UKUT 00138 (IAC) Heard on 26 January 2016	• Ms Rajendran was an elderly woman who had come from Canada to the UK on a 6-month visit visa to see her family. After the 6-month period, she left to Canada for 2 weeks and then returned to the UK and, after challenge by the Entry Clearance officer, was admitted as a visitor for 3 months. • She then applied to extend her leave on the basis of private and family life. Her application was (unsurprisingly) refused. Her appeal was dismissed by the F-tTJ. • On appeal to the UT, the UT held that sections 117B(4)(a) and (5) concern precarious and unlawfully established "private life". • The Appellant argued that the provisions in section 117B(4) and (5) were not absolute, being inconsistent with the long residence exception in paragraph 276ADE(1)(iii) of the Immigration Rules (see § 18 and 33). The UT rejected this argument on the ground that what the Secretary of State chooses to impose by way of requirements in the Rules is a matter for her. When considering Article 8 'outside the Rules', the Tribunal is bound by the provisions in section 117B(4) and (5). If a person fails under the Rules, their case may be likely to have other features that call for consideration under Part 5A, which allows for additional factors (§ 35). • However (in cases without children), Judges may regard "precarious" **family life** when assessing the public interest question (see §§ 39 to 41). This is established Article 8 jurisprudence (citing *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin) and *Jeunesse v Netherlands*, app.no.12738/10 (GC)). The F-tTJ was entitled to consider this in dismissing the appeal. • It may be an error of law for a Judge to disregard relevant public interest considerations that are not expressly included in Part 5A (§ 39).
MM (Uganda) & another [2016] EWCA Civ 450 20 April 2016	• This was an appeal against the UT determination in *KMO (section 117 - unduly harsh) Nigeria* [2015] UKUT 543 (IAC). It concerned the meaning of the phrase "unduly harsh" in paragraph 399 of the Rules and section 117C(5) of NIAA 2002. There had been conflicting authorities in the UT on the point. • Lord Justice Laws giving the leading judgment in the Court of Appeal upheld the UT's decision in *KMO,* namely, that when considering the harshness of the removal on the deportee's family,

	decision-makers are required to take into account the seriousness of the deportee's offending and immigration history and any other relevant circumstances (§ 24). • In effect, section 117C(5) must be read in the context of section 117C(1) and (2) which emphasise the importance of the public interest in deporting foreign criminals and the expansion of the public interest where the criminal offences are more serious (§§ 23 and 24). • *MAB (para 399; "unduly harsh") USA* [2015] UKUT 00435 (IAC) overruled (§ 26).
NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662 29 June 2016	• Under Part 5A NIAA 2002 and Chapter 13 of the Immigration Rules, the Court defined "medium offenders" as foreign nationals sentenced to at least 12 months imprisonment and "serious offenders" as foreign nationals sentenced to at least 4 years imprisonment. • The absence of any provision for "medium offenders" in section 117C(3) who fall outside Exceptions 1 and 2 is a drafting error (§ 25). • Read compatibly with the ECHR and HRA 1998, section 117C(3) should be read as saying that for medium offenders "the public interest requires C's deportation unless Exception 1 or Exception 2 applies or unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2." (§ 27) • A "foreign criminal" may rely
Rexha (S.117C – earlier offences) [2016] UKUT 00335 (IAC) 5 July 2016	• Section 117C requires a careful assessment of all of the criminal offences on the deportee's record that formed the basis of the decision to deport them, not simply the most recent offence that triggered the making of a deportation order (§§ 14 and 15).
MA (Pakistan) and others v Secretary of State for the Home Department [2016] EWCA Civ 705 7 July 2016	• Read in isolation, section 117B(6) creates an absolute exception to the public interest in removal (§ 17. In keeping with *Treebhawon* at §§ 18 to 22 above). • However, Lord Justice Elias at §§ 45 felt bound by the earlier authority of *MM (Uganda)* (see above) and held that Judges may consider the conduct and immigration histories of *parents* when deciding whether it is reasonable to expect *children* to leave the UK. • To quote the judgment: "*the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary."* (§§ 49 and 116). • Decisions by the Secretary of State may give rise to appeals if they fail to take into account the public interest as expressed by Parliament in Part 5A NIAA 2002 (§ 15).

Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803 2 August 2016	• Lord Justice Sales analysed the language of Part 5A. • He confirmed that the question of whether a person's immigration status is 'precarious' depends on the circumstances (see § 44, approving *Deelah* at § 32). • The Court re-iterated the requirement that Part 5A must produce results that comply with Article 8 (§ 45, see also *NA (Pakistan)* at §§ 26 and 31). • The effect of the provisions that declare certain factors to be in the public interest (ie. sections 117A(2), 117B(1), (2), (3), and 117C(1)) is definitive of the public interest and Judges cannot hold that such factors are *not* in the public interest (§ 49). • The effect of the provisions that "require" that certain outcomes in the public interest (such as sections 117B(6) and 117C(3) and (6)) is that Parliament has specified what the outcome should be in such cases (§ 51). • The effect of the "little weight" provisions in section 117B(4) and (5) are that normally little weight should be given to those factors, unless there are compelling reasons which override that approach (§ 53). • Section 117B(2) and (3), which declare that it is in the public interest for a person to be able to speak English and be financially independence cannot be positive factors that weigh in a person's favour. Where present they are neutral factors. Where absent they are negative factors. (§ 62). (This was already explained in *AM (S 117B) Malawi* at §§ 15 and 18). • "Financially independent" means someone who is financially independent from others (not just independent from state support) (§ 62).
IT (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 932 2 September 2016	• This case primarily concerned the weight that should attach to the public interest when a person applies for revocation of a deportation order under paragraphs 390. In particular, the Court considered whether section 117C creates a new, lower test than the Immigration Rules. • In Lady Justice Arden's judgment, with which Lord Justice Jackson and Lady Justice Gloster agreed, the undue harshness test in section 117C(5) of the 2002 Act requires a deportee to show "very compelling reasons" for revoking a deportation order before it has run its course and it should be read in accordance with the Immigration Rules to that effect (§ 3, 50 to 52 and 55) • Case law pre-28 July 2014, (when Parliament's statutory human rights framework came into force) continues to apply notwithstanding that they were decided under different provisions (§ 55). The case of *ZP (India) v Secretary of State for the Home Department* [2016] 4 WLR 35 made clear that "very compelling reasons" were required for post-deportation revocation cases to succeed. • The exception contained in section 117C(5) of the 2002 Act must be read with subsections (1) and (2) which describe the strength of the public interest (§ 55). In other words, whether the effect of maintaining a deportation order is 'unduly harsh' on the children of the deportee depends on the circumstances, in particular the gravity of the offence and the conduct of the offender (§ 55). • This is in keeping with the recent Court of Appeal decision in *MM (Uganda)* at §§ 22 to 24 (see

	above) and *MA (Pakistan)* at § 45, although potentially at odds with the dissenting comments of Lord Justice Elias in *MA (Pakistan)* at § 17 (see above).
Treebhawon and Others (NIAA 2002 Part 5A - compelling circumstances test) [2017] UKUT 00013 (IAC) 9 January 2017	• On a proportionality assessment outside of the Immigration Rules, the correct threshold to be applied in a non-criminal case is that of "compelling circumstances" (§ 44), a less demanding concept than the threshold in deportation cases concerning "foreign criminals" (§ 47). • *Rhuppiah* was applied and re-iterated.
Kaur (children's best interests / public interest interface) [2017] UKUT 00014 (IAC) 10 January 2017	• The UT held: "The phrase "little weight" is unsophisticated, perhaps deceptively so. It invites reflection. It does not denote an absolute measurement or concept. While the intention underlying these statutory words is evident, "little weight" is not to be confused with "no weight". Furthermore, I consider that the measurement of "little weight" is unlikely to be the same in every case. It will, rather, vary according to the particular context. Thus there is a spectrum the existence of which may not be entirely obvious at first glance. In the abstract, at the upper end of this spectrum lie cases qualifying for the attribution of a quantum of weight approaching the notionally moderate, while at the lower end there will be cases deserving of virtually no weight. (§ 9)
AM (Pakistan) v Secretary of State for the Home Department [2017] EWCA Civ 180 22 March 2017	• This appeal concerned the 7-year rule in paragraph 276ADE(1)(iv) of the Rules and section 117B(6) of the NIAA 2002. • The Court was bound by *MA (Pakistan)* (see above). • As in that case, the 'reasonableness' test contained in paragraph 276ADE(1)(iv) and section 117B(6) allows decision-makers to consider the wider public interest of firm immigration control • The same approach applies to both provisions, even though on the face of it the Immigration Rules make no reference whatsoever to 'public interest' factors (see § 22 of the judgment).

Note: this table cannot substitute a full and detailed reading of the cases and Article 8 case law more generally. It does not constitute legal advice specific to your case/s or client/s nor does it attempt to substitute any such legal advice. Please contact me if you would like to discuss any particular case/s.

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