

Supreme Court rules on definition of ‘precarious’ immigration status (Rhuppiah v Secretary of State for the Home Department)

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Immigration analysis: The Supreme Court has ruled that all migrants present in the UK who do not have leave to remain indefinitely have a precarious immigration status for the purposes of section 117B(5) of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002) and therefore, when their applications for leave to remain are considered, little weight should be given to the private life they have established. Ben Amunwa, barrister at 36 Group, considers the case.

Rhuppiah v Secretary of State for the Home Department [\[2018\] UKSC 58](#), [\[2018\] All ER \(D\) 64 \(Nov\)](#)

What are the practical implications of the judgment?

Rhuppiah potentially affects all immigration applications and appeals that are based on a claimed breach of a person’s right to private life (rather than family life) under Article 8 of the European Convention on Human Rights (ECHR).

It is particularly relevant where the private life in question has been wholly or partly developed while the person’s immigration status was precarious. *Rhuppiah* tells us that ‘precarious’ refers to any time that the person did not have leave to remain indefinitely. Most statutory appeals based on private life claims are likely to fall under the guidance in *Rhuppiah* and so it is important for practitioners to be familiar with it.

While Article 8 ECHR case law is already a crowded space, *Rhuppiah* makes several key clarifications in this area and the practical effect of which is three-fold.

Firstly, while in many cases the public interest will require that little weight is given to a person’s private life, which has been developed when the person did not have indefinite leave to remain, that requirement is not absolute. There remains flexibility, in suitably strong or compelling cases, to disapply the ‘little weight’ provision in [NIAA 2002, s 117B\(5\)](#). Persons and their representatives need to evidence carefully the aspect of their case that can be considered compelling or exceptional in order to avoid decision-makers or judges dismissing their private life claims.

Secondly, to avoid claims being weakened by the effect of [NIAA 2002, s 117B\(3\)](#)—which requires persons seeking to remain in the UK on the basis of Article 8 ECHR to be financially independent—those persons and their representatives should provide detailed evidence to demonstrate their self-sufficiency, including evidence of third-party financial support.

Thirdly, the court emphasised that overall, the operation of [NIAA 2002, Part 5A](#) had to produce outcomes that complied with Article 8 ECHR. That provides some additional scope for representatives to argue for or against particular interpretations or applications of Parliament’s human rights framework. Appellants relying on Article 8 ECHR should consider the Immigration Rules and the statutory framework in [NIAA 2002, Pt 5A](#), but the ultimate test is compliance with Article 8 ECHR.

Looking ahead, it seems likely that in appropriate cases, the Secretary of State will seek to expand the scope of precarious immigration status further still, so as to include persons with indefinite leave to remain who have embarked upon a course of criminal conduct.

What was the background?

The appellant entered the UK as a student in 1997 and after successive grants of further leave to remain, she became an unlawful overstayer. She was unsuccessful in several attempts to apply for leave to remain indefinitely on the basis of her continuous residence and eventually her application was considered under Article 8 ECHR, outside the Immigration Rules, and rejected.

She appealed to the First-tier Tribunal (FTT) on the basis of her long residence and her close relationship and cohabitation with a friend who was severely ill and who was heavily dependent on her. Five years later, her case reached the Supreme Court, by which time she had been granted leave to remain on the basis of 20 years' continuous residence in the UK. Her appeal proceeded anyway as the court found that there was a point of law that required clarity.

What did the Supreme Court decide?

The court was primarily concerned with the meaning of the word 'precarious' in [NIAA 2002, s 117B\(5\)](#). That provision requires judges who are balancing the public interest in a person's removal from the UK to attach 'little weight ... to a private life established by a person at a time when the person's immigration status is precarious.'

The appellant argued that the immigration status of migrants whose leave to remain is time-limited, but who were on a potential path to settlement, should not be considered as precarious. The Secretary of State argued that any form of time-limited leave to remain was precarious.

The court agreed with the Secretary of State. It discussed the line of case law from the European Court of Human Rights (ECtHR), which has established that exceptional circumstances were required before removal of a non-national spouse or family member would violate Article 8 ECHR where family life had been created or maintained at a time when the parties were aware that one or other of them had precarious immigration status.

Not for the first time, the court cited the ECtHR judgment in *Jeunesse v Netherlands* (12738/10) [2014] 60 EHRR 789 (a pivotal case that features in both *R (on the application of MM (Lebanon)) v Secretary of State for the Home Department and other cases* [2017] UKSC 10, [2017] All ER (D) 172 (Feb) at para [91], and *R (on the application of Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11, [2017] 4 All ER 575 at paras [40]–[43] and [49]–[55]).

The Supreme Court highlighted that the statutory human rights framework contained in [NIAA 2002, Pt 5A](#) had to be applied in a manner that produced outcomes that were compatible with Article 8 ECHR.

It noted and approved of the Upper Tribunal's earlier decisions on the meaning of 'precarious' immigration status, which, for reasons unknown, were not considered in the judgment of Sales LJ in the Court of Appeal.

The court stopped short of fully endorsing the approach in *AM (s 117B)* [2015] UKUT 260 (IAC), where Vice President Ockleton held that even the immigration status of persons with indefinite leave to remain could become precarious if they embarked upon a course of criminal offending. However, the court observed that this approach might find some support in the ECtHR's case law.

Precariousness is a binary issue, not a matter of degree (as had been suggested by Sales LJ in the Court of Appeal) and it should not be measured as such by decision-makers or judges.

Nevertheless, [NIAA 2002, Pt 5A](#) should be applied with a measure of flexibility. The Court of Appeal had been correct to hold that the normative guidance within the 'little weight' provisions in [NIAA 2002, s 117B\(4\)](#) (which required little weight to be given to private or family life established at a time when a person was in the UK unlawfully) and [NIAA 2002, s 117B\(5\)](#) could be disapplied where there were compelling or exceptional features in a person's claim.

As for [NIAA 2002, s 117B\(3\)](#), which states that it is in the public interest for persons who seek to remain in the UK to be 'financially independent', the court determined that this required financial independence from the state. A person could demonstrate financial independence by relying on third-party support, a conclusion which follows inexorably from the court's judgment in *MM (Lebanon)*.

The Supreme Court also agreed with the Court of Appeal that where persons were able to demonstrate English language skills and financial independence, those were not positive factors in their favour, but where those requirements were not satisfied, that would enhance the public interest in their removal.

The Court of Appeal and the tribunals below it had erred by not finding that the appellant was financially independent, and that was a material factor in this finely balanced case. The Supreme Court allowed her appeal and set aside the FTT's decision.

Interviewed by Robert Matthews.

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