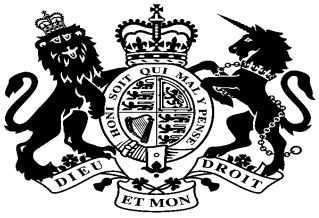

Upper Tribunal
(Immigration and Asylum Chamber)

AM (S 117B) Malawi [2015] UKUT 0260 (IAC)

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 23 January 2015	**On 17 April 2015**

Before
MR CMG OCKELTON, VICE PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE HOLMES

Between

AM
(ANONYMITY DIRECTION)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Brakaj, Solicitor, Iris Law Firm
For the Respondent: Mr Dunlop, Counsel, instructed by Treasury Solicitor

(1) The statutory duty to consider the matters set out in s 117B of the 2002 Act is satisfied if the Tribunal's decision shows that it has had regard to such parts of it as are relevant.

(2) An appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources.

(3) *Parliament has now drawn a sharp distinction between any period of time during which a person has been in the UK "unlawfully", and any period of time during which that person's immigration status in the UK was merely "precarious".*

(4) *Those who at any given date held a precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or to remain. 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.*

(5) *In some circumstances it may also be that even a person with indefinite leave to remain, or a person who has obtained citizenship, enjoys a status that is "precarious" either because that status is revocable by the Secretary of State as a result of their deception, or because of their criminal conduct. In such circumstances the person will be well aware that he has imperilled his status and cannot viably claim thereafter that his status is other than precarious.*

(6) *When the question posed by s117B(6) is the same question posed in relation to children by paragraph 276ADE(1)(iv) it must be posed and answered in the proper context of whether it was reasonable to expect the child to follow its parents to their country of origin; EV (Philippines). It is not however a question that needs to be posed and answered in relation to each child more than once.*

DECISION AND REASONS

1. The Appellant was granted entry clearance in September 2006 as a student. There followed successive decisions to vary his leave to remain, but ultimately his leave to remain expired on 2 December 2012. In the meantime his wife and eldest daughter were granted entry clearance to join him as his dependents in January 2007, and a second child was then born to the couple in the UK on 3 April 2011. All of the family are citizens of Malawi.

2. As an overstayer, on 24 December 2012, the Appellant applied for a grant of leave to remain. In so doing he relied upon a risk of a breach of the Article 3 rights of his wife in the event of her removal to Malawi. That application was refused on 27 September 2013.

3. The Appellant then made an application on his own behalf for asylum on 7 November 2013. In so doing he relied upon the risk of harm that he said his eldest daughter would face in the event of her removal to Malawi. At interview he accepted that neither he nor his wife faced any risk of harm in the event of their removal to Malawi, and that his concerns were focused upon his eldest daughter and the consequences for her education if the family returned. The asylum application was refused on 6 August 2014, and in consequence a series of individual decisions to remove the Appellant and each member of his family to Malawi as overstayers were made by the Respondent.

4. The Appellant alone lodged an appeal against the removal decision that was made in relation to him. That appeal was dismissed on asylum, humanitarian protection, and human rights grounds by First Tier Tribunal Judge Hands in a determination promulgated on 22 September 2014. Permission to appeal that decision was granted to the Appellant by First Tier Tribunal Judge Simpson on 16 October 2014.

5. The matter came before a Presidential panel of the Upper Tribunal on 5 December 2014. Based upon a combination of the application for permission to appeal, the grant of permission, and the oral submissions made at that hearing, the following questions of law were identified as arising, and directions were made for their determination. (For administrative reasons the Upper Tribunal has not been able to reconstitute the same panel, but the parties have no objection to that and are content to treat the hearing of 5 December 2014 as a directions hearing.)

i) The legal consequences of the failure of the First-tier Tribunal (the "FtT") to consider all of the factors listed in section 117B of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"), taking into account what is mandated by section 117A(2)(a).

ii) Whether, having regard to section 117B(5) of the 2002 Act, the FtT erred in law in holding, in [52], that the private lives of all members of the Appellant's family were established during a period when their immigration status was precarious "*in that it was of a temporary nature dependent upon the Appellant's right to remain in the United Kingdom as a student*".

iii) Whether, independent of the two issues formulated above, the determination of the FtT is erroneous in law having regard to section 55 of the Borders, Citizenship and Immigration Act 2009. [See, in this respect, the recent decision of the Upper Tribunal in JO Nigeria [2014] UKUT 00517 (IAC).]

Sections 117A-D of the 2002 Act

6. Section 19 of the Immigration Act 2014 introduced into the Nationality Immigration and Asylum Act 2002 a new Part 5A, headed "Article 8 of the ECHR: Public Interest Considerations". These new provisions are set out in sections 117A-D of the 2002 Act, which were brought into effect on 28 July 2014 pursuant to Article 3 of The Immigration Act 2014 (Commencement No 1, Transitory and Saving Provisions) Order 2014. They provide, in so far as is material to this appeal, as follows;

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.

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.

The failure to set out ss117A-117D in full

7. It is common ground that although the judge in the course of her decision did make express reference both to s117A(3), and to s117B(5), she did not therein set out in full either the provisions of s117A, or s117B, and, she did not make any express reference to any of the other provisions of s117A-D.

8. The Appellant has sought to persuade us that this is, of itself, an error of law that is sufficient to require the decision to be set aside and remade. We disagree. It is not necessary for the FtT to set out in full in each of its decisions each of the statutory provisions that it seeks to apply to the evidence placed before it in the course of an appeal. Still less is it necessary to make reference to statutory provisions that have no application to that evidence. What is required of the FtT is no more, and no less, than that its decisions should demonstrate that the relevant statutory provisions have been taken into account, and that they have been applied to the facts of the particular appeal; AJ (India) v SSHD [2011] EWCA Civ 1191 at [43]. That is a requirement of substance, rather than of form, and in this respect we would respectfully reiterate the caution expressed by Dyson LJ in Baker v SSCLG [2008] EWCA Civ 141 at [37];

> "*The question in every case is whether the decision maker has* in substance *had due regard to the relevant statutory need. Just as the use of a mantra referring to the statutory provision does not of itself show that the duty has been performed, so too a failure to refer expressly to the statute does not of itself show that the duty has not been performed.*"

9. Accordingly we reject the suggestion that the effect of s117A(2) is to render unlawful a decision of the FtT simply for failure to set out in turn each of the provisions of s117A and s117B, whether or not they are relevant to the facts of a particular appeal. We can find no support for any contrary view in either the decision of the Court of Appeal in YM (Uganda) v Secretary of State for the

Home Department [2014] EWCA Civ 1292, or the decisions of the Upper Tribunal in R (on the application of Luma Sh Khairdin) v Secretary of State for the Home Department (NIA 2002: Part 5A) IJR [2014] UKUT 00566 (IAC), or Dube (ss117A-117D) [2015] UKUT 90 (IAC).

10. In our judgement the FtT's duty is quite clear. By virtue of s117A(2) the FtT is required (in particular) to have regard to the considerations listed in s117B, and where the appeal concerns the deportation of a foreign criminal, the considerations listed in s117C. The FtT has no discretion to leave one of those considerations out of account, if that is a consideration that is raised on the evidence before it. Equally, there can be no error of law in the failure of the FtT to have regard to one of those considerations if the evidence before the FtT does not raise it. Thus the circumstances of a single man who asserts no relationship with a qualifying partner or child do not require the FtT to specifically set out, and then discount, s117B(6).

11. On the other hand, as the Upper Tribunal pointed out in Dube [23] the considerations set out in ss117B-117C are not rendered an exhaustive list by s117A(2). If there are other relevant considerations raised by the evidence then the FtT must have regard to them.

12. Although the judge did not in her determination make specific reference to s117B(1) or set that provision out in full, it is plain from its terms [57] that she did direct herself to the effect that the maintenance of effective immigration controls was in the public interest.

13. There is also in our judgement no requirement that the FtT should pose and answer the same question more than once, simply as a matter of form. Thus since both paragraph 276ADE(1)(iv) of the Immigration Rules, and s117B(6), both raise the same question in relation to a particular child, of whether or not it would be reasonable to expect that child to leave the UK: it is a question that need only be answered once. Although the judge did not make specific reference to s117B(6) or set its provision out in full, it is plain from the terms of her determination at paragraphs 30-37, 48-52, and 56-58, that she did consider at some length the circumstances of the children and their ability to relocate to Malawi. There is no suggestion before us that the judge failed to have regard to any material circumstance relating to either child. The mere presence of the children in the UK, and their academic success, was not a "trump card" which their parents could deploy to demand immigration status for the whole family; Butt v Norway App 47017/09 4 December 2012, and EV (Philippines) and others v Secretary of State for the Home Department [2014] EWCA Civ 874.

The effect of ss117B(2)-(3)

14. Whilst we heard extensive argument upon the purpose and effect of s117B(2) and s117B(3), we are satisfied that ultimately the matter is quite straightforward. Upon their proper construction neither s117B(2), nor s117B(3), grants any form of immigration status to an individual who does not otherwise qualify for that

status, because they have failed to meet the requirements set out in the Immigration Rules for the grant of that status. If it was the intention of Parliament that the requirements of the Immigration Rules should be over-ridden, merely because an individual could establish that they were able to speak English, or were financially independent, to some degree, then we are satisfied that Parliament would have said so in the clearest terms. In addition we consider that Parliament would have considered it necessary to set out what degree of fluency, or, level of financial independence was required of the individual, and the immigration status that the individual would be entitled to once it had been demonstrated. Plainly these statutory provisions do no such thing. One must continue to look to the Immigration Rules to discern what Parliament considers are the requirements to be met by a claimant, and the length of the period of leave to be granted to them if those requirements are met.

15. What then is their purpose? We are satisfied that s117B(2), and s117B(3), were intended by Parliament to meet, and to finally dispose of, the arguments that have from time to time been advanced to the effect that the language and/or the financial requirements of the Immigration Rules should either be ignored altogether, or, should carry little weight, when the Tribunal is weighing the proportionality of a decision to remove in the context of the consideration of an individual's Article 8 rights; Bibi [2013] EWCA Civ 322, and MM (Lebanon) [2013] EWCA Civ 985. That view is strengthened by the Human Rights Memorandum that was published by the Respondent as an accompaniment to the 2014 Act [71-73]. In short we are satisfied that s117B(2) and s117B(3) can only properly be read as reinforcing the statement of principle that is set out in s117B(1), as indeed the Appellant accepts both s117(4) and s117(5) should be read.

16. Read in that way, the arguments sometimes advanced that depend upon the inferior status of the Immigration Rules to primary legislation, and the lack of full democratic legitimacy, are rendered sterile; R (on the application of Onkar Singh Nagre) v SSHD [2013] EWHC 720 (Admin) at [25].

> "There was some debate at the hearing about the status of the new rules. For general discussion about the status of the Immigration Rules, which is also relevant to the new rules, see *Odelola v Secretary of State for the Home Department* [2009] UKHL 25; [2009] 1 WLR 1230. They do not have the status of primary legislation, or the full democratic legitimacy which goes with that status: *Huang v Secretary of State for the Home Department* [2007] UKHL 1; [2007] 2 AC 167, [17]. That is the position even though the new rules were subject to debate in Parliament going beyond what is usual when such rules are made and laid before Parliament. However, the Immigration Rules do have *some* degree of democratic endorsement, in that they represent the policy of the Secretary of State (who is politically accountable to Parliament and, ultimately, the electorate) and they are laid before Parliament and so are amenable to being called up for a negative resolution in Parliament (a measure of parliamentary control which is greater than would be the case if, for example, the Secretary of State simply had power to make the rules without them being subject to such a procedure; although it also clearly less than would be the case if they were actually made as subordinate legislation, in particular if made pursuant to the affirmative resolution procedure, or as full primary legislation)."

17. It follows that we would respectfully disagree with the concluding remark of Upper Tribunal Judge Lane in R (on the application of Luma Sh Khairdin) v Secretary of State for the Home Department (NIA 2002: Part 5A) IJR [2014] UKUT 00566 (IAC) at [59];

> "The most that section does is to offer some mild support for the applicant, rather than the respondent, in that the evidence makes plain that the applicant is not and will not be "a burden on taxpayers" (subsection (3)(a)), with the result that the respondent cannot rely upon that as a public interest factor weighing against the applicant."

18. The mere fact that the evidence in a particular case establishes fluency or financial independence to some degree, does not prevent the Respondent from relying upon these matters as public interest factors weighing against the claimant. The Respondent would only be prevented from doing so if a claimant could demonstrate fluency, or financial independence, to the level of the requirements set out in the Immigration Rules. There was therefore no error of law in the Judge's approach to the issues of fluency and financial independence in the context of her consideration of s117B. The Appellant could obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources.

The effect of ss117B(4)-(5)

19. How then should the FtT have approached s117B(4) and s117B(5)? Whilst the parties could see no difficulty of interpretation raised by the phrase "*at a time when the person is in the United Kingdom unlawfully*" as used in s117B(4), the same could not be said of s117B(5) and the phrase "*at a time when the person's immigration status is precarious*".

20. The term "*precarious*" as used in s117B(5), is not defined within s117D. We are not satisfied that any significant assistance with its definition in this statutory context can be obtained from past judicial use of the term "*precarious immigration status*", when it is plain that the term "*precarious*" is one that has been used judicially both domestically, and in Strasbourg, to describe a variety of different situations, and sometimes to describe an individual without any lawful status. As identified in Nagre [39]

> 39. In such a case, there is a substantial body of Strasbourg case-law which explains the general approach to be applied when assessing the proportionality of a removal of a foreign national by reference to Article 8. In *Rodrigues da Silva and Hoogkamer v Netherlands* (2007) 44 EHRR 34, drawing on previous statements in its jurisprudence, the ECtHR explained the approach at para. 39, as follows:
>
> > "The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation. Moreover, Art.8 does not entail a general obligation for a state to

> respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a state's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the contracting state, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion. Another important consideration will also be 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. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Art.8".
>
> 40. This has been repeated and adopted by the ECtHR as its reasoning in near identical terms in many cases since then: *Useinov v The Netherlands*, App. 61292/00, ECtHR, decision of 11 April 2006; *Konstatinov v The Netherlands*, App. 16351/03, ECtHR, judgment of 26 April 2007, para. 48; *M v United Kingdom*, App. 25087/06, ECtHR, decision of 24 June 2008; *Omoregie v Norway*, App. 265/07, ECtHR, judgment of 31 July 2008, para. 67; *Y v Russia* (2010) 51 EHRR 21, para. 104; *Haghigi v The Netherlands*, App. 38165/07, ECtHR, decision of 14 April 2009; *Nunez v Norway*, App. 55597/09, ECtHR, judgment of 28 June 2011, para. 70; *Arvelo Aponte v The Netherlands*, App. 28770/05, ECtHR, judgment of 3 November 2011, para. 55; *Antwi v Norway*, App. 26940/10, ECtHR, judgment of 14 February 2012, para. 89; *Biraga v Sweden*, App. 1722/10, ECtHR, decision of 3 April 2012, paras. 49-51; and *Olgun v The Netherlands*, App. 1859/03, ECtHR, decision of 10 May 2012, para. 43. "

21. By way of example only, we note that in Arvelo Aponte v The Netherlands (28770/05) at [56] and [59] the term was used by the ECtHR in relation to the whole of the period of time spent by the claimant in the Netherlands comprising; (i) the period of time the claimant held an initial tourist visa, (ii) the subsequent period of time during which she held a provisional residence visa issued to her to enable her to make an application for a permanent residence permit, and, (iii) the subsequent period of time during which she remained in the Netherlands in the face of the refusal of that permit, and the exclusion order that was then made against her, whilst she pursued appeal proceedings.

22. Domestically, in the recent decision of Green J in Ahmed v Secretary of State for the Home Department [2014] EWHC 300 the term was used in relation to the period of time that the claimant was an overstayer, and thus when that individual was in the UK unlawfully.

23. Our starting point must therefore be that Parliament has now drawn a sharp distinction between any period of time during which a person has been in the UK "*unlawfully*", and any period of time during which that person's immigration status in the UK was merely "*precarious*". We are satisfied that those who at any given date held a precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or to remain. They must have enjoyed some immigration status within the UK at the given date, because if that were not the case, then their presence in the UK would have been unlawful at that date. Thus we are satisfied that Parliament envisaged that the immigration history of a particular individual might disclose periods when they had enjoyed lawful immigration status in the UK, and periods when they were in the UK unlawfully because they had enjoyed none. Some might enter unlawfully and never acquire a grant of leave. Others might subsequently acquire a grant of leave. Some might enter lawfully but then fail to obtain a variation of their leave. Others might always have held a grant of leave. We regard the immigration history of the individual whose Article 8 rights are under consideration as an integral part of the context in which any Article 8 decision is made, whether by the Respondent or the FtT.

24. We reject the suggestion that some yardstick for the identification of whether or not a period of lawful immigration status is "*precarious*", might be found by reference to its length. We can see no basis for such an approach, not least because that would impose upon the judiciary the burden of identifying where that boundary lay, which cannot have been Parliament's intention. If the answer was to be found in the length of the period then Parliament would simply have said so. Nor does the statute oblige the FtT to descend to adopting the approach of affording subtle gradations of "little weight" to the elements of private life established during different periods of time. Whether an individual was present unlawfully, or had a precarious immigration status, Parliament has required the FtT to give little weight to the "private life" relied upon. The distinction in approach to the issue of weight is to be found in s117B(4) so that little weight is also to be given to a relationship formed with a qualifying partner at a time when the claimant is present unlawfully. It is open to the FtT to give such weight as it sees fit to such a relationship formed at a time when the individual's immigration status was precarious, but the FtT is not required to give that relationship little weight any more than it is required to give it significant weight.

25. Nor is there any merit in our judgement in the suggestion that the answer is to be found in an individual's subjective belief that they would in the future be able to extend the period of leave that had been granted to them. The test must be an objective one.

26. That approach is in our judgement entirely consistent with the approach of the ECtHR to those families with children who seek to resist removal on the basis of their "private life" from a host state when none of them is a citizen of their host; Alidjah-Anyame v The United Kingdom App 39633/98 4 May 1999, and Sarumi v The United Kingdom App 43279/98 26 January 1999.

27. In our judgement all those who have been granted by the Respondent a defined period of leave to enter the UK, or, to remain in the UK (which includes both those with a period of limited leave to remain, and those with a period of discretionary leave to remain), hold during the currency of that leave, an immigration status that is lawful, albeit "precarious". Even if the individual genuinely holds a legitimate expectation that their leave will ultimately be extended further by the Respondent, they have no absolute right to insist that this will occur, whether or not they meet the requirements of the Immigration Rules at the date of their application; HSMP Forum UK Limited [2008] EWHC 664. Still less will those who merely hold a genuine, and well founded belief, that they will at some future date be able to meet the requirements of the Immigration Rules and thus be able to obtain an extension; E-A (Article 8 – best interests of a child) Nigeria [2011] UKUT 00315 (IAC).

28. In all such cases, in order to obtain the variation that they seek (whether to gain a further grant of leave which is limited in duration, or is indefinite) the individual will need to meet at some future date the requirements of the Immigration Rules that are then in force; Odelola v Secretary of State for the Home Department [2009] 1WLR 1230. The ability of the individual to do so is not capable of prediction in advance – even if at any given moment during the currency of their existing leave the individual genuinely believes that they are continuing to meet the requirements attached to their existing grant. Indeed the ability of those who have not yet been granted indefinite leave to remain, to obtain a variation of their leave in the future, will probably always depend in part upon matters that are outside their control – whether that be the actions of others, or the future prosperity of themselves or others.

29. During the course of argument we were referred to Chapter 13 of the IDIs, version 5.0 published on 28 July 2014, entitled "Criminality Guidance in Article 8 ECHR cases". At paragraph 4.4.5 appears the following;

> "The Immigration Rules also require that a relationship not be formed at a time when the foreign criminal has precarious immigration status because a claim to respect for family life formed when there was no guarantee that family life could continue indefinitely in the UK, or when there was no guarantee that if the person was convicted of an offence while he had limited leave he would qualify for further leave, will be less capable of outweighing the public interest. For the purposes of this guidance, a person's immigration status is precarious if he is in the UK with limited leave to enter or remain, or he has settled status which was obtained fraudulently, or he has committed a criminal offence which he should have been aware would make him liable to removal or deportation".

30. Again, whilst in no way binding upon any court, one can see that the Respondent's view of what the term "precarious" meant where used in s117B is entirely consistent with out own.

31. In consequence we are satisfied that the judge made no material error of law in holding, as she did, that the private lives of all of the members of the Appellant's family were established in the UK at a time "*when their immigration status was precarious in that it was of a temporary nature dependent upon the Appellant's right to*

remain in the United Kingdom as a student". During the periods in which the members of the family had the benefit of a grant of leave to remain their immigration status was "precarious" for the purpose of s117B(5). To the extent that the FtT did fail to identify with clarity that for a period of time the members of a family held no immigration status, and that they were present unlawfully when their most recent application for leave was made, there could be no material error of law that could count in the Appellant's favour. First it would be entirely reasonable to consider that if any distinction was to be drawn between the two periods of time, there was a greater public interest in the removal of those present unlawfully. Second the statutory consequences for the weight that the FtT could give to the private life relied upon was the same. Whether by virtue of s117B(4), or s117B(5), the FtT was required to give that private life little weight. In fact, the text of the Judge's decision, when read as a whole, shows that she did have in mind both the period during which the claimant was in the UK unlawfully, the period in which he held a grant of leave to remain, and, that she had properly distinguished between the lengths of those periods in the course of her analysis of the immigration history of the family [51]. That was the context in which she had to consider the Article 8 appeal before her. This was after all a family who would be removed to Malawi together, and so the immigration decisions under appeal did not result in any interference in the "family life" enjoyed by the members of the family together. Thus the Judge properly approached the appeal as a "private life" appeal.

32. To put the matter shortly, it appears to us 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. It is precisely because such a person has no indefinite right to be in the country that the relationships they form ought to be considered in the light of the potential need to leave the country should that grant of leave not be forthcoming.

33. Of course in some circumstances it may be that even a person with indefinite leave to remain, or a person who has obtained citizenship, enjoys a status that is "precarious" either because that status is revocable by the Secretary of State as a result of their deception, or because of their criminal conduct. That is a different set of circumstances to these, but we can see no answer to the point that, vitiated by dishonesty, a grant of indefinite leave to remain would be susceptible to curtailment on proper grounds with immediate effect, with the consequent removal of the immigration status previously enjoyed. The Appellant did not seek to persuade us, correctly in our judgement, that this was the sole basis upon which an individual would hold a precarious immigration status. If that had been Parliament's intention it would have been a simple matter to spell it out. Equally, the decision by an individual with a grant of indefinite leave to remain to embark upon a course of criminal conduct, (even if it would not be sufficient from the outset to trigger a decision by the Respondent under the automatic deportation provisions of the 2007 Act) would probably be sufficient to render his status precarious. In these cases the person is well aware that he has either

initially, or subsequently, imperilled the status he had, and cannot viably claim thereafter that his status is other than precarious.

The effect of s55 of the Borders Citizenship and Immigration Act 2009

34. Independently of the requirements of s117A-117D of the 2002 Act, the FtT was required by s55 of the 2009 Act to consider in some detail the circumstances of the children of the family; JO Nigeria [2014] UKUT 00517 (IAC).

35. In the circumstances of this family only the eldest child was a "qualifying child" as defined in s117D(1). By virtue of her entry to the UK in January 2007, it was not in dispute before the FtT that she had lived in the UK for a continuous period of seven years or more at the date of the appeal hearing. As a result the FtT was required to consider her position by reference to s117B(6). There was no dispute before the FtT that the Appellant as her father had a genuine and subsisting parental relationship with his eldest daughter is child – thus the only issue was whether or not it would be reasonable to expect her to leave the UK.

36. As set out above, the question posed in relation to the eldest child by s117B(6) was the same question posed in relation to both of the children by paragraph 276ADE(1)(iv). It was a question that was posed and answered by the judge in the proper context of whether it was reasonable to expect each of those children to follow her parents (because they had no right to remain) to their country of origin; EV. We reject the suggestion that this question needed to be posed and answered in relation to each child more than once.

37. The circumstances of each child did require separate consideration, but it is abundantly clear from what was an entirely appropriate level of analysis of the evidence relating to them, that this is precisely what the judge sought to do. To be sustainable, the criticisms levelled against the judge's decision would require the concluding passage of the determination to be read in isolation, rather than for it to be read as a whole. Such a criticism is plainly ill founded, and at this point we would respectfully reiterate the guidance of Pill LJ in AJ (India) [2011] EWCA Civ 1191.

> 43. Before expressing final conclusions I make the following general comments, in addition to those made in paragraphs above.
>
> (a) As Baroness Hale stated at paragraph 33 in ZH, consideration of the welfare of the children is an integral part of the Article 8 assessment. It is not something apart from it. In making that assessment a primary consideration is the best interests of the child.
>
> (b) The absence of a reference to section 55(1) is not fatal to a decision. What matters is the substance of the attention given to the "overall wellbeing" (Baroness Hale) of the child.
>
> (c) The welfare of children was a factor in Article 8 decisions prior to the enactment of section 55. What section 55 and the guidelines do, following Article 3 of UNCRC, is to highlight the need to have regard to the welfare and interests of children when taking decisions such as the present. In an overall assessment the best interests of the child are a primary consideration.

(d) The primacy of the interests of the child falls to be considered in the context of the particular family circumstances, as well as the need to maintain immigration control.

38. The younger child of this family had not then been diagnosed with autism [32], and that remains the position today. Whilst she has both behavioural and delayed speech development characteristics that would give any parent cause for real concern, the evidence placed before the FtT fell well short of establishing either that she could not access the care and assistance that she then required, or might need in the future. Nor did it establish any well founded fear for her safety upon return. Her characteristics did not establish that it was unreasonable to expect her to live as a member of her family in the country of which the whole family were nationals.

39. There was no reason to infer that any interruption to the education of the elder child upon return to Malawi would be any more significant than that faced by any child forced to move from one country to another by virtue of the careers of their parents. Nor should the difficulties of a move from one school to another become unduly exaggerated. It would be highly unusual for a child in the UK to complete the entirety of their education within one school. The trauma, or excitement, of a new school, new classmates and new teachers is an integral part of growing up. In too many appeals the FtT is presented with arguments whose basic premise is that to change a school is to submit a child to a cruel and unduly harsh experience. Indeed, as if to illustrate the point, we note that the eldest child of this family has been required to move schools, and move from one end of the UK to the other, as a result of the decisions of her parents. The evidence does not suggest she suffered any hardship or ill effect from so doing.

40. By the date of the hearing the Appellant was a highly educated and well qualified man, and it would be reasonable to suppose that the educational qualifications he had acquired would stand to his considerable benefit in the labour market within Malawi upon return. He had been able to gain a degree in agriculture from the University of Malawi, and he had used that degree when working for six years in Malawi in that field. He had won scholarships in Malawi and in the UK, in order to finance his further study in the UK, no doubt in the expectation that he would return to Malawi, and put that further education to use in that country for the benefit of its population generally, and his own circumstances.

41. Thus the judge was entitled to conclude, as she did, that this Appellant was well placed to seek out, and pay for any assistance in Malawi that he might consider either of his daughters required; whether that be in the field of autistic spectrum disorder physiotherapy, speech therapy, or education generally. There was every reason to suppose that both children would be able to access both primary and secondary education in Malawi. There was no evidential basis upon which the judge could find that either of them would be denied the opportunity of tertiary education, or the ability to access it if they attained the educational threshold requirements. The reports relied upon were written in general terms, and thus failed to have any proper regard to the family's true circumstances.

Conclusions

In our judgement, and notwithstanding the terms in which permission to appeal was granted, there is no merit in the grounds advanced. It was open to the Judge to reach the conclusion that she did, for the reasons that she gave. Those reasons were adequate and disclosed that the relevant statutory provisions had been considered and applied. The complaints made about the Judge's approach reveal no material error of law that requires her decision promulgated on 22 September 2014 to be set aside and remade. It is accordingly confirmed.

Signed

Deputy Upper Tribunal Judge Holmes

Dated 2 April 2015

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Signed

Deputy Upper Tribunal Judge Holmes

Dated 2 April 2015