Upper Tribunal
(Immigration and Asylum Chamber)

Deelah and others (section 117B – ambit) [2015] UKUT 00515 (IAC)

THE IMMIGRATION ACTS

Heard at Field House, London
On 01 and 15 June 2015

Determination Promulgated

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Before

Mr Justice McCloskey, President

Between

ANSUY DEVI JAMAWANTEE DEELAH (AND 3 OTHERS)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellants: Mr Z Malik, of Counsel, instructed by Malik Law Chambers Solicitors

Respondent: Mr N Sheldon, of Counsel, instructed by the Government Legal Department

(i) Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002 are not confined to an appeal under section 84(1)(c). They apply also to appeals brought under section 84(1) (g).

(ii) Section 117B(4) and (5) of the 2002 Act, which instruct Judges to attribute "little weight" to the considerations specified therein, do not give rise to a constitutionally impermissible encroachment on the independent adjudicative function of the judiciary.

(iii) *A private life "established", in the wording and in the context of section 117B(4) and (5) of the 2002 Act, is not to be construed as confined to the initiation, or creation, of the private life in question but extends to its continuation or development.*

(iv) *The adjective "precarious" in section 117B(5) of the 2002 Act does not contemplate only, and is not restricted to, temporary admission to the United Kingdom or a grant of leave to remain in a category which permits no expectation of a further grant.*

DECISION AND REASONS

Introduction

1. The four Appellants are nationals of Mauritius and, together, constitute a family unit formed by mother and father (the first two Appellants) and their daughter and son, aged 21 and 14 years respectively. The first Appellant was lawfully present in the United Kingdom from July 2005, initially as a visitor and subsequently, upon conversion, as a student. The other three Appellants entered the United Kingdom lawfully and acquired dependant status. Successive grants of leave to remain ensued. These were followed by several unsuccessful attempts by the first Appellant to acquire further leave to remain as a student. This phase culminated in her application for further leave to remain outside the Immigration Rules, dated 05 April 2013. This elicited, initially, an in-country unappealable refusal decision, followed by a decision to issue removal directions against all Appellants, dated 28 January 2014.

2. The grounds of the Appellants' appeal to the First-tier Tribunal (the "*FtT*") invoked Article 8 ECHR and section 55 of the Borders, Citizenship and Immigration Act 2009. In dismissing their appeals, the Judge noted in particular that the family unit would be undisturbed by the Secretary of State's decisions. He also highlighted ability to reintegrate into their country of origin; the utility of educational achievements acquired in the United Kingdom; enduring significant family ties with Mauritius; and the ability of the third and fourth Appellants to learn a new language if necessary. The Judge further found certain aspects of the first and second Appellants' evidence unworthy of belief. In making his conclusions he referred explicitly to section 117B(6) and section 117D(1)(a) and (b) of the Nationality, Immigration and Asylum Act 2002.

The Issues

3. Following an initial refusal, permission to appeal was granted by a Judge of the Upper Tribunal. Both the grounds of appeal and the grant of permission focus on the new provisions of section 117A and 117B of the Nationality, Immigration and Asylum Act 2002 (the "*2002 Act*"), inserted by the Immigration Act 2014 and operative from 28 July 2014. As the appeal progressed, permission to amend the grounds was granted. As a result, the Appellants' case now telescopes to the following four submissions:

(i) Sections 117A and 117B of the 2002 Act apply only to an appeal under section 84(1)(c) of the same statute. As a result, they have no application to this appeal which is brought under section 84(1)(a) and (g).

(ii) Insofar as section 117B(4) and (5) of the 2002 Act purport to instruct Judges to attribute "*little weight*" to the considerations specified therein it cannot be thus construed as to do so would be to give effect to a constitutionally impermissible encroachment on the independent adjudicative function of the judiciary.

(iii) A private life "*established*", in the wording and in the context of section 117B(4) and (5) of the 2002 Act, is not to be construed as confined to the initiation, or creation, of the private life in question but extends to its continuation or development.

(iv) The adjective "*precarious*" in section 117B(5) of the 2002 Act contemplates, and is restricted to, temporary admission to the United Kingdom or a grant of leave to remain in a category which permits no expectation of a further grant.

In setting forth the four issues to be decided I have, as regards issues (ii) and (iii), preferred my own formulation which, I am confident, is a fair reflection of the slightly different terms in which they were constructed by Mr Malik on behalf of the Appellants. While each of the four issues shall be addressed *seriatim*, it is necessary to begin with the relevant statutory provisions.

Statutory Framework

4. All statutory references which follow are to the legislation in force at the material time. For convenience, the provisions currently in force are reproduced in the Appendix hereto. The right of appeal against immigration decisions is governed by section 82 of the 2002 Act, the material provisions whereof were, at the material time, these:

> "*(1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal.*
>
> *(2) In this Part "immigration decision" means –*
> *(a) refusal of leave to enter the United Kingdom,*
> *(b) refusal of entry clearance,*
> *(c) refusal of a certificate of entitlement under section 10 of this Act,*
> *(d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,*
> *(e) variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain,*
> *(f) revocation under section 76 of this Act of indefinite leave to enter or remain in the United Kingdom,*
> *(g) a decision that a person is to be removed from the United Kingdom by way of directions under [section 10(1)(a), (b), (ba) or (c) of the Immigration and Asylum Act 1999 (removal of person unlawfully in United Kingdom),*

(h) a decision that an illegal entrant is to be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 (control of entry: removal),
(ha) a decision that a person is to be removed from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006 (removal: persons with statutorily extended leave),
(i) a decision that a person is to be removed from the United Kingdom by way of directions given by virtue of paragraph 10A of that Schedule (family),
[(ia) a decision that a person is to be removed from the United Kingdom by way of directions under paragraph 12(2) of Schedule 2 to the Immigration Act 1971 (seamen and aircrews),]
[(ib) a decision to make an order under section 2A of that Act (deprivation of right of abode),]
(j) a decision to make a deportation order under section 5(1) of that Act, and
(k) refusal to revoke a deportation order under section 5(2) of that Act.

The permitted grounds of appeal are regulated by section 84(1), which provides:

"(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds –
(a) that the decision is not in accordance with immigration rules;
(b) that the decision is unlawful by virtue of Article 20A of the Race Relations (Northern Ireland) Order 1997or by virtue of section 29 of the Equality Act 2010 (discrimination in the exercise of public functions etc) so far as relating to race as defined by section 9(1) of that Act;
(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;
(d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;
(e) that the decision is otherwise not in accordance with the law;
(f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules;
(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.

Part 5A of the 2002 Act, introduced by section 19 of the Immigration Act 2014 and in force since 25 July 2014, establishes a new regime under the rubric "Article 8 of the ECHR: Public Interest Considerations". Section 117A provides:

"(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). **"**

Section 117B, embraced by the cross heading "*Article 8: Public Interest Considerations Applicable in All Cases*", provides:

"*(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. "

The subject matter of section 117C is "*Article 8: Additional Considerations In Cases Involving Foreign Criminals*". Section 117C does not arise for consideration in these appeals.

5. The trigger for the application of the various provisions assembled in Part 5A of the 2002 Act is a decision "*made under the Immigration Acts*". These latter words are defined in section 61(2) of the UK Borders Act 2007:

> *"A reference (in any enactment, including one passed or made before this Act) to "the Immigration Acts" is to–*
>
> *(a) the Immigration Act 1971,*
> *(b) the Immigration Act 1988,*
> *(c) the Asylum and Immigration Appeals Act 1993,*
> *(d) the Asylum and Immigration Act 1996,*
> *(e) the Immigration and Asylum Act 1999* [cf section 10: removal directions],
> *(f) the Nationality, Immigration and Asylum Act 2002,*
> *(g) the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c. 19),*
> *(h) the Immigration, Asylum and Nationality Act 2006 (c. 13) ,*
> *(i) this Act, and*
> *(j) the Immigration Act 2014."*

I would also mention two material provisions of the Human Rights Act 1998. First, by virtue of section 1 and Schedule 1 to the Act, one of the Convention rights protected under domestic law is Article 8. Second, by section 6(1):

> *"It is unlawful for a public authority to act in a way which is incompatible with a Convention right."*

This completes the statutory framework relevant to this appeal.

The First Issue

6. Is the application of sections 117A and 117B of the 2002 Act confined to an appeal under section 84(1)(c)? The argument of Mr Malik on behalf of the Appellant drew attention to the cluster of statutory provisions formed by sections 82, 84 and 86. He linked the words "*is required to determine*" in section 117A to the words "*must determine*" in section 86(2). He also sought to forge a nexus between section 117A(1)(b) and section 84(1)(c). He contended that the exercise of considering all of the provisions belonging to the statutory context in play impels to an affirmative answer to the question posted above. It was further submitted that the criteria enshrined in paragraph 276ADE and Appendix FM of the Immigration Rules are clear and objective, leaving no scope for applying the section 117B considerations.

7. It was further argued that in cases of the present kind it is not the Secretary of State's decision to remove a person from the United Kingdom which is challenged on Article 8 grounds: rather, it is the consequence of the decision, or the further action taken via removal directions, which is objectionable. Mr Malik submitted that the construction for which the Appellants contend is not undermined by either Dube (Sections 117A – 117D) [2015] UKUT 90 (IAC) or YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292. It was also argued that the language of the new section 84, deriving from section 15 of the 2014 Act, points to a consistent intention on the part of Parliament. Finally, Mr Malik prayed in aid the following passage in Forman (ss 117A-C – considerations) [2015] UKUT 00412 (IAC), at [17](i):

"*These provisions* (sections 117A and 117B) *apply in every case where a Court or Tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8 ECHR and, as a result, would be unlawful under section 6 of the Human Rights Act 1998. Where a court or tribunal is* <u>not</u> *required to make this determination, these provisions do not apply.*"

As a result, Mr Malik argued, the FtT erred in law in applying sections 117A and 117B in determining these appeals.

8. The submissions of Mr Sheldon on behalf of the Secretary of State, primarily, drew attention to the differing ways in which the Appellants' appeals were canvassed before the FtT. This was due to the differing circumstances of the two children and the distinctive circumstances of their parents. Thus while section 55 of the Borders, Citizenship and Immigration Act 2009 was invoked, this applied to the younger child only; paragraph 276 ADE of the Rules applied to the children, but not the parents; paragraph 276 ADE(1)(iv) applied to the older child, but not the younger one in whose case the relevant provision was paragraph 276 ADE(1)(vi); and paragraph EX.1 of Appendix FM applied to the parents and the older child, but not the younger one. Mr Sheldon observed that it would appear that all of the Appellants asserted the existence of individual private lives in the United Kingdom. Moreover, the older child has a girlfriend in the United Kingdom (who testified) and the mother's father is a British citizen. Mr Sheldon submitted that, notwithstanding these differences and variations, the main question for the FtT was whether it was reasonable to expect the family to return to Mauritius. This is reflected in the key conclusion in [61] of the determination:

"*For the reasons stated above there is no reliable evidence to demonstrate that it would be unreasonable to expect the third or fourth Appellants to return to Mauritius.*"

It is appropriate to observe that the substance of this conclusion is unchallenged on behalf of the Appellants.

9. Next, Mr Sheldon drew attention to the consonance of language found in paragraph 276 ADE(1)(iv) of the Rules ("*and it would not be reasonable to expect the applicant to leave the UK*") and section 117B(6)(b) of the 2002 Act ("*it would not be reasonable to expect the child to leave the United Kingdom*") and paragraph EX.1(ii) ("*it would not be reasonable to expect the child to leave the UK*"). Mr Sheldon submitted that within [64] of the FtT's determination there are two distinct and perfectly valid conclusions:

(a) it would not be unreasonable to expect the family and the older child in particular to return to Mauritius; and

(b) the Appellants' lack of financial independence was a factor which operated to their detriment.

Mr Sheldon argued that the first of these conclusions disposed of the appeal under the Rules. In making this conclusion the FtT applied section 117B(6) and section

117D(1)(b).[1] It was further submitted that in making the second of these conclusions, which weakened the Article 8 appeal, the FtT applied section 117B(3). Properly analysed, Mr Sheldon argued, the FtT applied sections 117A and 117B to the Article 8 grounds of appeal, but did not do so in conducting the separate exercise of deciding whether the Secretary of State's decision was in accordance with the Rules. This notwithstanding that in this particular case both the Rules and the Act require the FtT to ask, and determine, the same question.

10. Pausing at this juncture, I find Mr Sheldon's analysis of the determination of the FtT persuasive. It flows from an evaluation of the determination as a whole and does not rely on forensic microscopic dissection. Furthermore, it was not really countered in the arguments of Mr Malik. I further agree with Mr Sheldon's alternative submission. This was to the effect that even if the Appellants' construction of the relevant statutory provisions is correct and the FtT made the error asserted the net effect would have been the adoption of three (rather than two) separate routes to the same destination, namely paragraph 276 ADE of the Rules, paragraph EX.1 thereof and sections 117B(6) and 117D(1)(b) in tandem. As a result, the outcome of the appeals would have been no different.

11. It follows that this ground of appeal must fail. Notwithstanding, given the full argument on the issue and the special listing status of this appeal, I consider it appropriate to examine the issue of statutory construction which formed the centrepiece of this ground. The argument on behalf of the Secretary of State is that sections 117A – 117D of the 2002 Act apply to appeals brought under both section 84(1)(c) and (g). In my judgment, this submission is correct. Fundamentally, it is compatible with the ordinary and natural meaning of the statutory words. Furthermore, it yields an unremarkable and perfectly workable outcome, harmonious with the other elements of the statutory framework. In contrast, I consider the construction advanced on behalf of the Appellants to be strained and distorted. In my view there is no sensible distinction between an Article 8 assessment in an appeal pursued under section 84(1)(c) and an Article 8 assessment in an appeal pursued under section 84(1)(g). The principles governing the Article 8 assessment must, in each case, be the same. Article 8 does not possess the chameleon character which these arguments require. Logic and common sense dictate this construction.

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[1] 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).

12. Furthermore, while it is correct that in a section 85(1)(c) appeal the focus is on the immigration decision under challenge and in a section 84(1)(g) appeal the focus is on removal of the Appellant from the United Kingdom in consequence of the immigration decision under challenge, I consider this to be of no moment. If Parliament had intended to make the distinction advanced by the Appellants, one would expect to find explicit and unambiguous words to this effect. There are none. In addition, I offer the observation that while this discrete issue was not ventilated in argument, it is unclear whether this distinction could have been legitimately made in any event without, simultaneously, amending the Human Rights Act 1998, which, per section 6, makes it unlawful for a public authority to act in a manner incompatible with a person's protected Convention rights.

13. My conclusions on the issue of statutory contribution raised by the first ground of appeal are, therefore, twofold. First, assuming the underpinning of this ground to be sound, the FtT did not commit the error of which the Appellants complain. Second, this ground is based on a construction of the relevant statutory provisions which I consider misconceived and, accordingly, lacks the underpinning assumed to be correct for the purpose of the first of these conclusions.

The Second Issue

14. Do section 117B(4) and (5) oblige Tribunals, without choice or discretion, to attribute "*little weight*" to the considerations specified therein? The argument developed by Mr Malik is that Article 8 ECHR forms part of domestic statutory law and it is the duty of courts and tribunals to interpret it like any other statute and give effect to it according to what they consider to be its proper meaning: see the discussion in Re P [2008] UKHL 38, at [33]. This is a principle which reflects the rule of law, one of the axioms whereof is that statute law be mediated by an authoritative judicial source independent of the legislature, the executive and the public authority which administers the statute: see R (Cart) v Upper Tribunal [2009] EWHC 3052 (Admin) at [36] – [38]. Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law: see R (Evans) v Attorney General [2015] UKSC 21, at [51] – [59].

15. The next step in the Appellants' argument involves the proposition that it is for the court or tribunal concerned to decide the issue of proportionality under Article 8(2) ECHR. In performing this function the court or tribunal decides how much weight is to be attributed to competing considerations in determining how the balance should be struck between the public interest and protected individual rights: see *inter alia*, Huang v Secretary of State for the Home Department [2007] UKHL 11 and EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41. The doctrine of judicial precedent requires lower courts and tribunals to follow binding authorities of superior Courts. As a result, section 117B(4) and (5) does not require the court or tribunal concerned to ascribe "*little weight*" to the matters specified therein. Rather, it is argued that what appears to be a clear and strict instruction to the court or tribunal can effectively be ignored, with the result that the Judge is unconstrained in deciding how much weight to accord to each of the listed considerations.

16. The riposte of Mr Sheldon on behalf of the Secretary of State is that the meaning of section 117A(2) is unambiguous: in conducting the Article 8(2) proportionality assessment the court or tribunal concerned must have regard to the specified considerations. There will be no obligation to do so in cases where the considerations do not arise. The "*little weight*" provisions in section 117B(4) and (5) are the statutory incarnation of principles well established in both the domestic and Strasbourg jurisprudence. These are conveniently summarised in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin), at [38] – [41]. Section 117B(5) in effect operates as a reminder to courts and tribunals of a principle which, irrespective of its recent incorporation in statute, they would be obliged to apply in any event. Finally, Mr Sheldon submitted that this issue of construction arises in a vacuum, given that in dismissing the appeals the FtT did not decide that little weight should be given to either of the matters specified in section 117B(4) and (5).

17. It is convenient to address this latter argument first. In short, I find it persuasive. The central issues for the FtT were whether it would be reasonable to expect the younger child to return to Mauritius and whether there were any insurmountable obstacles to the reintegration in Mauritius of the other three Appellants. I have rehearsed in [4] and [5] above the relevant provisions of both Part 5A of the 2002 Act and the Rules. I have concluded that the FtT did not engage in any impermissible elision. Furthermore, there is no adverse "precariousness" finding in its determination. The only provisions of Part 5A considered by the FtT were section 117B(3) and (6). It follows from this analysis that, in my judgment, Mr Sheldon's submission is to be accepted. The construction of sections 117A and 117B urged on behalf of the Appellants simply does not arise having regard to the provisions of Part 5A which the FtT considered and its ensuing findings and conclusions.

18. While the second ground of appeal must, therefore, fail, given the fullness of argument on the statutory construction issue I would add the following. First, I reiterate what this Tribunal said in Forman, at [17]:

> "*We consider the correct analysis of sections 117A and 117B to be as follows:*
>
> *(i) These provisions apply in every case where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8 ECHR and, as a result, would be unlawful under section 6 of the Human Rights Act 1998. Where a Court or Tribunal is not required to make this determination, these provisions do not apply.*
>
> *(ii) The so-called "public interest question" is "the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).", which appears to embrace the entirety of the proportionality exercise.*
>
> *(iii) In considering the public interest question, the court or tribunal must have regard to the considerations listed in section 117B in all cases: per section 117A(1) and (2).*

(iv) In considering the public interest question in cases concerning the deportation of foreign criminals, the court or tribunal must have regard to the section 117B considerations and the considerations listed in section 117C.

(v) The list of considerations in sections 117B and 117C is not exhaustive: this is clear from the words in parenthesis "(in particular)".

(vi) *The court or tribunal concerned has no choice: it must have regard to the listed considerations.*"

The next passage in Forman foreshadows to some extent the issue raised under the banner of this ground of appeal:

> "*While the court or tribunal is clearly entitled to take into account considerations other than those listed in section 117B (and, where appropriate, section 117C), any additional factors considered must be relevant, in the sense that they properly bear on the "public interest question". In this discrete respect, some assistance is provided by reflecting on the public law obligation to take into account all material considerations which, by definition, prohibits the intrusion of immaterial factors. We are not required to decide in the present case whether there is any tension between section 117A(2), which obliges the court or tribunal concerned to have regard to the list of considerations listed in section 117B and, where appropriate, section 117C and the contrasting terms of section 117B (5) and (6) which are framed as an instruction to the court or tribunal to attribute little weight to the two considerations specified*."

19. Next, in construing the provisions under scrutiny, certain observations about the structure and syntax of sections 117A and 117B are appropriate. The draftsman's mechanism of enjoining a decision maker, whether it be a court or tribunal or other agency, to "*have regard to*" specified matters is of some longevity. It is long established that where this mechanism is employed, the corresponding duty is to obey the legislature's instruction, that is to say the decision maker must have regard to the matter in question. In the typical statutory model, the legislature goes no further. Where this model is invoked this denotes the first stage in the exercise to be performed by the judge or decision maker. The second stage is a product of the common law: it imports a duty to give such rational weight to the matters specified as the judge or decision maker considers appropriate. Within this formulation lies the principle that in the generality of cases involving decisions of this *genre* the barometer for judicial review, or appeal on a point of law, is the Wednesbury principle. See, for example, Tesco Stores v Secretary of State for the Environment and Others [1995] 1 WLR 759. Lord Hoffmann's formulation of the principles at [56] – [57] and [68], while devised in a planning law context, applies generally.

20. The statutory model for which the legislature has opted in sections 117A and 117B is not the typical one. True it is that its first striking element is the familiar one of obliging the court or tribunal concerned to have regard to specified considerations: per section 117A(2). These obligatory considerations are then listed in sections 117B and 117C. As section 117C does not arise in this appeal, I say nothing more about it. As regards section 117B, there is a total of six "*considerations*". Some of these have the

dual identity of statutory considerations and legal principles, being readily traceable to both Strasbourg and domestic jurisprudence. The characteristic which links the "*considerations*" listed in section 117B(1), (2), (3) and (6) is that of the "*public interest*". These provisions reflect the reality that the public interest is multi-layered and has multiple dimensions. Those aspects of the public interest which the legislature has identified as considerations to be taken into account as a matter of obligation are contained in these provisions.

21. In contrast, the two "*considerations*" contained in section 117B(4) and (5) are somewhat different from the other four, in the following respects. First, they make no mention of the public interest. They are, rather, concerned with facts and factors which, while bearing on the proportionality assessment under Article 8(2) ECHR, shift the focus from the ambit of the public interest to choices and decisions which have been made by the person or persons concerned in their lives and lifestyles. Second, there is a degree of tension between a court or tribunal having regard to a specified factor, as a matter of obligation (on the one hand) and (on the other) giving effect to a Parliamentary instruction about the weight to be given thereto. Indeed, in giving effect to section 117B(4) and (5), the court or tribunal concerned is not, in truth, performing the exercise of <u>having regard to</u> these statutory provisions. Rather, the Judge is complying with a statutory obligation, unconditional and unambiguous, to give effect to a parliamentary instruction that the considerations in question are to receive little weight.

22. All of the six factors contained in section 117B are properly seen as a rehearsal of well established principles of law and/or provisions of the Immigration Rules which have become familiar to all who practise in this field. Furthermore, this discrete statutory model develops the increasingly familiar device of codifying and incorporating Article 8 principles in the Immigration Rules. In the Part 5A model the legislators have taken a step further by giving expression to such principles in primary legislation.

23. I would add that I am satisfied that there is nothing in this analysis which promotes the Appellants' argument. The elements of this analysis, interesting though they may be, are, ultimately, of little moment. True it is that the drafting of the new statutory provisions is far from felicitous. A statutory exhortation to "*have regard to*" a consideration is not the same as a statutory instruction and corresponding obligation, to "give little weight" to a specified consideration. The infelicities of drafting in these particular provisions are not unique: section 117A(2), structurally and syntactically, suffers from comparable infelicities. The words in parenthesis "*(in particular)*" are detached from the position which they should ideally occupy and the distant separation of "*to*" from "*have regard*" similarly jars. However, while the drafting could undoubtedly have been better, I consider the underlying intention to be abundantly clear, expressed in unambiguous language. While the drafting of these critical statutory provisions wins no literary prizes, I consider that the substance of the duty imposed on courts and tribunals by section 117A(2) admits of no doubt or ambiguity.

24. The argument advanced by Mr Malik on behalf of the Appellants explicitly acknowledges that if the statutory provisions under scrutiny are possessed of the

clarity which I have found it must fail. It founders accordingly. To this I would add that there is no legal principle of which I am aware confounding the conclusion that an instruction by the legislature to a court or tribunal to attribute little weight to the matters specified in section 117B(4) and (5) either contravenes some constitutional norm or, in order to preserve the constitutional balance, must be construed as narrowly and strictly as possible and in a manner which unshackles the Judge from the constraints imposed. The United Kingdom, being one of those states which operates the so-called "dualist" doctrine, it is by statute that Article 8 forms part of the domestic law of this jurisdiction and it is by the same vehicle viz statute that Parliament has chosen to calibrate certain aspects of its operation in our legal system. I consider that this gives rise to no constitutional trespass or imbalance. I further consider this analysis entirely consistent with the passages in the judgment of Laws LJ in Cart (*supra*) on which the Appellants rely. *Ditto* those in Evans (*supra*). My final conclusion is that the statutory provisions under scrutiny do not have the effect of abrogating or eclipsing any fundamental right or any principle of the rule of law. Every court or tribunal would be attributing little weight to the matters specified irrespective of the parliamentary instruction in primary legislation. Approached in this way, these new statutory provisions may be viewed both as a reinforcement of established principles, all Judge made and a reminder to Courts and Tribunals of the need to give effect to them.

The Third Issue

25. In the context of section 117B(4) and (5) of the 2002 Act, is the establishment (or establishing) of private life confined to its initiation, or creation? Mr Malik submitted that the normal meaning of the verb "*establish*" impels to an affirmative answer. In response to a question from the Tribunal, Mr Malik accepted that private lives and relationships are by their vary nature effervescent and dynamic rather than static. He agreed that neither comes into existence abruptly. Rather, both are developed progressively, with a distinct element of evolution. While it is a truism that every person's private life and relationships develop at different paces, some more quickly than others, I consider that this does not assist the Appellants' argument. On the contrary it confounds it.

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26. In choosing the verb "*establish*" in section 117B(4) and (5), it seems likely that the draftsman has simply drawn from the long standing and repeated judicial espousal of this term. Developing the analysis begun in [24] above, I consider that, in this statutory context, "*established*" is synonymous with "*developed*". The construction of "*established*" advanced on behalf of the Appellants is, in my view, artificially narrow. It is further defeated by the long established absurdity principle of statutory construction, familiar to all: Parliament is presumed not to have intended an absurd effect or consequence. The suggestion that the "*little weight*" instruction enshrined in section 117B(4) and (5) applies only to the beginning of a person's private life or the commencement of a relationship formed with a qualifying partner and not the continuance of either results in a construction of these provisions which, in my estimation, is manifestly unsustainable to the point of absurdity. Why penalise the former and not the latter? No rational explanation or justification for this differential treatment was advanced in argument and I am unable to conceive of any.

27. Furthermore, the construction advocated on behalf of the Appellants would, in my opinion, be unworkable in practice. The exercise of attempting to delineate the formation of a person's private life or relationship with a qualifying partner from the continuation and extension thereof would be an impossible one in practice. In this context one is reminded of the truism that Parliament legislates in the real world. There is no conceivable rational distinction to be made between the two concepts, or scenarios. For this combination of reasons the third ground of appeal must fail.

The Fourth Issue

28. Is a "precarious" immigration status, in the context of section 117B(5) of the 2002 Act, confined to cases where the person concerned is afforded either temporary admission to the United Kingdom or a grant of leave to remain under a category which permits no expectation of any further such grant? Mr Malik submitted that the word "*precarious*", in ordinary language, denotes something uncertain, unsafe or shaky. Pausing, I find no reason to dissent from this contention. Developing his argument, he submitted that a person's residence is not precarious in this sense where there is valid leave to remain as a student. This (he submitted) is to be contrasted with residence pursuant to temporary admission or under a category which by its nature admits of only very limited permission to stay with no provision for further extension – for example, entry and sojourn pursuant to a visitor's visa. Finally, it was argued that a "*precarious*" immigration status is, in the Strasbourg and domestic jurisprudence, generally associated with unlawful residence.

29. The primary submission of Mr Sheldon on behalf of the Secretary of State is that the "*precarious*" provision in section 117B(5) does not arise on the facts of this case. Consistent with my analysis of the determination of the FtT and associated conclusions – see above – I concur with this submission. This ground of appeal must fail accordingly.

30. I consider that Mr Malik's submission is confounded in any event by the decision of the Upper Tribunal in AM at [19] – [33], AM (S117B) Malawi [2015] UKUT 260 (IAC), at [19]–[33] and, in particular, the conclusion enshrined in [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*"

Judges and practitioners should be constantly alert to this clear and concise formulation of the principle of "*precariousness*". More recently, in BM and Others (Returnees – criminal and non-criminal) DRC CG [2015] UKUT 00293 (IAC), the Upper Tribunal stated, in the context of a person who had been granted limited leave to enter and remain in the United Kingdom after making an asylum claim, at [107](v):

> "*Section 117B(5):* *We find that this Appellant's immigration status in the United Kingdom was at all material times precarious. All of his attempts to establish a stable, secure status in the United Kingdom were unsuccessful. It follows that the private life which he has developed in the United Kingdom qualifies for the attribution of little weight.*"

31. The argument that in the Strasbourg and domestic jurisprudence a precarious immigration status generally equates to unlawful residence was not developed by reference to any decided cases. Furthermore, it is not easily reconciled with the Appellant's principal contention, formulated in [3](iv) above. In addition, in Jeunesse v the Netherlands (Application No. 12738/10), the Grand Chamber stated that the Applicant's residence in the Netherlands during a 17 year period - which, on the facts of her case, could not be described as anything other than precarious - was unlawful: see [102]. She was an alien whose presence was "*tolerated*" by the host state: see [103]. The precarious nature of her presence emerges clearly in the succeeding passage:

> "*Confronting the authorities of the host country with family life as a fait accompli does not entail that those authorities are, as a result, under an obligation … to allow the applicant to settle in the country.* ***The court has previously held that, in general, persons in that situation have no entitlement to expect that a right of residence will be conferred upon them*** *…".*

[Emphasis added].

As the case references which follow demonstrate, there is clear and consistent Strasbourg authority to this effect. See, for example, B v Sweden (Application No. 57442/11).

32. I consider that the word "*precarious*" is an unsophisticated, unpretentious member of the English language. It denotes generally, something which is unstable, uncertain, fragile. It describes a state of affairs, condition or status which is bereft of guarantees and security. It is the antheisis of something which is stable, secure, certain. This is its ordinary and natural meaning. 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.

33. Giving effect to the principles and approach outlined above, I conclude unhesitatingly that in enacting these statutory provisions it was the intention of the legislature that 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. Such status regulates the life, arrangements and affairs of the person concerned for a measured period of time and with no assurance of continuation or extension. It does not extend beyond the short or medium term. Its effect is to convey to the beneficiary from the outset an unequivocal message, or admonition, that permission to reside in the United Kingdom for the permitted purpose and complying with all of the stipulated conditions will expire on a specified date, or sooner in certain eventualities. The immigration status of every such person is, in my

view, both captured and defined by the adjective *"precarious"*. Furthermore, Parliament has made a clear and deliberate distinction between those unlawfully present in the United Kingdom and those whose presence derives from a precarious immigration status. The suggestion that Parliament has legislated in a manner which treats unlawful immigration status as synonymous with precarious immigration status is confounded by the clear statutory language and has no jurisprudential underpinning which was brought to the attention of the Tribunal. I reject all of Mr Malik's arguments accordingly. For this combination of reasons the fourth ground of appeal must fail.

Omnibus Conclusion and Decision

34. On the grounds and for the reasons elaborated above I dismiss these appeals and affirm the decision of the FtT.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 10 July 2015

APPENDIX

Current provisions of the Nationality, Immigration and Asylum Act 2002 Act introduced by section 15 of the Immigration Act 2014, brought into force on 20 October 2014 by The Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014

82. Right of appeal to the Tribunal

(1) A person ("P") may appeal to the Tribunal where –
(a) the Secretary of State has decided to refuse a protection claim made by P,
(b) the Secretary of State has decided to refuse a human rights claim made by P, or
(c) the Secretary of State has decided to revoke P's protection status.

(2) For the purposes of this Part –
(a) a "protection claim" is a claim made by a person ("P") that removal of P from the United Kingdom –
(i) would breach the United Kingdom's obligations under the Refugee Convention, or
(ii) would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
(b) P's protection claim is refused if the Secretary of State makes one or more of the following decisions –
(i) that removal of P from the United Kingdom would not breach the United Kingdom's obligations under the Refugee Convention;
(ii) that removal of P from the United Kingdom would not breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
(c) a person has "protection status" if the person has been granted leave to enter or remain in the United Kingdom as a refugee or as a person eligible for a grant of humanitarian protection;
(d) "humanitarian protection" is to be construed in accordance with the immigration rules;
(e) "refugee" has the same meaning as in the Refugee Convention.

84. Grounds of Appeal

"(1) An appeal under section 82(1) (refusal of protection claim) must be brought on one or more of the following grounds –
(a) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;
(b)that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
(c) that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention). "