Upper Tribunal
(Immigration and Asylum Chamber)

Treebhawon and Others (NIAA 2002 Part 5A - compelling circumstances test) [2017] UKUT 00013 (IAC)

THE IMMIGRATION ACTS

Error of law hearing: 28 October 2015	**Part 1 promulgated 19 November 2015**
Remaking hearing: 06 December 2016	**Part 2 promulgated 09 January 2017**

Before

[Part 1]

THE HON. MR JUSTICE MCCLOSKEY, PRESIDENT
UPPER TRIBUNAL JUDGE FRANCIS

[Part 2]

THE HON MR JUSTICE MCCLOSKEY, PRESIDENT
THE HON MR JUSTICE SOOLE, SITTING AS A JUDGE OF THE UPPER TRIBUNAL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

SOOREEADO TREEBHAWON, KJUL TREEBHAWON, ATISH TREEBHAWON, AKASH TREEBHAWON AND ADESH TREEBHAWON

Respondents

Representation

For the Secretary of State: Ms A Fijiwala, Senior Office Home Presenting Officer [Part 1]

Ms C Patry, of counsel, instructed by the Government Legal Department [Part 2]

For the Appellant: Mrs H Arrif, Solicitor, of Arden Solicitors Advocates

(I) Where the case of a foreign national who is not an offender does not satisfy the requirements of the Article 8 ECHR regime of the Immigration Rules, the test to be applied is that of compelling circumstances.

(II) The Parliamentary intention underlying Part 5A of NIAA 2002 is to give proper effect to Article 8 ECHR. Thus a private life developed or established during periods of unlawful or precarious residence might conceivably qualify to be accorded more than little weight and s 117B (4) and (5) are to be construed and applied accordingly.

(III) *Mere hardship, mere difficulty, mere hurdles, mere upheaval and mere inconvenience, even where multiplied, are unlikely to satisfy the test of "very significant hurdles" in paragraph 276 ADE of the Immigration Rules.*

McCloskey J

Preface

(I) This judgment is in two Parts, in consequence of the conventional (though not invariable) separation of the error of law hearing and the remaking hearing. The error of law decision is reproduced fully in [1] – [26] below. It is reported at [2015] UKUT 00674 (IAC). It is appropriate to note that one aspect of this decision was, in substance, disapproved by a subsequent decision of the Court of Appeal: see MM (Uganda) v SSHD [2016] EWCA Civ 450, concerning section 117C (5) of the 2002 Act. This was followed with notable reluctance by a different division of the Court of Appeal in MA (Pakistan) [2016] EWCA Civ 705, where the judgment of Elias LJ acknowledges the strength of this Tribunal's competing interpretation of section 117B (6) espoused by this Tribunal in the present appeal, contained in Part 1: see [36] – [45]. It may be that the Supreme Court will be the ultimate arbiter. In the meantime, the decision in MM (Uganda) is the binding one concerning section 117C (5) and MA (Pakistan) is binding concerning section 117B (6).

(II) The second main aspect of this Tribunal's error of law decision is expressed in the headnote of the initial reported version, at [2015] UKUT. (IAC) in these terms:

> *Section 117B (4) and (5) are not parliamentary prescriptions of the public interest. Rather, they operate as instructions to courts and tribunals to be applied in cases where the balancing exercise is being conducted in order to determine proportionality under Article 8 ECHR, in cases where either of the factors which they identify arises.*

None of the several Court of Appeal decisions belonging to this sphere, promulgated subsequently, calls into question the correctness of this assessment. Indeed, one finds indications of substantially the same approach in the recent decision of the Court of Appeal in Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803 at [49] – [54].

(III) Part 2 of this judgment contains our remaking of the decision of the FtT: see [27] – [52].

Part 1: Error of Law Decision

Introduction

1. These conjoined appeals raise interesting questions relating to the construction and application of section 117B (6) of the Nationality, Immigration and Asylum Act 2002 which, so far as the panel is aware, have not previously been the subject of adjudication by the Upper Tribunal.

The Appellants

2. The Appellants are a family unit consisting of father, one daughter and three sons. All are nationals of Mauritius. The father is aged 44 and the children's ages range from 11 to 17. Their immigration history is as follows:

(i) The father claims to have entered the United Kingdom, via Dublin, in 2003.

(ii) In November 2007 the oldest child was given leave to enter the United Kingdom and remain for a period of six months. It appears that both she and the children's mother entered around this time.

(iii) In February 2008, in response to formal overstaying measures, the father confirmed that his wife and oldest child were in the United Kingdom, representing that they would be returning to Mauritius where their other three children resided.

(iv) On 04 August 2010 the second and third of the four children entered the United Kingdom.

(v) On 26 December 2011 the youngest of the four children entered the United Kingdom as a visitor.

[There is no mention in the papers of the mother of the family postdating this event.]

(vi) On 01 February 2013 the Appellants' human rights application was refused.

(vii) On 03 April 2013 further representations were made on the Appellants' behalf.

(viii) On 10 June 2014, in response to a request for clarification, the Appellants' representatives furnished further submissions.

(ix) By a decision dated 24 October 2014 on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), the Appellants' further human rights application was refused.

Appeal Proceedings

3. The latter decision was challenged by the Appellants by appeal to the First-tier Tribunal (the "*FtT*"). By its decision promulgated on 17 July 2015, the FtT allowed the appeals "*under the Immigration Rules and under Article 8*". Upon scrutiny, the FtT decided that the appeal of the oldest of the four children succeeded under paragraph 276 ADE(1) of the Rules, while the appeals of the other four family members succeeded under Article 8 ECHR outwith the Rules.

4. The Secretary of State applied for permission to appeal on the following two grounds:

(i) The second Appellant could not satisfy paragraph 276 ADE of the Rules, given the date of the decision, giving rise to a free standing error of law. This is allied to a further contention that this error infected the FtT's Article 8 decision in respect of the other four family members.

(ii) The FtT further erred in law in treating section 117B(6) of the 2002 Act as determinative of the public interest question, namely the issue of proportionality under Article 8(2) ECHR and failing to apply the other public interest provisions of the section.

The latter formulation is ours. Permission to appeal was granted on both grounds.

First ground of appeal: the Immigration Rules issue

5. At the material time, paragraph 276 ADE of the Immigration Rules provided:

> ***"****276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:*

(i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or

(iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

276ADE (2). Sub-paragraph (1)(vi) does not apply, and may not be relied upon, in circumstances in which it is proposed to return a person to a third country pursuant to Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004."

The history, in brief, is that on 09 July 2012, pursuant to HC 194, the Immigration Rules were revised in respect of applications for leave to remain on the ground of private life under Article 8 ECHR (per paragraphs 276 ADE – 276 DH), applications for entry and stay based on family life under Article 8 (Appendix FM) and claims based on Article 8 in the context of deportation (paragraphs 398 – 399B).

6. These provisions of the Rules have generated much jurisprudence during the last two years. In R (Amin) v Secretary of State for the Home Department [2014] EWHC 2322 (Admin) it was held that paragraphs 276 ADE – 276 DH and Appendix FM do not constitute a comprehensive Article 8 Code. Thus it is recognised that a claim based on Article 8 can, in principle, succeed either under the prescriptive Article 8 regimes within the Rules or outwith the Rules, residually. In Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558, the Court of Appeal espoused the test of "*compelling circumstances*" in respect of claims outwith the Rules: see [44] and [77]. In MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985 the Court of Appeal, in effect, disapproved the suggestion in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin), at [29], that there is an

intermediate hurdle to be overcome prior to consideration of Article 8 claims outwith the Rules: per Aikens LJ at [129].

7. In the Secretary of State's decision it was noted that the longest of the sojourns of the four children [the oldest, the second Appellant] in the United Kingdom was six years and five months. As the minimum sojourn prescribed by the relevant provision of the Rules, namely paragraph 276 ADE (1)(vi) is seven years, it was concluded that the four children's Article 8 claims under the Rules must be refused.

8. In considering the appeal of the oldest child, the FtT stated:

> "*The only issue ……. Is whether it would be reasonable to expect* [this child] *to leave the United Kingdom she being under the age of 18 years* ***and having lived continuously in the United Kingdom for seven years****. (It is accepted that at the date the Respondent made her decision* [this child] *had not been living continuously in the United Kingdom for seven years.)*"

[Emphasis added.]

The Judge's ultimate finding was that it would not be reasonable to expect this Appellant to leave the United Kingdom. Accordingly, her appeal was allowed under the Rules. We consider that this conclusion is unsustainable in law, having regard to the seven years residence requirement and the operative date for assessing same, namely the date of the application to the Secretary of State, not the date of the FtT decision: per paragraph 276 ADE(1) of the Rules. The materiality of this error being unmistakeable, the first limb of the first ground of appeal is established accordingly.

9. The second limb of the first ground of appeal is that the error of law which we have found above infected the FtT's decision to allow the appeals of the other four family members outwith the Rules. In the key section of its decision, under the rubric of "My Findings", the FtT devotes most of its attention to the oldest child, the second Appellant. This is followed by a brief final section which yields the following analysis:

(i) All five Appellants enjoy family and private life together.

(ii) Only the second Appellant can succeed under the Rules.

(iii) The removal of the other four family members would interfere with the rights to private and family life in play.

(iv) The issue is proportionality.

(v) The public interest engaged is the maintenance of immigration control in pursuit of the economic wellbeing of the country.

(vi) To require the other four Appellants to leave the United Kingdom would be disproportionate –

> *"…. because family life would be disrupted given that it is reasonable for* [the second Appellant] *to remain in the United Kingdom ….* [and] *there would be* [concerns] *and difficulties for the remaining siblings should the first Appellant's health deteriorate. These factors tip the balance in their favour."*

This latter passage may be linked to an earlier section of the decision in which evidence relating to the health and employability of the first Appellant, the father, is recorded.

10. We consider that there is a demonstrably clear nexus between the FtT's decision to allow the second Appellant's appeal on the ground that her case satisfied the requirements of the Rules and the further decision to allow the other four Appellants' appeals outwith the Rules. The two are inextricably linked. We have concluded that the first decision is unsustainable in law. Given that the cornerstone of the second decision is the legally unsustainable first decision, it follows inexorably that the second decision cannot survive. It's sole and exclusive rationale is the legally untenable first decision. The materiality of this further error of law brooks no argument. Thus all five decisions must be set aside.

Second ground of appeal: the section 117B(6) issue

11. The FtT gave consideration to section 117B (6) of the 2002 Act in the context of considering whether the claims of the 1st, 3rd, 4th and 5th Appellants could succeed outwith the Article 8 regime of the Rules. The decision states:

> "*In considering this I have had regard to and applied* [section 117B (6)] *… which confirms to me that there is no public interest in removing the first Appellant because he has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect her to leave the United Kingdom.*"

This is the only reference to section 117B in the entirety of the decision.

12. Section 117B of the 2002 Act 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 new Part 5A of the 2002 Act, comprising sections 117A – 117D, came into operation on 28 July 2014. This is a novel legislative mechanism whereby in the exercise of determining proportionality in Article 8 cases, courts and tribunals are obliged to have regard to Parliament's formulation of the public interest. This flows from the definition of the "*public interest question*" as the question of "*whether an interference with a person's right to respect for private and family life is justified under Article 8(2)* [ECHR]", per section 117A (3).

13. In the evolving jurisprudence of the Upper Tribunal, the new Part 5A regime has been considered in a series of reported decisions. The most comprehensive analysis of its provisions is found in Forman (Sections 117A – C considerations) [2015] UKUT 00412 (IAC), at [17] especially. In that case the Upper Tribunal decided, *inter alia*, that sections 117A and 177B apply in every case where a court or tribunal is required to

determine whether a decision made under the Immigration Acts breaches any person's rights under Article 8 ECHR. It further held that 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). Other major pronouncements of the Upper Tribunal on sections 117A – 117B are found in AM (Section 117B) Malawi [2015] UKUT 0260 (IAC) and Deelah and Others (section 117B – ambit) [2015] UKUT 00515 (IAC).

14. None of the above decisions addresses the specific issue which arises in the present appeals. We formulate this issue in the following terms:

> ***In a case where a Court or Tribunal decides that a person who is not liable to deportation has a genuine and subsisting parental relationship with a qualifying child, as defined in Part 5A of the Nationality, Immigration and Asylum Act 2002, as amended, and it would not be reasonable to expect such child to leave the United Kingdom, with the result that the two conditions enshrined in section 117B(6) are satisfied, is this determinative of the "public interest question", namely the issue of proportionality under Article 8(2) ECHR?***

While acknowledging that this formulation has certain offshoots, giving rise to other issues, we consider this to be the overarching question.

15. In Deelah and Others, the Upper Tribunal provided the following overview of the new Part 5A regime, at [19]-[21]:

> *"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."

16. In answering the question formulated in [14] above, we begin by subjecting Part 5A of the 2002 Act to the following further analysis:

(a) Part 5A is expressed to be applicable <u>in every case</u> where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's rights under Article 8 ECHR.

(b) In cases where an interference with such rights is demonstrated, the court or tribunal <u>must</u>, in determining proportionality, have regard to the considerations listed in section 117B <u>in all cases</u>

and to the additional considerations enumerated in section 117C in all cases involving the deportation of foreign criminals.

(c) Turning to section 117B, the first port of call is the cross heading "Article 8: public interest considerations applicable in all cases".

[Our emphasis.]

At this juncture of the analysis, the effect of section 117A(2)(a) is that the Court or Tribunal must have regard to everything contained in section 117B.

(d) Section 117B comprises, in subsections (1) – (3), three unequivocal Parliamentary statements of the content of the public interest: the maintenance of effective immigration controls, the ability to speak English and financial independence. *En passant,* a striking feature of the formulation of the second and third of these statements of the public interest is the exposition of their rationale.

(e) The next division of section 117B, in subsections (4) and (5), consists of separate statements that "*little weight*" should be given to three specified factors.

(f) Next, and finally, there is an unequivocal statement of what the public interest does not require in section 117B (6): this is the only public interest pronouncement in section 117B framed in these negative terms.

17. The two "*little weight*" provisions of section 117B do not readily satisfy the appellation of Parliamentary statements of the public interest, in view of the terms in which they are phrased and compared with the formulation of the public interest statements in subsections (2), (3) and (6). Furthermore, the two "*little weight*" provisions relate to matters which, in practice, are invoked by the person concerned, rather than the Secretary of State, namely a private life and/or a relationship formed with a qualifying partner during such persons sojourn in the United Kingdom. As noted in Deelah, at [21], the focus of these discrete statutory provisions is choices and decisions which have been made by the person or persons concerned in their lives and lifestyles. We consider that section 117B (4) and (5) contain a recognition that the factors therein sound on the question of proportionality, where they arise, but are, by unambiguous Parliamentary direction, to be accorded little weight. We further consider that, properly construed, section 117B (4) and (5) are not Parliamentary statements of the public interest. They are, rather, Parliamentary instructions to courts and tribunals, to be applied in the balancing exercise, that little weight should be given to the matters specified where relevant. Thus analysed, the function of the court or tribunal concerned is not simply to have regard to these factors, in cases where they arise. Rather, they must be considered and given little weight. This is in contrast

with the classic public law case whereby the decision maker, having discharged the primary duty of identifying all relevant facts and considerations, is free to accord to these such weight as he rationally considers appropriate.

18. The resolution of the second ground of appeal turns on how we construe section 117B (6), considered in its full statutory context. In performing this exercise, we derive no assistance from the construction which we have given to section 117B (4) and (5). WE consider it instructive to juxtapose section 117B (6) with its three public interest siblings, namely Section 117B (1), (2) and (3). Section 117B (6), notionally, follows these three provisions sequentially. Notably, Parliament has not established any correlation between Section 117B (6) and the other three sibling public interest provisions. In particular, section 117B (6) is not expressed to be "*without prejudice to*" or "*subject to*" any of the other three related provisions. Furthermore, section 117B (6) is formulated in unqualified terms: in cases where its conditions are satisfied, the public interest does not require the removal from the United Kingdom of the person concerned. In this respect also it different from its siblings, which contain no comparable instruction.

19. The next notable feature of the new statutory regime is that in section 117B (6) Parliament has chosen to differentiate between those who are, and who are not, liable to deportation. It has provided a separate and special dispensation for members of the latter class. This is harmonious with one of the overarching themes of Part 5A, which is to subject foreign criminals who are liable to deportation to a more rigorous and unyielding regime. In the case of those who are not liable to deportation, Parliament has chosen to recognise that, where the specified conditions are satisfied, a public interest which differs from those public interests expressed in Section 117B (1)- (3) is engaged. The most striking feature of this discrete public interest is its focus on one of the most vulnerable cohorts in society, namely children. The focus is placed on the needs and interests of these vulnerable people. Furthermore, the content of this public interest differs markedly from the other three, all of which are focused on the interests of society as a whole. In enacting Section 117B (6), Parliament has given effect to a public interest of an altogether different species. Notably, this new statutory provision is closely related to and harmonious with what has been decided by the Upper Tribunal in a number of cases, namely that there is a free standing public interest in children being reared within a stable and secure family unit. The effect of Part 5A of the 2002 Act is, of course, that this discrete public interest must yield to more potent public interests in certain circumstances.

20. In section 117B (6), Parliament has prescribed three conditions, namely:

(a) the person concerned is not liable to deportation;

(b) such person has a genuine and subsisting parental relationship with a qualifying child, namely a person who is under the age of 18 and is a British citizen or has lived in the United Kingdom for a continuous period of seven years or more; and

(c) it would not be reasonable to expect the qualifying child to leave the United Kingdom.

Within this discrete regime, the statute proclaims unequivocally that where these three conditions are satisfied the public interest does not require the removal of the parent from the United Kingdom. Ambiguity there is none.

21. Giving effect to the analysis above, in our judgment the underlying Parliamentary intention is that where the three aforementioned conditions are satisfied the public interests identified in section 117B (1) – (3) do not apply.

22. It would further appear that the "*little weight*" provisions of section 117B (4) – (5) are of no application. If Parliament had been desirous of qualifying, or diluting, section 117B (6) by reference to either section 117B (4) or (5), it could have done so with ease. It has not done so. Fundamentally, there is no indication in the structure or language of Part 5A that in cases where, on the facts, section 117B (4) and/or (5) is engaged, the unambiguous proclamation in Section 117B (6) is in some way weakened or demoted. To this may be added the analysis in [18] - [21] above. Clearly, there is much to favour this construction. However, conscious of the limits of the judicial function, we decline to provide a definitive answer to this discrete question, for two reasons. First, we received no argument upon it. Second, it does not clearly fall within the grant of permission to appeal.

23. Similarly, the issue of the interplay between Section 117B (6) and the Immigration Rules does not arise directly in this appeal. In this context, we draw attention to the leading reported decision of the Upper Tribunal, Bossade (Sections 117A-D: Inter-relationship with Rules) [2015] UKUT 415 (IAC). In that case, the Upper Tribunal held that, ordinarily, a court or tribunal will first consider an appellant's Article 8 claim by reference to the Immigration Rules, the purpose of this exercise being to decide whether the relevant qualifying conditions are satisfied by the person concerned. This exercise is performed without reference to Part 5A. The latter regime is engaged directly only where the decision making process reaches the stage of concluding that the person does not satisfy the requirements of the Rules. Thereafter, in any consideration of the case outwith the framework of the Rules, and subject to the application of the Razgar tests, Part 5A will fall to be applied in the decision maker's determination of the proportionality question. It follows that in any case where the parent concerned is unable to satisfy the requirements of the Rules section 117B(6) may conceivably apply: all will depend on the facts as found by the tribunal.

24. We apply the analysis and conclusions above to the decision of the FtT in the following way:

(i) The FtT committed no error of law in giving no consideration to Part 5A of the 2002 Act in deciding whether the case of the second Appellant satisfied the requirements of the Rules.

(ii) The FtT committed no error of law in giving consideration to section 117B (6) of the 2002 Act in deciding whether the claims of the other four Appellants could succeed outwith the Article 8 regime of the Rules.

(iii) The FtT's application of Section 117B (6), which did not involve consideration of any of the other provisions of Section 117B, was similarly free of error.

(iv) Accordingly, the second ground of appeal fails.

Decision

25. For the reasons explained in [8] – [10] above, the first ground of appeal succeeds. Accordingly, we set aside the decision of the FtT. The decision will be remade in this forum.

Direction

26. The Appellant's bundle of evidence, indexed and paginated, will be lodged with the Upper Tribunal and served on the Secretary State by 08 January 2016 at latest.

Part 2: Remaking the FtT's Decision

27. We remind ourselves of the composition of the family unit and to reflect the passage of time, certain updated data. Mr Treebhawon ("*the father*")

is aged 45 years and has resided unlawfully in the United Kingdom during the past 13 years. The mother of their four children, from whom he is separated, has not formed part of the family unit since 2008, the separation having begun and progressed some years previously. There are four children of the family:

(i) The oldest child of the family, a girl now aged 18 years, has resided continuously in the United Kingdom during the past 9 years, having the status of unlawful overstayer during the bulk of this period.

(ii) The second and third children, twins now aged 16, have resided in the United Kingdom during the past six and a half years, unlawfully throughout.

(iii) The youngest child, now aged 13, has resided in the United Kingdom during the past five years, unlawfully during most of this period.

28. All five members of the family were born and reared in Mauritius, an island nation in the Indian Ocean which gained its independence from Britain in 1968 and is a member of the Commonwealth. It is a constitutional democracy. Its official languages, in sequence, are English and French, while Mauritian Creole is popularly spoken. It has a population of around 1.5 million. Since independence, Mauritius has progressed to a middle-income diversified economy based on tourism, textiles, sugar and financial services.

29. Mr Treebhawon, the father, had an active working career, both employed and self-employed, having previously studied to GCSE level, prior to departing Mauritius. Apart from GCSEs he has no special academic or vocational qualifications. While he has suffered ill health in the United Kingdom, he has been classed fit for work since 2013. The family has survived on publicly funded services (education *et al*) throughout their sojourn in the United Kingdom.

30. Mr Treebhawon has sole responsibility for his four children. The family previously resided in the two bedroom home owned by his mother (now aged 76) in Mauritius. She continues to live in the same accommodation, assisted by a nephew, one of four children of Mr Treebhawon's sister, all of them grown up and married. We find that this accommodation would be less than adequate by many standards if the family were to return to Mauritius. However, we further find as a probability that it would be available to them and they would resume living with the grandmother. The probability is that Mr Treebhawon would substitute for his nephew, a married man, who is providing some unspecified care to Mr Treebhawon's mother. There is nothing to suggest that Mr Treebhawon could not provide this service. Nor did any of the evidence hint that the current arrangement involving the nephew is designed to continue long term.

31. Inevitably, there is substantial evidential focus on the four children. This is encapsulated in the following passage in their father's witness statement:

> "*… My children have continuously attended school with an immaculate attendance record and have really flourished as young children. They receive excellent feedback from school and take part in many activities outside of school. My children have integrated into the United Kingdom society and community, they very much love the ties they have established within the United Kingdom and are very ambitious in respect of their future. I am proud to state that my children are all very intelligent and bright individuals. This is evident from the school reports, letters and certificates …. If given the opportunity, my children will take full advantage of their stay in the United Kingdom and have a valuable input into the United Kingdom community …*
>
> *I fear that should I have to return with my children then my children and I will have no future … This will greatly harm my children mentally, psychologically and emotionally as we all consider the United Kingdom to be our home …* [and] *… they may lose interest in education, in their future and their social wellbeing.*"

It is abundantly clear that the family has been surviving on very limited means in the United Kingdom. In one part of the evidence there is a reference to "*excruciating financial difficulties*". The survival and progress of the family are, in essence, due to a combination of publicly funded services, the determination and devotion of the father and the resilience of the children. The claims made in the father's witness statement about the integration, educational achievements and general progress of the four children are unremarkable, were largely unchallenged and are confirmed by the bundles of documentary evidence, which we have considered.

32. We have also considered a not insubstantial *tranche* of evidence relating to the quality of life which the family would be likely to experience upon return to Mauritius. Much of this evidence proved to be uncontentious and it is unnecessary to rehearse it in any detail. Our assessment of this is as follows. In short, Mauritius has a functioning welfare benefits system. The benefits available include housing aid, social aid and unemployment benefit. There is state funded free education. There is a state funded health care system. Furthermore, there is a social housing programme. Much of this is summarised in a report adduced in evidence by the Appellants, thus:

> "*Mauritius is a free and democratic country and it inherited its system of Welfare State from the British. Everybody is entitled to free health care, free education up to university level in some cases and social security benefits to all who are eligible under the relevant legislation ….*

Mr Treebhawon would be entitled to claim Disability Allowance if it is confirmed by the Medical Board that his physical ability to undertake employment is not possible and his degree of disability is over 60%. He is also likely to be entitled to claim Social Aid but he cannot claim disability benefit and Social Aid currently ….

Social Aid … is payable only where the income of a head of a household is not enough to meet the basic requirements of the members of the household … [and] *… is payable to the poorer section of the population where the persons concerned are unable to earn a living …* [and] *… to abandoned spouses especially with dependent children.*"

The evidence also points to the likelihood that Mr Treebhawon would qualify for unemployment benefit.

33. In addition to the above, we make the following evaluative predictions about the <u>probable</u> future for the family in the event of returning to Mauritius at this stage of their lives. First, the children will be educated. While adaptation and integration will not be immediate or initially comfortable, there are no indications that these will not be achievable. Second, all family members will be returning as nationals to their country of birth in which they were previously integrated in all material respects. While reintegration will not be immediate or initially comfortable, there are no indications that it will not be attainable, particularly having regard to the children's linguistic abilities, and evident capacity for any further necessary learning in this respect and their resilience noted above.

34. Should they return to Mauritius life will, in general, be less comfortable and, initially, less enjoyable for the entire family. Mauritius and England, while having much in common, unsurprising given the island's history, are not <u>directly</u> comparable. The panel is under no illusions: the family's likely accommodation will be unsatisfactory, there will be no adult support other than that provided by the father and the family will struggle financially. However, albeit in a different environment and context, this, with certain adjustments, has been the reality of their lives in the United Kingdom. The educational achievements of the children in England augur well for their academic progress in Mauritius, the children are clearly resilient young people and the benefits of their English education will not be lost to them. Furthermore, certain State benefits and services will, in principle, be available to them.

35. At this juncture we turn our attention to the legal rules to be applied. It is common case that none of the children's cases falls within the Secretary of State's policies expressed in the leave to remain provisions of the Immigration Rules ("*the Rules*"). Their cases cannot satisfy the Rules. The proposition that the impugned decisions of the Secretary of State interfere with, substantially so, the private lives of all of the Appellants is incontestable. The legal question, in a nutshell, is whether such

interference ranks as a disproportionate means of furthering the overarching public interest in play, namely the maintenance of firm immigration control. This public interest has, since 2014, had the imprimatur and weight of parliamentary endorsement via section 117B (1) of the Nationality, Immigration and Asylum Act 2002 ("*the 2002 Act*"). This is not, however, the only public interest engaged in this appeal. Section 117B (3) provides:

> "*It is in the public interest, and in particular in the interests of the economic wellbeing 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.*"

We shall return to these public interests *infra.*

36. Mr Treebhawon is the only member of the family whose case might conceivably satisfy one of the Secretary of State's Article 8 ECHR private life policies as expressed in the Rules. This is so by virtue of paragraph 276ADE(1)(vi), which provides in material part:

> *"The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of the application, the applicant …*
>
> *has lived continuously in the UK for less than twenty years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK".*

The question is whether there would be "*very significant obstacles*" to his reintegration in Mauritius: see paragraph 276 ADE(1)(vi) of the Rules. Being housed in the Rules, it ranks as a statement of the Secretary of State's policy, to be contrasted with a legal Rule. Tribunals are enjoined to give considerable weight to such policy statements: Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 at [46].

37. The two limbs of the test to be addressed are *"integration"* and *"very significant obstacles"*. In Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813, the Court of Appeal held that "*integration*" in this context is a broad concept. See [14]:

> "*It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a Court or Tribunal simply to direct itself in the terms*

that Parliament has chosen to use. The idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day to day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life".

The other limb of the test, "*very significant obstacles*", erects a self-evidently elevated threshold, such that mere hardship, mere difficulty, mere hurdles and mere upheaval or inconvenience, even where multiplied, will generally be insufficient in this context. The philosophy and reasoning, with appropriate adjustments, of this Tribunal in its exposition of the sister test "unduly harsh" in MK (Sierra Leone) [2015] UKUT 223 at [46] apply.

38. The finding that Mr Treebhawon's case does not satisfy the test enshrined in paragraph 276ADE(1)(vi) of the Rules is readily made. If required to leave the United Kingdom, his future will lie in the country of his birth where he has spent most of his life (33 of his 46 years). He is an educated, evidently intelligent man with a command of all of the languages commonly used in Mauritius. He is plainly familiar with the culture of the country. There is no apparent reason why he will be unable to renew certain relationships and friendships and develop others. He has overcome ill health and is now fit for work, albeit we accept that finding employment will not be easy. He has maintained some contact with his mother and sister and we refer to our finding above that, as a matter of probability, he and his children will return to the mother's home where they lived previously. In sum, the "very significant obstacles" test is not satisfied by some measure. It follows that no error of law has been committed on behalf of the Secretary of State in failing to find that Mr Treebhawon's case satisfies this (or any) provision of the Rules.

39. The second legal test in play is to be applied to all five Appellants. In undertaking our search for this test, it is no exaggeration to observe that there is a proliferation of decisions of the Court of Appeal addressing the Article 8 test to be applied in the specific context of the deportation of foreign national offenders. These decisions begin with MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192, at [42] where, in a deportation context, the court formulated the test that where removal from the United Kingdom is resisted under Article 8 ECHR, outwith the Rules regime -

> "*.. something very compelling … is required to outweigh the public interest in removal.*"

Further citation of authority in this context is otiose.

40. Before continuing the search for the governing principle in non – deportation cases, we consider it important to highlight a particular imperative. The fundamental importance of identifying the characteristics and conduct of the person against whom removal or deportation action is proposed courses through the veins of Part 5A of the 2002 Act and the growing jurisprudence in this field. It is one of the themes of the decision in Hesham Ali (*supra*), where, in [46], one finds an important distinction between foreign national offenders who have been punished by a custodial sentence of four years or more and those whose sentences belong to the bracket of twelve months to four years:

> *"A custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender's deportation almost always outweighs countervailing considerations of private or family life .... Great weight should generally be given to the public interest in the deportation of a foreign offender who has received a custodial sentence of more than twelve months ... ".*

We discern a nuanced difference between these two public interest propositions. This differential approach is unsurprising, given the unequivocal statement in Part 5A of the 2002 Act, in section 117C (2), that the public interest is greater in the cases of those who have committed more serious offences. We further draw attention to the unambiguous statement of principle in Part 1 of this judgment: see [19] above. All of this is traceable to the distinct categories of foreign national offender recognised by Parliament in the UK Borders Act (ss 32 – 33).

41. With the benefit of the above preface we resume the task of identifying the correct legal test to be applied in a context such as the present, where there is no element of criminality or deportation. Since 28 July 2014, the operative date of category Part 5A of the 2002 Act, the substantial jurisprudence which has developed both in this chamber and the Court of Appeal, has focussed mainly on cases involving the deportation of foreign national offenders. Cases belonging to the present stable have been somewhat eclipsed. In this context, it is of no little significance that in Part 5A of the 2002 Act Parliament has singled out foreign national offenders for special attention and treatment. There are "additional" considerations in their cases: per section 117A(2)(b). In very brief compass, the hurdles in the way of foreign criminals who seek to resist deportation by invoking Article 8 ECHR are greater: they find themselves within a heavily circumscribed statutory regime containing elevated tests. Furthermore, in their cases the additional, freestanding public interest underpinning the deportation of foreign criminals is engaged, per section 117C (1).

42. Those who adjudicate, practise, teach and study in this field may struggle to find a clear formulation of the Article 8 test applicable in a case such as this. First, the test is nowhere to be found in Part 5A of the 2002 Act – although certain indicators and guides can be identified. Second, the domination of cases involving foreign national offenders in the

jurisprudence of the Court of Appeal has rather eclipsed the illegal entrant or unlawful overstayer who has been convicted of no offence.

43. There is a brief passage in Haleemudeen v SSHD [2014] EWCA Civ 558 at [44] suggestive of a test of "compelling circumstances", though not decisively so. This *lacuna* in the jurisprudence of the Court of Appeal has, very recently, been addressed in Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803. In this decision one finds clear recognition of the imperative highlighted above, namely the importance of identifying clearly the characteristics and conduct of the person against whom removal or deportation action is proposed.

44. Rhuppiah is the most recent notable contribution to a series of decisions of this chamber and the Court of Appeal addressing the novel and challenging provisions of Part 5A of the 2002 Act. It is essential to reproduce two important passages in full, given the present context. First, in [53] Sales LJ states:

> *"Reading section 117A(2)(a) in conjunction with section 117B(5) produces this: "In considering the public interest question, the court or tribunal must have regard to the consideration that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious". That is a normative statement which is less definitive than those given by the other sub-sections in section 117B and section 117C. Although a court or tribunal should have regard to the consideration that little weight should be given to private life established in such circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question, where it is not appropriate in Article 8 terms to attach only little weight to private life. That is to say, for a case falling within section 117B(5) little weight should be given to private life established in the circumstances specified, but that approach may be overridden where the private life in question has a special and compelling character. Such an interpretation is also necessary to prevent section 117B(5) being applied in a manner which would produce results in some cases which would be incompatible with Article 8, i.e. is necessary to give proper effect to Parliament's intention in Part 5A; and a similar interpretation of section 117B(4) is required, for same reasons".*

Sales LJ continues at [54]:

> *"In my view, reading section 117A(2) and section 117B(5) together in this way, as is appropriate, means that considerable weight should be given to Parliament's statement in section 117B(5) regarding the approach which should normally be adopted. In order to identify an exceptional case in which a departure from that approach would be justified, compelling reasons would have to be shown why it was not appropriate. That is a significantly higher threshold than was urged*

upon us by Mr Southey by reference to the London Oratory School case. There is a considerable difference between a statement by Parliament itself as to what the usual approach should be and the Diocesan guidance at issue in that case. The threshold to displace the ordinary rule in section 117B(5) in the present context cannot be less than that to justify a decision not to follow statutory guidance as in the Munjaz case. Identification of the test as one of compelling circumstances differentiates the position in an appropriate way from that applicable in relation to foreign criminals, in relation to which a test of "very compelling circumstances" applies".

Here one finds the clearest statement in the Court of Appeal jurisprudence that the test to be applied in Article 8 private life cases not involving foreign national offenders is that of compelling circumstances.

45. Certain observations are apposite. First (and importantly in the present context), Parliament has chosen to devise distinct regimes for foreign offenders (on the one hand) and illegal entrants and unlawful overstayers (on the other). Moreover, the public interest engaged in the deportation of foreign national offenders is a variable, depending upon the individual case. Second, the recently promulgated decision of this chamber in Kaur (children's best interests/public interest interfaces) [2017] UKUT 00014 (IAC) contains, at [22] – [24], a thesis on the words "*little weight*" and the notional sliding scale which they entail. Kaur reasons that this produces the result that in some cases a private life developed during a period of unlawful or precarious leave in the United Kingdom may qualify for virtually no weight, whereas in others the quantity of weight to be attributed may verge on the notionally moderate where the assessment is that the particular case, with its individual traits and circumstances, belongs to the upper end of the "*little weight*" spectrum. We consider this complementary to, and not in conflict with, the 'little weight flexibility' approach espoused in Rhuppiah.

46. Ultimately, having regard to orthodox doctrine, the regime introduced by Part 5A of the 2002 Act is to be construed and applied in a manner which makes it sensible, intelligible and workable. As this Tribunal has observed previously, its structure and contents are, in certain respects, not altogether clear: see for example Deelah and Others [2015] UKUT 515 (IAC) at [19] – [22]. However, broadly, and as the decided cases since July 2014 have demonstrated, this discrete statutory regime can be made to work in a manner that is faithful to the discernible parliamentary purpose

47. We return to the question posed above: what is the legal test to be applied in a case such as the present? The answer, which we deduce from a combination of the governing statutory provisions and, in particular, the decision in Rhuppiah, is that these Appellants must demonstrate a compelling (not very compelling) case in order to displace the public interests inclining towards their removal from the United Kingdom. In formulating this principle, we do not overlook the question of whether the adverb "very" in truth adds anything to the adjective "compelling", given

that the latter partakes of an absolute flavour. It seems to us that the judicially formulated test of "very compelling circumstances" has been driven by the aim of placing emphasis on the especially elevated threshold which must be overcome by foreign national offenders, particularly those convicted of the more serious crimes, who seek to displace the potent public interests favouring their deportation. In contrast, immigrants such as these Appellants confront a less daunting threshold.

Conclusion

48. We apply the governing legal test, as formulated above, to the salient facts and considerations characterising these appeals. In doing so, we would observe that this is not a judicial fact finding exercise. It is, rather, an exercise of evaluative judgement and assessment, to be undertaken on the basis of and by reference to material facts found and material facts that are uncontentious. We undertake this exercise on the basis that these appeals have been presented as, fundamentally, Article 8 private life cases. We concur with this approach. The family life which all five Appellants have enjoyed together for so many years is capable of being maintained: above all, the effect of the impugned decisions of the Secretary of State is to leave the family unit intact. Accordingly, on this dimension of Article 8, the threshold of interference is not overcome.

49. We give effect to section 117B of the 2002 Act in the following way:

(a) The starting point is that the maintenance of effective immigration controls is in the public interest.

(b) There is no dispute about the English language abilities of any of the Appellants.

(c) The Appellants are plainly not financially independent and owe much of their survival and progress in the United Kingdom to reliance on publicly funded services.

(d) Given the nature of their status in the United Kingdom throughout their combined sojourns, the private lives which they have developed qualify for the attribution of little weight only. The case has not been made that any of their private lives is of a special or compelling character: and there is no evidence which would warrant this conclusion in any event.

50. Next, we are mandated by section 55 of the Borders, Citizenship and Immigration Act 2009 to give primacy to the best interests of the third, fourth and fifth Appellants as all are children. We consider that the best interests of these children will primarily be served by the maintenance of the family unit: as already noted, this will predictably occur. The second dimension of these three Appellants' best interests is that, on balance, they would be better off in certain respects, in particular economically, if

the family were to remain in the United Kingdom. This we must take into account in the balancing exercise as a primary consideration.

51. Our balancing of the salient features of the Appellants' cases with the public interests engaged, all as set forth above, yields the conclusion that the public interests must prevail. The Appellants' cases, in combination, unquestionably possess a certain appeal and various attractions. No reasonable or humane court or tribunal could, in our judgement, consider otherwise. Furthermore, we must accord a primacy of importance to that aspect of the third to fifth Appellants' best interests identified above. However, we consider that the effect of contemporary immigration law is that this superficially seductive case falls short, measurably so, of overcoming the threshold necessary to demonstrate a disproportionate interference with private life rights under Article 8 ECHR. The most sympathetic view of the Appellants' combined cases – which we have adopted – does not warrant any different conclusion in law. While we are mindful that the Article 8 private life claim of each of these Appellants has its distinctive personal features, given their different ages and circumstances, we find nothing to warrant a different conclusion in respect of any of the Appellants individually.

Decision

52. We remake the decision of the FtT by dismissing the Appellants' appeals. While as human beings we reach this conclusion without enthusiasm, as judges we do so without any real hesitation.

53. While the Tribunal is not required to determine the discrete issue of whether it would be disproportionate to require the removal of the four children concerned from the United Kingdom in the middle of the school year, we consider it appropriate to add that any argument to this effect would be a powerful one. The doctrine of proportionality has much in common with what is humane, sensible, measured and reasonable. It would be, as a minimum, surprising if the Secretary of State were to insist on the removal of this family from the United Kingdom prior to the end of the current academic year. Furthermore, such action would, predictably, generate further legal challenge with resulting – and pre–eminently avoidable - delay, expense and uncertainly to all concerned.

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

Dates: 07 November 2015 [Part 1]

22 December 2016
[Part 2]