Michaelmas Term
[2018] UKSC 58
On appeal from: [2016] EWCA Civ 803

JUDGMENT

Rhuppiah (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Wilson
Lord Carnwath
Lord Hughes
Lady Black
Lord Lloyd-Jones

JUDGMENT GIVEN ON

14 November 2018

Heard on 10 July 2018

Appellant	*Respondent*
Hugh Southey QC David Sellwood (Instructed by Wilson Solicitors LLP)	Lisa Giovannetti QC Andrew Byass (Instructed by The Government Legal Department)

LORD WILSON: (with whom Lord Carnwath, Lord Hughes, Lady Black and Lord Lloyd-Jones agree)

The Primary Question

1. The Home Secretary determines to exercise his power to remove a foreign national from the UK. The foreign national contends that the determination is unlawful on the ground that her removal would violate her right to respect for her private life under article 8 of the European Convention on Human Rights and section 6(1) of the Human Rights Act 1998 ("the 1998 Act"). Section 117B(5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") provides that little weight should be given to a private life which she established at a time when her immigration status was "precarious". What does the word "precarious" mean in this context? This is the primary question posed by the present appeal.

Introduction

2. The foreign national is Ms Rhuppiah. On 22 August 2014, in the First-tier Tribunal, First-tier Tribunal Judge Blundell (to whom I will refer as Judge Blundell) reluctantly dismissed her challenge under article 8 to the Home Secretary's determination, dated 6 June 2013, to remove her from the UK. Judge Blundell concluded that her private life in the UK had been established at a time when her immigration status had been precarious within the meaning of section 117B(5), which had come into force less than a month earlier; and he considered himself in effect bound by the subsection to dismiss her appeal against the determination. Her further appeals to the Upper Tribunal and then to the Court of Appeal both failed. By its decision dated 2 August 2016, [2016] EWCA Civ 803, [2016] 1 WLR 4203, the Court of Appeal (Sales LJ, who gave the substantive judgment, and Moore-Bick LJ and Sir Stephen Richards, who agreed with it) upheld Judge Blundell's conclusion that the establishment of Ms Rhuppiah's private life in the UK had occurred at a time when her immigration status had been precarious. Now she appeals against the decision of the Court of Appeal. Within the well-known structure of article 8, the primary question arises as part of the inquiry into whether the proposed interference with Ms Rhuppiah's private life in the UK is proportionate. Therefore, in determining this appeal, this court, like the Upper Tribunal and the Court of Appeal, must ask itself whether Judge Blundell was *wrong* to hold that at the relevant time her immigration status had been precarious: see the judgment of Lord Carnwath in *R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47, [2018] 1 WLR 4079, paras 53 to 64.

3. As it happens, Ms Rhuppiah's appeal has recently become academic. This occurred on 9 February 2018; and explanation of it requires reference to the Immigration Rules HC 395 ("the rules").

4. The Home Secretary has set out in the rules, indorsed by Parliament, the provisions which, in his opinion reflective of his policy, should in principle govern his determination of claims to resist removal from the UK on the part of those in breach of immigration laws by reference to their right to respect for their private or family life under article 8. He recognises, however, that his obligation under section 6 of the 1998 Act, like that of a court hearing an appeal against his determination when based on article 8, is to act compatibly with rights under article 8 and that such compatibility may not always coincide with compatibility with his rules. So, like the courts, the Home Secretary has to allow for the possibility that a person may be entitled to resist removal under article 8 even when he or she cannot do so under the rules. But article 8 itself, as interpreted by the European Court of Human Rights ("the ECtHR"), confers upon the relevant policy-maker, who in the UK is the Home Secretary, a limited discretion in relation to the determination of claims made under it. So, when a person claims to resist removal by reference to article 8 outside the rules, the Home Secretary is entitled, and a court hearing an appeal against his determination is required, to weigh in the balance against the claim the fact that it could not have succeeded under the rules: see the judgment of Lord Reed in *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11, [2017] 1 WLR 823, at paras 46 and 47.

5. In these proceedings Ms Rhuppiah has been resisting removal by reference to article 8 outside the rules. What happened on 9 February 2018 was that the Home Secretary decided that she had recently become able to resist removal by reference to article 8 under the rules. As I will explain, Ms Rhuppiah entered the UK on 16 September 1997 and has lived here continuously ever since. Paragraph 276ADE(1) of the rules specifies the requirements to be met by an applicant for leave to remain in the UK on the ground of private life in the UK; and they include, at (iii), that he or she has lived continuously in the UK for at least 20 years. It follows that on 16 September 2017 Ms Rhuppiah began to satisfy the requirement at (iii); she also satisfied the other requirements. Paragraph 276BE(1) provides that, if the requirements of para 276ADE(1) are satisfied, the Home Secretary may grant leave to remain in the UK for up to 30 months; and para 276DE provides that, if an applicant has remained in the UK with continuous leave on the ground of private life for at least ten years, he or she may be granted indefinite leave to remain.

6. Thus it was that by letter dated 9 February 2018, the heading of which referred to Private Life Rules, the Home Secretary (to whom, for convenience, I will throughout refer as male) informed Ms Rhuppiah that he had granted her leave to remain in the UK for 30 months; that she could apply for further limited leave prior to the end of that period; and that, in the event that she were to complete at least ten

years of continuous residence pursuant to leave to remain on the ground of her private life, she might then be eligible for a grant of indefinite leave to remain in the UK.

7. The result is that the Home Secretary then granted to Ms Rhuppiah all that she could have hoped to achieve in the present proceedings. Thought then turned to the utility of any further prosecution of the present appeal. In the event the court agreed with the parties that the appeal should proceed. The court agreed that it was of general importance for it to offer a definitive interpretation of the word "precarious" in section 117B(5) of the 2002 Act. It is also now clear, as both parties agree, that in any event the First-tier Tribunal (and indeed the Court of Appeal) fell into error in a different respect and that, irrespective of whether it was material, the error requires to be rectified: see paras 51 to 57 below.

8. So the appeal has proceeded. Were this court to conclude that the First-tier Tribunal had been wrong in a material respect to dismiss Ms Rhuppiah's appeal against the Home Secretary's determination dated 6 June 2013, it would allow her appeal in the normal way and set aside the tribunal's order. That would render Ms Rhuppiah's appeal against it undecided. But there is now no need for it to be decided. So the court would not remit it to the tribunal for fresh determination.

The Facts

9. The relevant facts can be taken from a determination of conspicuous clarity and sensitivity made by Judge Blundell following a substantial oral hearing.

10. Ms Rhuppiah is a Tanzanian national, now aged 45. She lived in Tanzania until 1997, when she entered the UK with leave to reside here as a student for three months. Her mother and one of her brothers still reside in Tanzania. Her father works for the UN in Sudan and regularly sends money to the UK for her support. Her other brother lives in Basingstoke; and he has a daughter, aged nine, with whom she is on close terms. There would, however, be no significant obstacle to the re-integration of Ms Rhuppiah into society in Tanzania.

11. The Home Secretary granted further leave to Ms Rhuppiah to reside in the UK as a student on no less than 12 occasions. The final grant expired on 30 November 2009. But six of these further grants were made pursuant to applications made after the previous leave had expired. Responsibility for the delay usually lay with the college to which Ms Rhuppiah had entrusted the task of making the applications on her behalf.

12. In making her applications for further leave to reside in the UK as a student, Ms Rhuppiah was required to demonstrate an intention to leave the UK at the end of her studies. On each occasion she did so to the satisfaction of the Home Secretary. In cross-examination before the tribunal she accepted that she always expected to be required to leave the UK at some point.

13. As a result of her extensive studies in the UK, Ms Rhuppiah, who speaks English fluently, gained a variety of qualifications in business studies and associated fields.

14. In November 2009, at the time of the expiry of the final grant of leave, Ms Rhuppiah applied for indefinite leave to remain in the UK on the ground of continuous lawful residence in the UK for at least ten years pursuant to what was then para 276B(i)(a) of the rules. The trouble was that her continuous residence had not always been lawful. The Home Secretary refused her application and the First-tier Tribunal dismissed her appeal against the refusal. When, on 11 October 2010, the Upper Tribunal refused to grant her leave to appeal against the dismissal, Ms Rhuppiah became an unlawful overstayer in the UK. Judge Blundell observed that, had it not been for the ineptitude of her college in failing to make timely applications for further leave on her behalf, her application for indefinite leave to remain would probably have succeeded.

15. Ms Rhuppiah's next attempt to apply for indefinite leave to remain in the UK met further ill-fortune. On 1 July 2012 she applied on the ground of continuous residence in the UK (whether or not lawful) for at least 14 years pursuant to what was then para 276B(i)(b) of the rules. But she applied on the wrong form and enclosed an insufficient fee. So on 12 July her application was returned to her. On 24 July she re-applied. But by then, namely on 9 July, the rules had been amended so as to delete para 276B(i)(b) (Statement of Changes in Immigration Rules HC 194). Judge Blundell observed that Ms Rhuppiah was justified in feeling cheated but he correctly held that a "near miss" was irrelevant. He cited *Patel v Secretary of State for the Home Department* [2013] UKSC 72, [2014] AC 651, in which, at para 53, Lord Carnwath cited with approval an observation that a miss was as good as a mile.

16. When, belatedly, the Home Secretary addressed Ms Rhuppiah's re-application dated 24 July 2012, he inevitably determined that it could not succeed under the rules. He proceeded to consider whether it should succeed on a basis outside the rules, by reference to her right to respect for her private life under article 8. His determination on that basis was also negative; and such has been the basis on which in these proceedings she has challenged the lawfulness of his determination to remove her from the UK.

17. There is a striking feature of the private life established by Ms Rhuppiah in the UK. It concerns her friendship with Ms Charles. She lives in the home of Ms Charles, which is, or was at the time of their oral evidence to Judge Blundell, in London. Ms Charles is highly qualified in the field of IT and works as a systems engineer for Ministry of Defence projects and often in Bristol. Ms Rhuppiah met Ms Charles when they were studying at the same college and they have resided together since 2001. But it is not suggested - and there is no need to consider whether it might have been suggested - that Ms Rhuppiah pursues "family life" with Ms Charles within the meaning of article 8.

18. Ms Charles suffers from ulcerative colitis, a gravely debilitating condition. She suffers frequent symptoms of diarrhoea, nausea, inability to eat, anaemia, fatigue, joint pain and reduced mobility. She has had multiple admissions to hospital. She is heavily dependent on Ms Rhuppiah both physically and emotionally. Ms Rhuppiah cooks such food as Ms Charles can eat and accompanies her to Bristol, to hospital and in effect everywhere. Ms Charles has ceded control of her financial affairs to her. Instead of paying her for looking after her in these respects, Ms Charles provides her with largely free board and lodging.

19. Judge Blundell found that Ms Rhuppiah, who is a Seventh Day Adventist, cares for Ms Charles out of friendship, faith and habit. He found that, were Ms Rhuppiah to leave the UK, Ms Charles would have to turn to the state to meet her need for care; that her physical health and her ability to continue to work in Bristol would be compromised, at least in the short term; and that her life would be turned upside down.

Sections 117A and 117B

20. Section 117B(5) falls within Part 5A of the 2002 Act, which was inserted into it, with effect from 28 July 2014, by section 19 of the Immigration Act 2014. Part 5A is headed "Article 8 of the ECHR: Public Interest Considerations". Unfortunately it is necessary to set out a substantial amount of Part 5A, as follows:

> "117A Application of this Part
>
> > (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts -
> >
> > > (a) breaches a person's right to respect for private and family life under article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard -

(a) in all cases, to the considerations listed in section 117B …

(3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English -

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons -

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to -

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) …"

21. It will be seen that the considerations in each of the first five subsections of section 117B are all entitled "public interest considerations". On any view the considerations in the first three subsections relate to the public interest in the removal of a person present in the UK contrary to immigration law. At first sight, however, one might consider that the considerations in the fourth and fifth subsections relate to the strength of the case which might weigh against that public interest. The explanation for their inclusion as public interest considerations lies in the wide definition of "the public interest question" set out in section 117A(3) above. See *Deelah (section 117B - ambit)* [2015] UKUT 00515 (IAC), paras 18 and 21.

22. Section 117B(4) is not engaged in the present case: it is agreed that Ms Rhuppiah established her relevant private life in the UK, in particular her role in caring for Ms Charles, long before 2010 and at a time when her presence here was predominantly lawful. Nevertheless it may be helpful to note the reference to a "qualifying partner" in section 117B(4)(b) and to glance at the definition of that phrase in section 117D(1). It means a partner who is a British citizen or "who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 - see section 33(2A) of that Act)". Section 33(2A) defines a person as settled in the UK if he is "ordinarily resident there without being subject under the immigration laws to any restriction on the period for which he may remain". Insofar as the court's inquiry into the meaning of a precarious status in section 117B(5) may be seen in what follows to require contrast with the meaning of a settled status, it may be

helpful to bear in mind the definition of the word "settled" brought by section 117D(1) into the 2002 Act itself.

23. At last this judgment can proceed to address the primary question, namely the meaning of the word "precarious" in section 117B(5).

Section 117B(5)

24. Ms Rhuppiah accepts that a person's immigration status in the UK can be precarious when he or she is lawfully present in the UK; otherwise subsection (5) of section 117B would add nothing to subsection (4). She suggests that, for example, asylum-seekers pending determination of their applications and lawful visitors to the UK probably have a precarious immigration status. But she contrasts their situation with that of persons who, albeit with a right to remain which is time-limited, have a reasonable hope of permanent settlement in the UK or who (as is suggested by Richard Warren, "Private life in the balance: constructing the precarious migrant", Journal of Immigration, Asylum and Nationality Law (2016) 124, 130) are on a potential path to settlement. She contends that, with the grant to her of long periods of leave to reside as a student, she fell into the latter category. Hope that circumstances might change to enable her to continue to live in the UK did not, says Ms Rhuppiah, invalidate her intention, when seeking extensions of her visa, to depart from the UK at the end of her studies. That a potential path to settlement was open to her is, she contends, made clear by the fact that she came close to securing it both in 2010 and in 2012.

25. The Court of Appeal rejected Ms Rhuppiah's argument, along the lines of the above, that her immigration status prior to 2010 was not precarious. But, when it turned to the Home Secretary's contrary argument, which was and is that all leave short of indefinite leave to remain in the UK gives rise to a precarious status, the court expressed provisional doubt. Sales LJ said at para 44:

> "There is a very wide range of cases in which some form of leave to remain short of ILR may have been granted, and the word 'precarious' seems to me to convey a more evaluative concept, the opposite of the idea that a person could be regarded as a settled migrant for article 8 purposes, which is to be applied having regard to the overall circumstances in which an immigrant finds himself in the host country. Some immigrants with leave to remain falling short of ILR could be regarded as being very settled indeed and as having an immigration status which is not properly to be described as 'precarious'."

26. Such being the parameters of the issue surrounding the primary question, we must seek guidance in authority, first that of the ECtHR.

27. It was in its admissibility decision in *Mitchell v United Kingdom*, (Application No 40447/98) 24 November 1998, that the ECtHR appears first to have used the word "precarious" in the context of an application under article 8. It rejected, as manifestly ill-founded, a British citizen's application that her husband's deportation to Jamaica had violated her right to respect for her family life. Her husband had been admitted to the UK as a visitor for six months; and for the following five years, in the course of which the applicant had married him, he had remained in the UK unlawfully. The court said, at p 4:

> "An important though not decisive consideration will also be whether the marriage … was contracted at a time when the parties were aware that the immigration status of one of them was such that the persistence of the marriage within the host state would from the outset be precarious. The court considers that where this is a relevant consideration it is likely only to be in the most exceptional circumstances that the removal of the non-national spouse will constitute a violation of article 8 …"

28. In its numerous subsequent reiterations of the consideration identified in the *Mitchell* case the ECtHR has adapted it so as to extend to cases in which the context of the alleged family life was not a marriage. So the question became whether *family life* was *created* at a time when the parties were aware that the immigration status of one of them was such that the persistence of *family life* within the host state would from the outset be precarious: see, for example, *Rodrigues da Silva, Hoogkamer v Netherlands* (2007) 44 EHRR 34, para 39. In that case a mother and her young daughter relied on their family life together. At all times the mother's stay in the Netherlands had been unlawful and she had given birth to the daughter there. It is implicit in the court's judgment that the persistence of their family life in the Netherlands was therefore known to be precarious and that it was only by virtue of exceptional circumstances that the court held article 8 to have been violated.

29. In what circumstances beyond those in which a participant in the family life was known to be present in the state unlawfully, would its persistence there be precarious?

30. In its admissibility decision in *Useinov v Netherlands* (Application No 61292/00) 11 April 2006, the ECtHR said, at p 9:

> "… it is the applicant's submission that he was allowed to live in the Netherlands pending the proceedings on his asylum application and his subsequent application for a residence permit for compelling reasons of a humanitarian nature, ie a total period of just over five years. However, the court is of the view that this cannot be equated with lawful stay where the authorities explicitly grant an alien permission to settle in their country. Therefore, the applicant's stay in the Netherlands was precarious for most of it, and illegal for the remainder."

The court proceeded to hold, in apparent reference to the discussion in the *Mitchell* case, that there were no exceptional circumstances giving rise to a violation.

31. The final sentence of the above passage in the *Useinov* case presents a slight complication in that it pitches the word "precarious" into a slightly different context from that in which it had been placed in the *Mitchell* case, from which the court had just quoted. For in the final sentence the court analysed whether the *applicant's stay* had been precarious, not whether the *persistence of family life* there had been known to be precarious. In that slightly different context it distinguished between a precarious stay, permitted by the state but only pending its determination of outstanding applications, and an illegal stay. Had the court instead asked whether the persistence of family life had been known to be precarious, it would surely have answered affirmatively in relation both to the precarious and to the illegal periods of the applicant's stay.

32. The more useful part of the above passage is in the distinction drawn between permission to stay pending determination of applications, which makes persistence of family life during that period precarious, and permission to "settle", which (by implication) does not do so. The distinction was reaffirmed in *Nnyanzi v United Kingdom* (2008) 47 EHRR 18, para 76.

33. The case of *Butt v Norway* (Application No 47017/09) 4 December 2012, sheds further light on the circumstances in which the persistence of family life would be precarious. The family life of the applicant siblings in Norway had been created at a time when, with their mother, they had been granted a settlement permit which was later withdrawn because the mother had obtained it by the provision of false information. The court held at para 79 that, to the mother's knowledge, the persistence of their family life was precarious but at para 90 that there were exceptional circumstances which gave rise to a violation.

34. But the most helpful decision of the ECtHR on this topic is that of the Grand Chamber in *Jeunesse v Netherlands* (2015) 60 EHRR 17. The applicant's husband

and their three children were Dutch nationals. But her family life with them in Holland was created at a time when, as a national of Suriname, her right to reside in Holland was no more than tolerated by the state pending its protracted determination of her various applications for residence permits and of her consequential appeals. The court held that, to her knowledge, the persistence of their family life there was precarious. In para 102 it echoed the contrast drawn in the *Useinov* and *Nnyanzi* cases with a grant of permission to settle. In para 104 it proceeded as follows:

> "The instant case may be distinguished from cases concerning 'settled migrants' as this notion has been used in the court's case law, namely, persons who have already been granted formally a right of residence in a host country. A subsequent withdrawal of that right, for instance because the person concerned has been convicted of a criminal offence, will constitute an interference with his or her right to respect for private and/or family life …"

The significance of the passage mainly lies in the word "withdrawal", which sheds light on the nature of the right of residence which the Grand Chamber had in mind. For, as Sales LJ himself suggested in para 39 of his judgment, a right of residence which can be withdrawn, for instance because of a criminal conviction, is, in particular, a right of residence pursuant to indefinite leave to remain.

35. In relation to applications under article 8 arising prior to the introduction of section 117B(5), both the Home Secretary, in his Instructions to case-workers, and the courts of England and Wales duly sought to take into account the consideration identified by the ECtHR in the *Mitchell* case and later adapted. For example in *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin) Sales J rejected the applicant's challenge to the lawfulness of a determination to remove him to India on the basis that persistence of his family life in the UK with his cohabitant had from the outset been precarious. In fact at all material times the applicant had been in the UK unlawfully; so the basis for the judge's decision was obvious and he was not required precisely to discern the boundary between when persistence of family life was and was not precarious. In the *Agyarko* case, cited in para 4 above, the appellants had also formed the relevant relationships while they had been unlawfully in the UK. But it is worthwhile to note the way in which Lord Reed expressed himself in a judgment with which the other members of the court agreed. Having in para 49 addressed the *Jeunesse* case, he suggested in para 51 (and in effect repeated in para 54) that persistence of family life would be precarious if created when an applicant was in the UK unlawfully or was "entitled to remain in the UK only temporarily".

36. In para 45 of his judgment in the present case Sales LJ recorded that it was

> "… common ground that the starting point for consideration of the proper construction of Part 5A of the 2002 Act is that sections 117A-117D … are intended to provide for a structured approach to the application of article 8 which produces in all cases a final result which is compatible with, and not in violation of, article 8."

This remains common ground; and it is clearly correct. But, insofar as the legislation is intended in all cases to produce a result compatible with the article, we will need to find somewhere within it provision for a degree, no doubt limited, of flexibility.

37. It is obvious that Parliament has imported the word "precarious" in section 117B(5) from the jurisprudence of the ECtHR to which I have referred. But in the subsection it has applied the word to circumstances different from those to which the ECtHR has applied it. In particular Parliament has deliberately applied the subsection to consideration only of an applicant's private life, rather than also of his family life which has been the predominant focus in the ECtHR of the consideration identified in the *Mitchell* case. The different focus of the subsection has required Parliament to adjust the formulation adopted in the ECtHR. Instead of inquiry into whether the persistence of family life was precarious, the inquiry mandated by the subsection is whether the applicant's immigration status was precarious. And, because the focus is upon the applicant personally and because, perhaps unlike other family members, he or she should on any view be aware of the effect of his or her own immigration status, the subsection does not repeat the explicit need for awareness of its effect.

38. Apart from the judgment of Sales LJ in the present case, the leading authority on the meaning of the word "precarious" in section 117B(5) is the decision of the Upper Tribunal given by Deputy Upper Tribunal Judge Holmes on behalf of himself and Mr CMG Ockelton, the Vice-President, in *AM (S117B) Malawi* [2015] UKUT 260 (IAC), [2015] Imm AR 5. The appellant, a citizen of Malawi, entered the UK in 2006 on a student visa. In 2007 his wife and daughter joined him from Malawi. In 2011 a second daughter was born. The immigration status of his wife and daughters was dependent upon his status. In 2012 the final extension of his student visa expired. The Home Secretary determined to remove all four members of the family to Malawi. The appellant challenged the determination by reference to the private life of each of the four of them. He could not rely on their right to respect for their family life because the proposed removal of all of them together would not interfere with it. The Upper Tribunal upheld the conclusion of the First-tier Tribunal that their private lives in the UK had been established when their immigration status had been precarious within the meaning of section 117B(5) and that his appeal against the determination to remove them should be dismissed.

39. In explaining its decision the Upper Tribunal

(a) noted at para 20 that, prior to the introduction of section 117B(5), the word “precarious” had been applied both in the ECtHR and in domestic courts not only to the status of a person lawfully present for a limited period but also to the situation of a person unlawfully present;

(b) considered however at para 23 that Parliament had in section 117B(4) and (5) drawn a sharp distinction between a person in the UK unlawfully and one whose immigration status was precarious, with the result that, under the statute, a precarious immigration status did not include the situation of a person unlawfully present;

(c) held at para 27 that all those granted a defined period of leave to remain in the UK, including discretionary leave to remain as well as leave of limited duration, had a precarious immigration status, even if they had a legitimate expectation that their leave would ultimately be extended indefinitely;

(d) therefore at para 32 formulated its central decision as being that a person’s immigration status was precarious for the purpose of section 117B(5) if his continued presence in the UK would be dependent upon a further grant of leave; and

(e) suggested at para 33 that even a grant of indefinite leave to remain might render the person’s status precarious if the grant had been obtained by deception or if he or she had embarked on a course of criminal conduct which would justify its withdrawal.

40. In the *Deelah* case, cited in para 21 above, McCloskey J, sitting in the Upper Tribunal as its President, stressed at paras 17 and 29 that in the case before him no issue arose as to whether the immigration status of the appellants had been precarious. As an aside, however, at para 30, he described as clear and concise the central decision which in the *AM* case the same tribunal had recently reached (see para 39(d) above) and advised judges and practitioners constantly to be alert to it.

41. The court understands that, contrary to the law report of the decision of the Court of Appeal in the present case, the *AM* case was cited to it. At all events, for whatever reason, Sales LJ does not appear to have had in mind the strong indorsement in that case of the Home Secretary’s contention that, for the purposes

of section 117B(5), a person has a precarious immigration status if he or she has leave to remain in the UK which is other than indefinite.

42. The provisional view of Sales LJ, set out in para 25 above, was that leave to remain short of indefinite leave might sometimes confer on a person a status not properly to be described as precarious; and that the concept of precariousness might fall to be applied having regard to the person's overall circumstances. The view of Sales LJ is entitled to great respect. In para 36 above I have recognised the need for a degree, no doubt limited, of flexibility in the application of Part 5A of the 2002 Act. But I will shortly explain how, elsewhere, the statute does permit a limited degree of it. I do not consider that the ordinary meaning of the word "precarious" requires, or that in its context Parliament must have intended the word to require, that its application to the facts of a case should depend upon a subtle evaluation of the overall circumstances such as Sales LJ had in mind.

43. The bright-line interpretation of the word "precarious" in section 117B(5), commended by the specialist tribunal with the maximum weight of its authority, is linguistically and teleologically legitimate; and, for that matter, it is consistent with the way in which the ECtHR expressed itself in the *Jeunesse* case (see para 34 above) and in which this court expressed itself in the *Agyarko* case (see para 35 above).

44. The answer to the primary question posed by the present appeal is therefore that everyone who, not being a UK citizen, is present in the UK and who has leave to reside here other than to do so indefinitely has a precarious immigration status for the purposes of section 117B(5).

45. It follows that Judge Blundell, upheld on this point in both the successive appeals, was correct to determine that Ms Rhuppiah's private life in the UK, having been established when, at any rate predominantly, she had leave to reside here as a student, was established at a time when her immigration status was precarious. Irrelevant though it is, it may be worthwhile to note that even since 9 February 2018 her immigration status has been precarious. Although she no doubt reasonably entertains a hope that in 2028 she may secure indefinite leave to remain, her present leave is to do so for 30 months: see para 6 above.

46. Another helpful feature of the Upper Tribunal's decision in the *AM* case was its conclusion that the concept of a precarious immigration status under section 117B(5) did not include the situation of a person present in the UK unlawfully: see para 39(b) above. It is well arguable in principle that a person unlawfully present has an immigration status to that effect and that, of course, it is precarious. But in subsections (4) and (5) of section 117B Parliament has drawn a clear distinction

between unlawful presence and a precarious immigration status. In relation to a person unlawfully present, subsection (4) covers all the ground (indeed, at (4)(b), more than all the ground) which subsection (5) would cover; and there is nothing to indicate that, notwithstanding the clear distinction, Parliament intended subsection (5) to overlap with subsection (4).

47. The facts of the present case do not enable this court to appraise the further suggestion in the *AM* case that even a grant of indefinite leave to remain might yield a precarious immigration status in the circumstances identified at para 39(e) above. The reader will however have noted that the suggestion derives partial support from the decision of the ECtHR in the *Butt* case, summarised at para 33 above.

48. It would be reasonable for this court to expect that its indorsement today of the conclusions in the *AM* case at paras 43 and 44 above will make it easier for decision-makers to decide whether an immigration status was precarious at the relevant time. In *Ahmed v Secretary of State for the Home Department* [2014] EWHC 300 (Admin) Green J observed, at para 44, that there was "an element of precariousness but not a very strong one". In *Secretary of State for the Home Department v Thierno Barry* [2018] EWCA Civ 790 Singh LJ observed at para 62 that the respondent's position was "not entirely precarious". Neither case required consideration of section 117B(5); both courts were seeking outside the statute to weigh the consideration identified by the ECtHR in the *Mitchell* case in their appraisal of rights under article 8. It is, however, to be hoped that decision-makers will no longer need to wrestle with degrees of precariousness.

Section 117A(2)(a)

49. It was in section 117A(2)(a) of the 2002 Act that Parliament introduced the considerations listed in section 117B. So, in respect of the consideration in section 117B(5), Parliament's instruction is to "have regard … to the consideration [that] [l]ittle weight should be given to a private life established by a person at a time when the person's immigration status is precarious". McCloskey J suggested in para 23 of the *Deelah* case, cited in para 21 above, that the drafting "wins no literary prizes". But, as both parties agree, the effect of section 117A(2)(a) is clear. It recognises that the provisions of section 117B cannot put decision-makers in a strait-jacket which constrains them to determine claims under article 8 inconsistently with the article itself. Inbuilt into the concept of "little weight" itself is a small degree of flexibility; but it is in particular section 117A(2)(a) which provides the limited degree of flexibility recognised to be necessary in para 36 above. Although this court today defines a precarious immigration status for the purpose of section 117B(5) with a width from which most applicants who rely on their private life under article 8 will be unable to escape, section 117A(2)(a) necessarily enables their applications occasionally to succeed. It is impossible to improve on how, in inevitably general

terms, Sales LJ in his judgment described the effect of section 117A(2)(a) as follows:

> "53. … Although a court or tribunal should have regard to the consideration that little weight should be given to private life established in [the specified] 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 …"

50. There was lively argument before the Court of Appeal about whether Judge Blundell understood the effect upon section 117B(5) of section 117A(2)(a), then recently enacted, and, if not, whether the advocates (none of whom appeared in this court) had failed to give him the necessary assistance in that regard. For he concluded that he was "required by statute to attach little weight" to the aspects of her private life upon which Ms Rhuppiah relied and that he was "bound to conclude that the harsh consequences which will flow from [her] removal are justified". In the light of the now academic nature of the present appeal there is no need for this court either to explore this issue or to appraise the firm conclusion of Sales LJ at para 57, at first sight slightly surprising, that there were no such particularly strong features of Ms Rhuppiah's private life as would justify departure from the result indicated by section 117B(5).

Section 117B(3)

51. Section 117B(3) of the 2002 Act, set out in para 20 above, provides that it is in the public interest, and in particular in the interests of the economic well-being of the UK, that persons who remain here are "financially independent". Then the subsection proceeds to give two reasons why their financial independence is in the public interest.

52. Judge Blundell held that, in that she was dependent on support from her father and from Ms Charles, Ms Rhuppiah was not "financially independent" and that this was a further consideration, negative to her claim under article 8, to which he was required to have regard. The Court of Appeal, at paras 63-64, upheld his analysis and in doing so rejected the submission on behalf of Ms Rhuppiah that persons were "financially independent" for the purposes of section 117B(3) if they were not financially dependent upon the state.

53. The Home Secretary now agrees with the submission which was made, and which continues to be made, on behalf of Ms Rhuppiah about the meaning of

financial independence in section 117B(3); but he adds uncontroversially that the evidence of support from third parties has to be credible and the support reliable. This is the agreed area of error into which Judge Blundell and the Court of Appeal fell, to which reference was made in para 7 above.

54. The Home Secretary has changed his mind about the meaning of financial independence following the decision of this court in *R (MM (Lebanon)) v Secretary of State for the Home Department* [2017] UKSC 10, [2017] 1 WLR 771, which post-dated the decision of the Court of Appeal in the present case. In the *MM* and linked cases this court considered the financial requirements imposed by the rules upon non-EEA family members wishing to join their relatives in the UK. The court held that adherence to the rules, which had sought to exclude reliance on promises of third party support even if credible, might precipitate a violation of article 8. The rules were changed accordingly.

55. The parties are correct to join in submitting to this court that financial independence in section 117B(3) means an absence of financial dependence upon the state. Why would it be "in the public interest" that they should not be financially dependent on other persons? Why would it in particular be "in the interests of the economic well-being of the United Kingdom" that they should not be dependent on them? Sales LJ suggested, at para 64, that the financial support provided to Ms Rhuppiah by her father and Ms Charles might cease, whereupon the obligation to maintain her would probably fall upon the state; but a cessation of a person's employment would probably have the same result. Indeed the present case is a good example of the sometimes flimsy distinction between employment and third party support. Anyone other than Ms Rhuppiah who provided extensive caring services to Ms Charles would need to be paid; and it is but an incident of their close friendship and of Ms Rhuppiah's legal inability to have taken employment prior to 9 February 2018 that instead the provision to her has taken the form of largely free board and lodging.

56. Regard must moreover be had to the first of the two reasons given in section 117B(3) for its statement as to where the public interest lay: "because such persons … are not a burden on taxpayers". It was the view of Sales LJ at para 65 that, if the phrase "financially independent" referred to independence of the state, the quoted words were close to tautological. Had those words been part of the statement as to where the public interest lay, one might more readily have agreed with his view. But they are not part of the statement. They are part of the explanation for it and in my view they unequivocally support the construction of section 117B(3) now agreed between the parties.

57. So Judge Blundell erred in concluding that Ms Rhuppiah was not financially independent within the meaning of section 117B(3). The further submission on her

behalf is and has been that the effect of section 117B(2) and (3) is to cast her ability to speak English and her financial independence as factors which positively weigh in her favour in the inquiry under article 8. But the further submission is based on a misreading of the two subsections and was rightly rejected by Judge Blundell, upheld by the Court of Appeal, just as an analogous submission was rejected in para 18 of the decision in the *AM* case, cited at para 38 above. The subsections do not say that it is in the public interest that those who are able to speak English and are financially independent should remain in the UK. They say only that it is in the public interest that those who seek to remain in the UK should speak English and be financially independent; and the effect of the subsections is that, if claimants under article 8 do not speak English and/or are not financially independent, there is, for the two reasons given in almost identical terms in the subsections, a public interest which may help to justify the interference with their right to respect for their private or family life in the UK. In seeking to portray the strength of their private or family life by reference to all their circumstances, claimants may wish to highlight their ability to speak English and/or their financial independence; but the legitimate deployment of such factors in that context is to be contrasted with the erroneous further submission that the subsections propel a conclusion that, where those factors exist, there is a public interest in favour of the claims.

Conclusion

58. It nevertheless follows that Judge Blundell erred in law in holding that section 117B(3) of the 2002 Act applied to Ms Rhuppiah's appeal and therefore that it identified an aspect of the public interest negative to her claim. Was his error material? In any event section 117B(5) required him to give little weight to her private life. But that requirement was subject to section 117A(2)(a), which conferred on him a limited degree of flexibility. In the absence of his error in relation to section 117B(3), section 117A(2)(a) might properly have led him to uphold her claim, for which he had obvious sympathy. I propose that we should allow Ms Rhuppiah's appeal to this court and should set aside his order upon her initial appeal; but that, for the reason given in para 8 above, we should not remit her initial appeal for fresh determination.