Upper Tribunal
(Immigration and Asylum Chamber)

Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC)

THE IMMIGRATION ACTS

Heard at Eagle Building, Glasgow **On 28 May 2015**	**Determination Promulgated** ……

Before

The President, The Hon. Mr Justice McCloskey
Upper Tribunal Judge Macleman

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

STEVEN RICHARD FORMAN

Respondent

Representation:

Appellant: Mr J Komorowski (Advocate), instructed by the Advocate General
Respondent: Mr Devlin (Advocate), instructed by Latta and Co Solicitors

(i) The public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden

on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

(ii) The list of considerations contained in section 117B and section 117C of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") is not exhaustive. A court or tribunal is entitled to take into account additional considerations, provided that they are relevant in the sense that they properly bear on the public interest question.

(iii) In cases where the provisions of sections 117B-117C of the 2002 Act arise, the decision of the Tribunal must demonstrate that they have been given full effect.

DECISION AND DIRECTIONS

INTRODUCTION

1. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), dated 25 September 2014, refusing the application of the Respondent (the original Appellant), a citizen of the United States of America aged 69 years, for a variation of his leave to remain in the United Kingdom. The Respondent appealed successfully to the First-tier Tribunal (the "*FtT*"). The Secretary of State now appeals with permission to this Tribunal.

THE IMPUGNED DECISION

2. On 26 July 2012, the Secretary of State granted the Respondent leave to remain in the United Kingdom as a Tier 1 (Highly Skilled) Post-Study Migrant for a period of two years, to expire on 26 July 2014. On 22 July 2014 the Respondent applied for a variation of his leave to remain. He based his application on his right to respect for private life under Article 8 ECHR. The ensuing decision of the Secretary of State has two elements. First, the application was considered under paragraph 276ADE of the Immigration Rules, yielding the conclusion that the Respondent did not satisfy any of the requirements enshrined therein. One interposes here the observation that this gives rise to no controversy between the parties. The second element of the impugned decision is expressed in these terms:

> "***Decision on Exceptional Circumstances***
>
> *It has also been considered whether your application raises or contains any exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8* [ECHR], *might warrant consideration by the Secretary of State of a grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules. It has been decided that it does not.*"

Therein lies the genesis of this appeal.

3. In order to comprehend the context, it is essential to outline some of the features of the Respondent's application to the Secretary of State. Dr Forman is a professional musician whose specialism lies in percussion. This is the career which he has pursued in the United States, where he worked mainly as a recording musician in the entertainment business. He has worked with some of the biggest names in the world of musical entertainment. As his career progressed he began to focus on composition, education and teaching. His activities include research in musical therapy, specifically in the realm of Parkinson's Disease. He has developed a particular affinity with the musical culture of Scotland, illustrated *inter alia* in his compositions, certain performances and his doctoral studies in this country. He secured his doctorate in 2012. This was the immediate impetus for the two years post-study work visa granted to him in July 2014. He has spent the last seven years of his life in Scotland. His most recent employer here has been the Royal Conservatoire of Scotland ("*RSC*").

4. The nature, quality and quantity of the support for Dr Forman's application to the Secretary of State can only attract a mixture of admiration and envy. His application was supported by written testimonials from a total of 63 friends, professional and academic colleagues, studies and supporters. Dr Forman is clearly a rather special person.

DECISION OF THE FtT

5. Turning one's attention to the decision of the FtT, another of the stand out features of this appeal emerges. This decision is obviously the product of careful reflection and consideration on the part of Designated Judge MacDonald. It is, moreover, carefully and clearly structured. Furthermore, it was produced with commendable expedition.

6. If this were a merits appeal, there could only be one outcome, bearing in mind the various considerations and observations rehearsed in [3] – [5] above: Dr Forman would be a resounding winner. However, we have a significantly different duty and task, namely that of deciding whether the decision of the FtT is undermined by material error of law. We shall revisit certain aspects of the decision presently.

THE ISSUES

7. Permission to appeal was granted on the following basis. It was considered arguable that the Judge had erred in his approach to Article 8 ECHR by attaching no weight to the Respondent's failure to satisfy the requirements of the Immigration Rules. Continuing, the permission Judge observed that the FtT may have approached the appeal from the perspective that the Appellant is an asset to United Kingdom society, rather than that of whether removal would be a disproportionate breach of his right to respect for private life.

8. On behalf of the Secretary of State, Mr Komorowski helpfully reduced his argument to the following five core submissions:

   (i) The FtT failed to have regard to the full terms of and policy underlying paragraph 276ADE of the Immigration Rules (the "*Rules*").

   (ii) The FtT failed to recognise the inherently weak nature of the majority of private life claims.

   (iii) The FtT failed to consider the precarious nature of the Respondent's private life.

   (iv) The FtT wrongly weighed the consideration of wider societal benefit as part of the Respondent's private life.

   (v) The FtT wrongly discounted the weight to be given to immigration control by reference to the Respondent's self-sufficiency.

   In support of these submissions, Mr Komorowski drew attention to certain passages in the determination of the FtT, highlighting in particular what he suggested was an incorrect focus on the Tier 2 regime of the Rules, rather than paragraph 276ADE, an incomplete consideration of the latter and the inadequate consideration of section 117B of the Nationality, Immigration and Asylum Act 2002.

9. On behalf of the Respondent, Mr Devlin emphasised in particular the importance of considering the determination as a whole and, in this context, he placed some emphasis on that section of the decision wherein the Judge rehearses, in summary, the parties' competing submissions. Adopting this approach, he contended that, in substance and in the round, the Judge had avoided falling into error. In support of his submissions he invoked SS (Congo) and Others v SSHD [2014] EWCA Civ 387, at [44] and [48] especially. He contended that the Judge had observed the strictures contained in the judgment of Richards LJ at [48]:

   > "*What does matter, however – whether one is dealing with a section of the Rules which constitutes a 'complete code' (as in MF (Nigeria)) or with a section of the Rules which is not a 'complete code' (as in Nagre and the present appeals) – is to identify, for the purposes of the application of Article 8, the degree of weight to be attached to the expression of public policy in the substantive part of the Rules in the particular context in question (which will not always be the same ….), as well as the other factors relevant to the Article 8 balancing exercise in the particular case (which, again, may well vary from context to context and from case to case).*"

   Mr Devlin also reminded us of one of several memorable statements by Lord Bingham of Cornhill, in this instance his formulation in EB (Kosovo) v SSHD [2009] 1 AC 1159:

> "*The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which Article 8 requires.*"

Giving effect to this principle, the Court of Appeal in PE (Peru) v SSHD [2011] EWCA Civ 274 rejected the argument that, in any given case, there can only be one correct answer to the question of whether a person's deportation will constitute a disproportionate interference with the rights protected by Article 8. In the same case, Hooper LJ (delivering the judgment of the Court) preferred the view that the determination of such questions involves matters of evaluative judgment: see [11].

10. The decision of the Court of Session (Inner House) in MS v SSHD [2013] CSIH 52 is a reminder of what has become firmly rooted doctrine, namely that in the generality of cases the discrete code in the Rules formed by paragraph 276ADE – 276DE will cater for Article 8 claims. Lord Drummond Young continued, at [30]:

> "*The purpose of those provisions is to set out the factors which normally apply to the assessment of Article 8 rights in an immigration context; consequently both the terms of those provisions and the underlying policy that can be discerned from those terms are of importance. They must, of course, be weighed against the other special considerations that apply in the particular case.*"

One construes the final part of this passage as a reference to cases (by definition the minority) in which Article 8 claims should properly be considered outwith the ambit of the regime contained in the Rules.

11. It is also appropriate to focus on how the Article 8 jurisprudence has evolved during recent years. In Patel and Others v SSHD [2013] UKSC 72, Lord Carnwath stated, at [57]:

> "*It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the Rules, which may be unrelated to any protected human right.*"

We note the analysis of Upper Tribunal Judge Lane in Nasim and Others (Article 8) [2014] UKUT 00025 (IAC), at [12], that this passage has an import beyond the narrow confines of a student's ability to pursue education in the United Kingdom under the umbrella of Article 8 "*in seeking to refocus attention upon the core purposes of Article 8*". The question of what Article 8 protects has become one of the dominant themes of the more recent jurisprudence. In Nasim, the Upper Tribunal revisited Lord Carnwath's formulation in [20], invoking it in support of the proposition that Article 8 is of –

> "*….. limited utility to an individual where one has moved along the continuum, from that Article's core area of operation towards what might be described as its fuzzy penumbra.*"

The Tribunal emphasised the distinction between the family life and private life dimensions of Article 8, concluding that the ambition of the qualified students in the appeals, namely to undertake a period of post-study work in the United Kingdom –

> "… *lies at the outer reaches of cases requiring an affirmative answer to the second of the five Razgar questions and that, even if such an affirmative answer needs to be given, the issue of proportionality is to be resolved decisively in favour of the Respondent, by reference to her functions as the guardian of the system of immigration controls, entrusted to her by Parliament.*"

We would observe that this passage repays careful reading.

CONSIDERATION AND CONCLUSIONS

12. We begin by considering the first and second of the submissions on behalf of the Secretary of State, summarised in [8] above. The rationale of the exercise which the FtT conducted was based upon the premise that the Respondent did not satisfy the requirements of paragraph 276ADE of the Rules. This was expressly noted by the Judge in his summary of the parties' submissions, which included (unavoidably) an explicit acknowledgement to this effect by the Respondent's representative: see [40] and [57]. Further, in [61], the Judge observed (in terms) that the Respondent's inability to satisfy the Rules was one of substantial dimensions. It cannot be said, in our judgment, that the Rules were overlooked by the Judge. Furthermore, for our part, we have some reservations about the practical effect and meaning of the Court of Session's exhortation in MS that the Tribunal must have regard to paragraph 276ADE and the underlying policy thereof. This exhortation makes perfect sense in cases where there is a live dispute about the claimant's ability to satisfy the requirements under scrutiny. However, in cases, such as the present, where the starting point is that the claimant does not satisfy the requirements of the Rules, with the result that the sole question is whether his Article 8 claim can be successfully established outwith the framework of the Rules, we consider that the latter form a backdrop, but little more, in the context of an exercise which differs sharply from that just mentioned. Thus we find no merit in the first of the Secretary of State's submissions.

13. We can dispose swiftly of the second of the Secretary of State's submissions. At the commencement of his analysis the Judge recognised that –

> "…. *It is only in very rare cases that an appellant can succeed under Article 8 outside the Rules.*"

At the conclusion of his analysis he employed much the same terminology viz "… *one of those rare cases which demands that the proportionality exercise falls on the Appellant's side of the scales ….*"

We find no misdirection on the part of the Judge in this discrete respect.

14. The fourth of the Secretary of State's submissions was that the FtT erred in law by weighing the consideration of wider societal benefit as part of the Appellant's private life. We consider that there is no merit in this submission. In our judgment, the relevant passages in the determination considered as a whole make clear that the Judge viewed societal benefit as one of the factors in the proportionality balancing exercise favourable to the Respondent. In our view there is no warrant for construing these passages in the manner for which the Secretary of State contends. Formulating this consideration in the abstract, we consider it unexceptional that positive contributions to society are normally in furtherance of a clearly identifiable public interest that can properly be balanced against the competing public interest underpinning the Secretary of State's decision which, in this case, is the public interest in the maintenance of firm immigration control.

15. At this juncture we consider the fifth, and last, of the submissions on behalf of the Secretary of State. In doing so, we consider that the correct formulation of the principle which this submission engages is thus: the public interest in firm immigration control is not diluted by the consideration that the Article 8 claimant has at no time been a financial burden on the state, is self sufficient and is likely to remain so indefinitely. Furthermore, there is a related principle which we would formulate in these terms: in the proportionality balancing exercise, the public interest in maintaining firm immigration control qualifies for greater weight, or is enhanced and fortified, in circumstances where the Article 8 claimant is and/or is likely to be a financial burden on the state. These principles now find expression in the Immigration Act 2014, to which we shall refer presently. The application of these principles to the present case places the spotlight on the following passage in the decision of the FtT at [60]:

> "*It is clear that the Appellant's application for leave to remain under the Rules failed on the financial requirement. However this case is different from most in that the evidence has demonstrated – and it was not disputed – that the Appellant has his own financial means and therefore is not dependent financially on the salary which the RCS are able and willing to pay him. That fact seems to me to separate the Appellant from many other Appellants who fail under the financial requirements of the Rules.*"

We agree with Mr Komorowski that within this passage there is a conflation of two distinct issues, namely the Appellant's ability to satisfy the requirements of the Rules and the legal significance in an Article 8 context of his self sufficiency. The inescapable fact is that the Respondent was unable to satisfy the financial requirements of the Rules. This inability stemmed from the salary he was receiving. We consider that the Judge, effectively, diluted and mitigated this failure and, in substance, concluded that the public interest in place was weakened in consequence. This, for the reasons which we have explained above, is erroneous in law. The exercise of considering [60] – [65] of the determination as a whole impels to the conclusion that the materiality of this error is inescapable.

Section 117, Nationality, Immigration and Asylum Act 2002

16. The new Part 5A of the Nationality, Immigration and Asylum Act 2002 (the "*2002 Act*") came into operation on 25 July 2014. Its provisions are engaged by the third of the Secretary of State's submissions.

17. We consider the correct analysis of sections 117A and 117B to be as follows:

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

    (ii) The so-called "*public interest question*" is "*the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).*", which appears to embrace the entirety of the proportionality exercise.

    (iii) In considering the public interest question, the court or tribunal must have regard to the considerations listed in section 117B in all cases: per section 117A(1) and (2).

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

    (v) The list of considerations in sections 117B and 177C is not exhaustive: this is clear from the words in parenthesis "*(in particular)*".

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

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

18. We apply the above analysis to the determination of the FtT in the following way. The Judge, as mandated by the legislature, was obliged to have regard to all of the elements of section 117B. While the Judge did not adopt a sequential and structured approach this is not, of course, fatal *per se*. Indeed, this tribunal has held in appeals that the provisions of sections 117B – 117C were applied in substance – and, hence, without error of law – by the FtT. The critical issue in the present case turns on section 117B(5), which provides:

> "*Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.*"

In its determination, the FtT noted – in [43] – the Secretary of State's submission based on this provision. However, in the critical passages in its decision, one finds no reference to any of the provisions of the 2002 Act, with the exception of the somewhat bland and brief sentence, in [64]:

> "*Clearly I must take account of section 117B inserted into the 2002 Act.*"

The Judge was not simply required by Parliament to take account of this statutory provision: rather, he was obliged to have regard to all of the considerations listed therein. This required identification and analysis (however brief) of each of the provisions concerned. This exercise was not carried out and, in our judgment, it is not possible to infer that it was conducted. This constitutes an error of law.

19. Furthermore, the exercise of considering the determination as a whole gives rise to the conclusion, in our view, that the Judge attributed substantial weight to the Respondent's private life. This assessment is prompted by the detailed rehearsal of the evidence in [3] – [35] and the strong emphasis on various facets of the Respondent's private life in [61] and [62]. It was incumbent on the Judge to explicitly acknowledge that the entirety of the Respondent's private life in the United Kingdom was established during a period when his immigration status was precarious and, having done so, to conduct the balancing exercise accordingly. Neither this acknowledgement nor this exercise is contained in the decision. This, in our judgment, constitutes a clear error of law. The materiality of this error of law is beyond plausible dispute: if the Judge had done so, he would have been obliged to find unequivocally that the Respondent's private life in the United Kingdom could not be accorded more than slight weight.

20. The rigid, prescriptive nature of sections 117A – 117C of the 2002 Act invites reflection on the topic of judgment design and structure. Where the decisions of tribunals list, explicitly and sequentially, each of the obligatory statutory considerations, accompanied by the Tribunal's evaluation and application thereof, there should be no scope for debate. Adherence to this discipline will have the supreme merit of reducing the possibility of error of law. This is illustrated in MK (section 55 – Tribunal options) [2015] UKUT 223 (IAC), at [41] – [43]. Furthermore,

tribunals are well used to having to craft their decisions in accordance with the dictates of discipline and structure, in the light of decisions such as Razgar v SSHD [2004] UKHL 27, at [17]. The same exhortation is made in relation to the Tribunal's exercise of evaluating and applying the related provisions of the Immigration Rules: see MK, at [45] – [49]. Fundamentally, the decision must be crafted in such a way as to demonstrate that the statutory requirements have been given full effect.

DECISION

21. On the grounds and for the reasons elaborated above, we decide:

(i) There are material errors of law in the determination of the FtT.

(ii) We set aside the determination in consequence.

(iii) The Practice Directions of the Upper Tribunal indicate that the remaking of the decision of the FtT should be undertaken within this forum.

(iv) The parties' representatives shall, within 14 days, make submissions in writing in relation to the following matters:

(a) what we have said in (iii) above; and

(b) in the event of the decision being remade in this forum, the necessity for a further hearing and the question of whether there will be any application for the adduction of further evidence under Rule 15(2A).

Signed: Lord McCloskey.

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

Date: 29 May 2015