Upper Tribunal
(Immigration and Asylum Chamber)

Rajendran (s117B – family life) [2016] UKUT 00138 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 26 January 2016	
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Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE PERKINS

Between

MRS SANDRAJORTHY RAJENDRAN
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Davidson of Counsel instructed by S Satha & Co
For the Respondent: Mr N Bramble, Home Office Presenting Officer

1. That "precariousness" is a criterion of relevance to family life as well as private life cases is an established part of Article 8 jurisprudence: see e.g. R (Nagre) v SSHD [2013] EWHC 720 (Admin) and Jeunesse v Netherlands, app.no.12738/10 (GC).

2. The "little weight" provisions of s.117B(4)(a) and (5) of the Nationality, Immigration and Asylum Act 2002 are confined to "private life" established by a person at a time when their immigration status is unlawful or precarious. However, this does not mean that when answering the "public interest question" posed by s117A(2)-(3) a court or tribunal should disregard

"precarious family life" criteria set out in established Article 8 jurisprudence. Given that ss.117A-D considerations are not exhaustive, in certain cases it may be an error of law for a court or tribunal to disregard relevant public interest considerations.

DECISION AND REASONS

1. This case raises a particular issue about the scope and ambit of the "little weight" considerations to be found in s117B(4(a)) and (5) of the Nationality, Immigration and Asylum Act 2002, the full text of which is set out in the Appendix.

2. The appellant is a 62 year old citizen of Canada who is a widow and is blind. She had come to the UK as a visitor from 4 August 2013 to 30 January 2014. On 31 January 2014 she returned to Canada. On 19 February 2014 she returned to the UK. She was questioned by immigration officers and admitted for 3 months only. On 15 May 2014 her solicitors applied on her behalf for leave to remain in the UK on the basis of her private life. In the UK she has a younger daughter, and a son-in-law, the latter being a British citizen who had lived in the UK since September 2005 having qualified as a software engineer. Her younger daughter, like the appellant, is a Canadian citizen. Her younger daughter has leave to remain in the UK until 4 March 2016.The couple now have a son born in August 2013.

3. The appellant had migrated from Sri Lanka to British Columbia in Canada with her younger daughter in October 2007. In Canada the appellant has another older daughter, who has a son born in December 2007 who has been diagnosed in 2009 with autism spectrum disorder. The appellant and her younger daughter originally lived with her older daughter and her husband in Vancouver, British Columbia. In November 2009 they moved out and rented a room in a house in the same area. After her younger daughter married a man who lived in the UK, she left in August 2012 to join him there. The appellant then lived on her own. Because of her disability the family arranged for a carer to come and attend to her some of the time. It was said that language problems meant it was not possible for that care to be effective. She was said to have had difficulties looking after her day to day affairs, requiring long-term personal care as a result of her disability. Since the departure of her younger daughter from Canada, she was said to have suffered depression and loneliness leading to deterioration in her medical condition.

4. In refusing the appellant's application on 14 July 2014 the respondent stated that the appellant did not qualify under paragraph 276ADE(1) of the Immigration Rules, noting, *inter alia*, that since she had family members in Canada it could not be said she had lost all ties with that country.

5. The respondent also considered whether there were any exceptional circumstances warranting a grant of leave on Article 8 grounds outside the Rules. The respondent noted that the appellant claimed to be a dependent on her family members in the UK. The respondent also noted that she was said to be suffering from various medical conditions, but considered that treatment for these would be available for her in her home country and that, if she was seeking to come as a dependent, she could return to her home country and apply from there for entry clearance. The appellant appealed, maintaining that she had no close relations in Canada to provide the required level of support and care for her

whereas by contrast she had a strong family life ties with her younger daughter and her family in the UK.

6. The appellant appealed. Following a hearing which took place on 17 July 2015, First tier Tribunal (FtT) Judge Seelhoff dismissed the appeal. In a decision sent on 27 July 2015 the judge noted that the respondent had chosen not to be represented and that it was just to proceed with the case in the respondent's absence. He noted that counsel for the appellant, Mr Richardson, "sensibly accepted that there is adequate health and social services care in Canada …and that the case is solely based on Article 8 family life rights".

7. The appellant gave evidence during which she said that when in Canada her older daughter who was settled in that country did come to see her to take her to the doctor but did not see her every week as she (the daughter) was suffering from depression and had problems caring for her autistic son. The appellant said that the decision that she should stay in the UK had only been taken after she had returned to the UK on 19 February 2014. Her younger daughter also gave evidence in the course of which she said that she had contacted social services in Canada for help with her mother and had been told they could not help as she had been sponsored by her older sister. The family had looked into residential care homes in Canada but had not found anything suitable because of the language and cultural problems. She said that her older sister lived some 20 minutes walking distance from the appellant and had met the appellant at the airport last time and also driven her to the airport on the occasion of her last departure from Canada to the UK. The judge also had before him documentary evidence which included a number of doctor's letters including a GP letter dated 6 February 2015 confirming that the appellant was blind and suffering from anxiety with depression, hypertension and type II diabetes and was completely dependent on her younger daughter's assistance for her day-to-day activities and that her diabetes is poorly controlled.

8. The judge noted that he had only been asked to consider the claim based on Article 8 outside the Rules but that reviewing the requirements under the rules relating to adult dependent relatives contained in Appendix FM, the fact that it had been conceded that care was available in Canada meant that the application had to fail and not only because the appellant had been admitted as a visitor and was not eligible to switch categories.

9. As regards Article 8 outside the Rules, the judge cited case law governing how to approach Article 8 claims outside the Rules, including R (Nagre) v SSHD [2013] EWHC 720 (Admin) and added that it was "also necessary to have regard to a number of mandatory factors contained in s.117B of the Nationality, Immigration and Asylum Act 2002 as amended".

10. The judge said he accepted the appellant has a family life in the UK with her younger daughter, son-in-law and grandson and that the decision refusing leave to remain amounted to an interference with that right. In this regard he noted that her younger daughter and son-in-law appeared to have taken responsibility for the appellant's care, at least in the context of her most recent period of stay in the UK: see [34] and [36]. At [34] the judge said that:

> "I accept that family life between children and adult dependents relatives can engage Article 8 in special circumstances and in a case like this where there has clearly been a caring and dependent relationship…."

11. However, when assessing the proportionality of the decision under challenge, the judge considered there were several (interrelated) factors that made the refusal of leave proportionate. First, the appellant did not meet the requirements of the Immigration Rules and there was a public interest in persons in the appellant's position not being eligible for leave to remain in the UK where there was adequate care available in their country of nationality ([39]). Second, the family had not been entirely forthcoming about the history of the appellant in Canada and the circumstances of her coming to the UK on a second occasion. At [35] the judge said that:

> "I consider it significant that the family thought the Appellant entitled to return to the UK for a further six months within two weeks of leaving the UK after a six month visa. The family clearly considered it acceptable for visit visas to be used as a way of the Appellant effectively living in the UK and it was only when this was challenged by an entry clearance office on admitting the Appellant for three months that the Appellant sought a longer period of leave."

12. The lack of candour regarding the appellant's visit also meant there was a further public interest consideration:

> "I also consider that there is public interest in preserving the integrity of the immigration system and I do believe that there has been a degree of knowing abuse in this application which is evident from the timing of the decisions, the apparent belief that it was acceptable for the Appellant to spend nearly a year in the UK as a visitor in a 12 month period providing she had left in the middle, and from the inaccurate information that apparently found its way to the Appellant's Doctor's letter" ([39].

13. Third, linked to this, the judge was not satisfied that the daughter in Canada took as little responsibility for her mother as was claimed. In this regard the judge noted that the daughter in Canada was responsible for taking the appellant to and from the airport twice in two weeks in 2014 and was involved in the decision for the appellant to return to the UK. As a result the judge considered that the real situation would be that:

> "…in Canada the Appellant will have a comparable level of family life with the daughter, grandson and son-in-law living there which mirrors the family life in the UK almost exactly. Further, without evidence to specifically show that the Appellant is not entitled to health care or social support I find that many of her care needs could be addressed in Canada which would make the experience of leaving the UK less traumatic."

14. A fourth factor noted by the judge concerned "the level of family life and dependency that has been established in the UK". This, the judge said at [38], "has to be considered in the context of section 117B of the 2002 Act:

> "Whilst I have accepted factually a level of dependency has arisen I note that this has arisen at a time when the Appellant's leave is properly regarded as precarious as she was here as a visitor and also because I believe that the intention was for the Appellant to effectively live

here albeit only with status as a visitor. Accordingly I am required to attach less weight to the family life in the UK."

15. Fifth, the judge considered at [40] that although the appellant's family in the UK have significant means with her son-in-law earning £45,000 a year (which was "to the family's credit"):

> "I am not satisfied that they have shown that they have the means necessary to cover all medical costs for the remainder of her life. I consider that there is a significant chance that she will need to have recourse to public funds in the future and there is a potential risk to the public purse. "

The appellant's grounds of appeal

16. The grounds of appeal mount two principal challenges to the judge's decision.

17. The first challenge focuses on the judge's assessment of the content of the appellant's family life ties in Canada and the UK respectively. It was argued that in finding that in Canada the appellant would enjoy "a comparable level of family life", the judge ignored the evidence of the daughter in Canada's inability to care for her mother due to having a severely autistic son. It was argued that the fact that the daughter in Canada was able to drive her mother to and from the airport was not a sound basis for concluding that she would be able to provide the required level of care on a long term basis. In developing this point, Mr Davidson argued that since in Canada the appellant was living on her own the judge was not comparing like with like. The appellant's family life in the UK had far greater content and substance. Further, it was the appellant's evidence and that of her witnesses that her family had not been able to access social service care in Canada, so although there may be a health and care system there, she could not access it. The above finding was also said to ignore the impact that the appellant's proposed removal would have on the human rights of her family in the UK "and in particular the fact that they would not have a comparable level of family life with the appellant if she were removed from the country (Beoku-Betts [2008] UKHL 39)". The judge was also said to have erred in not recognising that any relocation of the appellant's family in the UK to Canada would be unreasonable because the appellant's grandson was a British citizen. The failure to conduct such an assessment was "consequently a highly material error of law".

18. The second main ground takes issue with the judge's approach to s.117B of the 2002 Act. It is submitted that the judge erred in stating at [38] that he was obliged under s.117B of the 2002 to attach less weight to the appellant's family life with her UK-based family because it was established at a time when her immigration status was precarious. That was said to be erroneous because s.117B(4) and (5) only required "little weight" to be given in two contexts only: where there was a private life (s.117B(4)(a), s117B(5)); and where there was a relationship with a qualifying partner (s.117B(4)(b)). The precariousness criteria applied only to private life cases and not to family life cases and hence "the judge was wrong to use it to undermine the value of a family life that was developed during lawful residence in the UK". Mr Davidson sought to elaborate this ground by pointing out that since the private life provisions of the Immigration Rules accepted that a person who had lived in the UK for 20 years could qualify on the basis of length of residence, the "little weight" provisions found in s.117B could not be an absolute rule.

19. In response to these grounds, Mr Bramble maintained that the judge was entitled to arrive at the findings of fact which underlay his assessment of the appellant's likely circumstances on return to Canada and the judge clearly did not accept that her daughter there played the very minimal role portrayed. The judge did not ignore the appellant's circumstances; it was just that he assessed them to be different from what had been claimed; the challenge to this part of the judge's findings was really no more than a disagreement with the facts as found. As regards the judge's reliance on s.117B considerations, even if he was wrong to rely on these, because they did not cover family life, the considerations set out in that section were not exhaustive and it was an undoubted fact that the appellant's immigration status in the UK was precarious.

Relevant case law

20. In Kaur (visit appeals; Article 8) [2015] UKUT 487 (IAC)) the Upper Tribunal stated that:

> "In visit appeals the Article 8 decision on an appeal cannot be made in a vacuum. Whilst judges only have jurisdiction to decide whether the decision is unlawful under s.6 of the Human Rights Act 1998 (or shows unlawful discrimination) (see Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC **)** and Adjei (visit visas – Article 8) [2015] UKUT 261 (IAC)), the starting-point for deciding that must be the state of the evidence about the appellant's ability to meet the requirements of paragraph 41 of the immigration rules.
> Unless an appellant can show that there are individual interests at stake covered by Article 8 "of a particularly pressing nature" so as to give rise to a "strong claim that compelling circumstances may exist to justify the grant of LTE [Leave to Enter] outside the rules": (see SS (Congo) [2015] EWCA Civ 387 at [40] and [56]) he or she is exceedingly unlikely to succeed. That proposition must also hold good in visitor appeals."

21. As regards s.117A-D, there is now a considerable body of case law bearing on several key matters arising in this appeal. As noted at the outset, the full text of ss.117A-D is set out in an Appendix.

22. As regards the meaning and effect of the "little weight" provisions of s.117B(4)-(5), the Upper Tribunal stated in Deelah and others (section 117B - ambit) (Rev 1) [2015] UKUT 515 (IAC) that:

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

23. In Treebhawon and others (section 117B(6)) [2015] UKUT 674 (IAC)) the Upper Tribunal said that:

> "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 person's

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."

24. As regards the meaning of "precarious in s.117B(5) ("Little weight is to be given to a private life established by a person at a time when the person's immigration status is precarious"), the Upper Tribunal said in AM (S.117B) [2015] UKUT 260 (IAC) that:

"Parliament has now drawn a sharp distinction between any period of time during which a person has been in the UK "unlawfully", and any period of time during which that person's immigration status in the UK was merely "precarious"(AM (S.117B) [2015] UKUT 260 (IAC)).

Those who at any given date held a precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or to remain. A person's immigration status is "precarious" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave.

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

25. In Deelah the Upper Tribunal said that:

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

27. As regards the concept of "private life", the same Tribunal added that:

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

Our analysis

The appellant's family life circumstances

26. We find the first main ground of appeal is not made out. It is clear from the judge's assessment that having considered the entirety of the evidence, including the witness statements, the oral testimony and the medical evidence, the judge was not satisfied that the family had given a truthful account of the appellant's circumstances in Canada. Mr Davidson has sought to argue that the judge simply arrived at this conclusion by way of a "quantum leap" from the finding that the appellant's older daughter took her to and from the airport on the occasion of her last, quite short, period of time in Canada. But it is clear that the judge's reliance on the role of the daughter in Canada taking the appellant to and from the airport was only one of the considerations taken into account. At [28] the judge noted that this daughter was also involved in the decision to send her back to the UK. At [29] the judge also noted the family's account differed in certain respects with that which the appellant had given to the doctor (Dr Sivakumar) who had written a letter of 7 May 2014. Among other inconsistencies, the doctor's letter said that the appellant was living alone in Vancouver for "few months after her daughter migrated to the UK" whereas "[i]n fact on the account before me the Appellant was on her own for a year prior to her first visit to the UK" ([30]). We fully concur with Mr Bramble in regarding this ground of challenge as a mere disagreement with adequately reasoned findings of fact.

27. As regards the precise situation of the appellant in Canada in terms of available care, it is clear that at the hearing before the judge the appellant's counsel did not seek to dispute that in Canada there was an effective functioning public health care system and a system of social care. The appellant's grounds of appeal do not contain any request to re-examine that concession or any background country evidence indicating that Canada lacked such a functioning system. Even if (as Mr Davidson contends) there was some evidence that the appellant in particular could not access social services, the family's own evidence was that they had taken steps to obtain private care for her and we note that prior to the appellant coming to the UK her daughter and son-in-law here had financially supported her. We also note that according to the appellant's witness statement the daughter in Canada had a husband who was employed as a Customer Service assistant at a gas station in Vancouver. When the appellant lived in Sri Lanka the older daughter regularly sent money for the appellant and her younger sister's upkeep but then decided to call her and her sister to Canada. Further, after her younger daughter left Canada the appellant continued to live at the same address. In addition, although the appellant and her family described the appellant as living on her own once her younger daughter departed for the UK, her own witness statement said it was "with the houseowner's family".

28. In light of this body of evidence it was entirely open to the FtT judge to conclude that the appellant would receive adequate care on return to Canada, whether provided by Canadian authorities, by private means financed by the daughters or by the appellant's older daughter in Canada or a combination of these.

29. We accept that the judge was not strictly correct to describe the level of care the appellant would receive in Canada as "comparable" even though he had found that the elder daughter there had been and would be more involved in the appellant's care than

was claimed. On the evidence accepted by the judge the care the appellant has been receiving from her younger daughter and her family in the UK was of a higher quality and that is no doubt one reason why her family has assisted her in her application to remain. But the fact that her level of care in the UK was and would be of a better quality does not demonstrate any error of law on the part of the judge in finding that it would not be disproportionate for the appellant to be required to return to Canada, on the basis that she would and could be adequately be cared for by a combination of care from the elder daughter and private care, bolstered by financial support by way of remittances sent by her younger daughter and her husband, as before. The judge was clearly entitled to consider that returning her to such a situation would not be disproportionate.

30. As regards the suggestion that the judge failed to take into account the family life of the appellant's daughter and son-in-law and grandson in the UK, we fail to see that this was the case. When concluding that the appellant enjoyed family life in the UK, the judge was clearly impressed by the level of care the appellant received in the UK and of the closeness of her ties with her younger daughter and family, including her grandson. We do not understand the decision of the House of Lords in Beoku-Betts to assist the appellant, as in sharp contrast to the situation being considered in that case, the appellant is someone who had come to the UK as a visitor, had only been here for a short period and had no expectation of being able to succeed under the Immigration Rules for dependants. Nor had she made any application under the "carer" provisions of the Rules – probably because she clearly failed to meet their requirements.

31. We mention at this point that we see no merit in the contention that the judge erred in not considering and concluding that the daughter and her family in the UK could not reasonably relocate to Canada to look after the appellant there. That had never been suggested as a possible scenario and the judge's finding that there would be sufficient care in Canada was not dependent on any such finding.

The "little weight" provisions of ss.117B(4)(a) and (5)

32. In respect of the second main ground, we would first observe that the s117B(4)(a) and (5) considerations dealing with "private life" do not seek to address every type of situation pertaining to a person's private life, only to "private life…that is established at a time when the person is in the United Kingdom unlawfully" (s117B(4)(a)) or "…at a time when the person's immigration status is precarious" (s117B(5)).

33. It is next to be observed that whether Mr Davidson is right to say that the "little weight" provisions found in s.117B(4) and (5) impose no "absolute" rule depends on what is meant by "absolute". If he means that they are not obligatory in character we cannot agree with him. As the Upper Tribunal has made plain in a number of decisions, these provisions are among a series of mandatory considerations: see for example, Dube (ss.117A-117D) [2015] UKUT 90 (IAC)) and Forman (ss 117A-C considerations) [2015] UKUT 412 (IAC)).

34. If however Mr Davidson means only to draw attention to the fact that these and other provisions are not exhaustive, we would entirely agree. That is certainly correct: see for example, Dube, Forman. Sections 117A-D considerations can only be a starting point.

35. Mr Davidson's point that the provisions of paragraph 276ADE(1)(iii) dealing with persons over 25 years old reflect a view that after 20 years such persons' private life can in certain circumstances be taken to be "weighty" enough to warrant eligibility on grounds of long residence is correct, but what the Secretary of State decides to impose by way of requirements under the Rules is a matter for her: see Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 415 (IAC). So far as concerns the scope of ss.117A-D considerations as applied in an appeal based on Article 8 grounds outside the Rules, we are bound by statute and the statute does not time-limit its "little weight" provisions. Further, as just noted, the considerations set out in ss.117A-D are non-exhaustive. Hence any case brought outside the Rules involving a person aged 25 or over with 20 years or more private life in the UK would likely have other features that would make the proportionality assessment of the "public interest" question (as defined in s.117A (3)) one that had regard to a wide range of factors.

36. The second observation we would make is that although ss.117B-C do not in terms refer anywhere to "family life" their subject-matter certainly touches on some considerations that quintessentially pertain to family life within the meaning of Article 8. Section 117(4)(a) concerns "a relationship begun with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully"; s117B(6) concerns " a genuine and subsisting relationship with a qualifying child"; and s117C((5) concerns "a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting relationship with a qualifying child…" Further, there are a number of considerations in s.117B(1)-(3) which have potential application not just to "private life" cases but to "family life" cases as well. In the above ways, courts and tribunals applying ss117B-C will often be applying considerations that are inherently about "family life".

37. That said, there is no specific provision in s117B(4) and (5) for "family life" relationships other than those specifically identified as above. Yet it is uncontroversial that in Article 8 jurisprudence, the meaning of "family life" can extend in certain circumstances to include, inter alia, relationships between adults and between grandparents and grandchildren: see e.g. Kugathas [2003] EWCA Civ 31, JB (India) v ECO [2009] 234, AAO v ECO [2011] EWCA Civ 840.

38. But this lack does not mean that family life relationships outwith the scope of s.117B and s117B are to be ignored. As noted earlier, ss117A-D considerations are inexhaustive and courts and tribunals are obliged by ss117A (2)-(3) to apply such considerations in the context of answering the wider "pubic interest" question defined 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)." In logic other considerations may well be pertinent to answering that question. Notably, s117A contains two references to family life, both coupling it with "private life": s117A(a) which identifies the material scope of ss117A-D as being determination of whether a decision made under the Immigration Acts "breaches a person's right to respect for private and family life under Article 8"; and s117A(3) which defines "the public interest question" to mean "the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)." In logic as well, when a court or tribunal is seeking to answer the "public interest question" it must apply established Article 8 jurisprudence. Sections 117A-D should not be understood

as in any way releasing judges from adherence to the binding authority of our higher courts on the subject of Article 8.

39. It follows that when answering the "public interest question" posed by s117A(2)-(3) a court of tribunal should not disregard "precarious family life" criteria set out in established Article 8 jurisprudence. Indeed in certain cases, given that ss.117A-D considerations are not exhaustive, it may be an error of law for a court or tribunal to disregard such criteria. The proportionality assessment involved is capable of cutting two ways. It may be in certain cases that relevant extraneous "family life" considerations will strengthen an applicant's Article 8 claim as regards the question of proportionality. For example it may be that an applicant who is caring for orphaned grandchildren will be able to show the existence of very compelling family life reasons for being allowed to remain in the UK. In other cases, however, extraneous "family life" considerations may weaken, at least in some respects, an applicant's Article 8 claim. One such example might be where the applicant's family life has been established or altered in character at a time when the applicant's immigration status is precarious.

40. That "precariousness" is a criterion of relevance to family life as well as private life cases is an established part of Article 8 jurisprudence: see the observations by Sales J (as he then was) at [38]-[43] in Nagre on what he called (at [42])"precarious family life" cases. At [41] he summarised the position as being that:

> "The approach explained in the Strasbourg case-law indicates that where family life is established when the immigration status of the claimant is precarious, removal will be disproportionate only in exceptional cases…"

41. More recently the Grand Chamber in the case of Jeunesse v Netherlands, app.no.12738/10, 3 October 2014 has reaffirmed at [108] that:

> "108. Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. It is the Court's well-established case-law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985, Series A no. 94, p. 94, § 68; Mitchell v. the United Kingdom (dec.), no. 40447/98, 24 November 1998; Ajayi and Others v. the United Kingdom (dec.), no. 27663/95, 22 June 1999; M. v. the United Kingdom (dec.), no. 25087/06, 24 June 2008; Rodrigues da Silva and Hoogkamer v. the Netherlands, cited above, § 39; Arvelo Aponte v. the Netherlands, cited above, §§ 57-58; and Butt v. Norway, cited above, § 78)."

42. It must also be recalled that there is no support in Article 8 jurisprudence for reading the two concepts "private life" and "family life" as mutually exclusive. It has long been accepted that the Article 8 concept of private life is of broad scope: see, inter alia, Nhundu and Chiwera, IAT [2001] 01/TH/1603. Indeed the Strasbourg Court has made clear that even if relationships between family members do not qualify as "family life" they still require to be assessed fully under the rubric of "private life". Thus in AA v UK, app.no.8000/08, 20 September 2011, the Fourth Section of the ECtHR noted that:

> "49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life". However, it is not necessary to decide the question given that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Thus, regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant constitutes an interference with his right to respect for private life. While the Court has previously referred to the need to decide in the circumstances of the particular case before it whether it is appropriate to focus on "family life" rather than "private life", it observes that in practice the factors to be examined in order to assess the proportionality of the deportation measure are the same regardless of whether family or private life is engaged (*Üner*, cited above, §§ 57-60)."

43. Turning to the judge's treatment of the appellant's case, it is not in dispute that the appellant's immigration status in the UK has always been and remains precarious: even when she was admitted as a visitor, her leave, being limited in time to a maximum of 12 months and for the temporary purpose of a visit, is unarguably precarious: see again, inter alia, AM and Deelaah and others.

44. It is fair to say that at [38] the judge' failed to show a precise appreciation of the ambit of s117B. At [38] he stated:

> "I find that the level of family life and dependency that has been established in the UK has to be considered in the context of section 117B of the 2002 [Act}. Whilst I have accepted factually a level of dependency has arisen I note that this has arisen at a time when the Appellant's leave is properly regarded as precarious as she was here as a visitor and also because I believe that the intention was for the Appellant to effectively live here albeit only with status as a visitor. Accordingly I am required to attach less weight to the family life in the UK".

45. As we have seen s.117B(4)(a) and (5) do not in fact "require" little [or to use the judge's term "less"] weight to be given to family life in the UK. At least in a case such as the appellant's (which was not one concerned with genuine and subsisting relationships between partners or children), s11B(4)(a) and (5) are silent about "family life".

46. However, we cannot see that this error was in any way material. The judge's assessment began at [25] with a self-reminder that he was only concerned with a claim on Article 8 grounds outside the Rules and earlier at [8] he had set out case law dealing with such claims, including Nagre. Having addressed the nature of the appellant's family life circumstances in [30]-[33], the judge then said that he turned to the 5 stage Razgar test and stated that he accepted that the appellant's family life ties in the UK engaged Article 8. In [35]-[37] the judge identified a number of factors bearing on the assessment of whether the interference with the appellant's private and family life ties would be proportionate or not. What then follows in [38]-40] is clearly an ongoing assessment of the "public interest" question having regard to private and family life.

47. Also indicative of the fact that the judge's primary focus was on the wider "public interest" question conceived of as encompassing the appellant's private and family life (not just private life) was what the judge said at [40]:

> "In terms of proportionality I do note that the Appellant's family in the UK have significant means with her son-in-law earning £45,000 a year. This is to the family's credit but I am not satisfied that they have shown that they have the means necessary to cover all medical costs for the remainder of her life. I consider that there is a significant chance that she will need to have recourse to public funds in the future and there is potential risk to the public purse. Assessing all the facts in the case I find that the interference represented by the refusal of leave is proportionate and that the Appellant is not entitled to remain in the UK".

48. The wording of this paragraph strongly suggests that the judge had in mind section 117B(3) which sets out that "[i]t is in the public interest, and in particular it is 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 the taxpayer". As explained earlier, s117B is one of three considerations set out in s117B that apply without distinction to private and family life-based claims.

49. But even if it were thought that the judge's reasoning in this paragraph strayed beyond the scope of s.117B(3) by talking not just about "a burden on taxpayers" but more broadly about "potential risk to the public purse", that was entirely consonant with Article 8 jurisprudence on private and family life in cases where there is a cost to the public purse: see e.g. Konstatinov v The Netherlands, App. 16351/03, ECtHR, judgment of 26 April 2007.

50. For the above reasons:

The First-tier Tribunal judge did not materially err in law and his decision to dismiss the appellant's appeal must stand.

Signed Date

Judge of the Upper Tribunal

Appendix

Sections 117A-D of the 2002 Act

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

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
  (a) breaches a person's right to respect for private and family life under Article 8, and
  (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

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

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

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

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

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
  (a) are less of a burden on taxpayers, and
  (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
  (a) are not a burden on taxpayers, and
  (b) are better able to integrate into society.

(4) Little weight should be given to—
  (a) a private life, or
  (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

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

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
  (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
  (b) it would not be reasonable to expect the child to leave the United Kingdom.

117D Interpretation of this Part

(1) In this Part –

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who –

(a) is a British citizen, or,

(b) has lived in the United Kingdom for a continuous period of seven years or more

"qualifying partner" means a partner who –

(a) is a British citizen, or,

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 – see section 33(2A) of that Act.