Upper Tribunal
(Immigration and Asylum Chamber)

Dube (ss.117A-117D) [2015] UKUT 00090 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated:**
On 21 January 2015	....

Before

MR JUSTICE NICOL

UPPER TRIBUNAL JUDGE STOREY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS RONAK MANYIKA DUBE

(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation :

For the Appellant: Mr T Melvin, Home Office Presenting Officer

For the Respondent: Mr M Joshi, Legal Representative

(1) Key features of ss.117A-117D of the Nationality, Immigration and Asylum Act 2002 include the following:

(a) judges are required statutorily to take into account a number of enumerated considerations. Sections 117A-117D are not, therefore, an a la carte menu of considerations that it is at the discretion of the judge to apply or not apply. Judges are duty-bound to "have regard" to the specified considerations.

(b) these provisions are only expressed as being binding on a "court or tribunal". It may be that the Secretary of State will consider it in the interests of good administration and consistency of decision-making on Article 8 claims at all levels to have express regard to ss.117A-117D considerations herself, but she is not directly bound to do so.

(c) whilst expressed in mandatory terms, the considerations specified are not expressed as being exhaustive: note use of the phrase “in particular” in s.117A(2): “ In considering the public interest question, the court or tribunal must (in particular) have regard— “.

(d) section 117B enumerates considerations that are applicable “in all cases”, which must include foreign criminal cases. Thus when s.117C (which deals with foreign criminals) states that it sets out “additional” considerations that must mean considerations in addition to those set out in s.117B.

(e) sections 117A-117D do not represent any kind of radical departure from or “override” of previous case law on Article 8 so far as concerns the need for a structured approach. In particular, they do not disturb the need for judges to ask themselves the five questions set out in Razgar [2004] UKHL 27. Sections 117A-117D are essentially a further elaboration of Razgar ’s question 5 which is essentially about proportionality and justifiability.

(2) It is not an error of law to fail to refer to ss.117A-117D considerations if the judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form.

DECISION AND REASONS

1. In a determination dated 29 October 2014, First-tier Tribunal Judge (FtTJ) Juss allowed the appeal of the respondent (hereafter the claimant) against the decision of the appellant (hereafter Secretary of State for the Home Department (SSHD)) refusing her indefinite leave to remain. The claimant is a citizen of Zimbabwe born in May 1948.

2. The claimant last came to the UK as a visitor in October 2002. On 8 May 2003 she applied for leave to remain on human rights grounds. This was refused on 14 April 2004 with no right of appeal. Further representations made on 6 April 2005 were refused on 18 July 2005. Her appeal against that refusal was dismissed by an Immigration Judge in October 2005.

3. The claimant remained in the UK thereafter as an overstayer. In 2010 , 2011 and 2012 she made further unsuccessful applications for leave. After considerable correspondence with the SSHD the application she made on 11 January 2012 was refused in July 2014. In giving reasons for refusing it, t he SSHD took into account, inter alia, evidence she had submitted regarding her ties with three adult daughters (and their children) in the UK upon whom it was said she was financially and emotionally dependent; medical evidence showing that she had been diagnosed as HIV positive in 2003 and also suffered from hyperthyroidism, dizzy spells and memory loss ; evidence that she was an active member of the Seventh Day Adventist Church. The SSHD concluded that it was not accepted that the claimant had formed a family life with her children and grandchildren in the UK or that she could succeed under private life provisions of the Immigration Rules because she had not lived continuously in the UK for twenty years or more and on her own evidence still had family ties in Zimbabwe with two brothers and a 37 year old son. It was noted that she had remained clandestinely in the UK in full knowledge that she did not have permission to do so. The SSHD considered that she could continue being an active member of the Seventh Day Adventist Church back in Zimbabwe and that she could maintain contact with her family members and friends via the means of modern communication after she returned to her home country. As regards her health problems, the SSHD considered that there was available treatment in Zimbabwe and in this regard referred to the Country of Origin Service (COIS) Report for Zimbabwe .

4. The refusal letter went on to address the point raised by representatives on her behalf in September 2013 that the delay in any decision being made had caused the claimant “undue hardship”. The SSHD’s response was to point to the claimant’s breaches of immigration law by failing to leave the UK voluntarily or to regularise her stay until 31 March 2010: the majority of the delay in her case

was said to be due to her own action in failing to submit any further application to regularise her stay until approximately four and a half years after her appeal was dismissed and she had become appeal rights exhausted.

First-tier Tribunal decision

5. At the hearing the FtTJ did not hear evidence but noted the contents of a statement by Elizabeth Nyoni, the daughter of the claimant. Having heard submissions from the parties, the judge noted that it was accepted by both parties that the claimant could not succeed under the Immigration Rules.

6. The judge then proceeded to set out his reasons for deciding to allow the claimant's appeal "under freestanding Article 8":

"10. This is a case concerning a 68 year old woman who is a HIV sufferer, and undergoes dizziness, pain, and stress, and is currently under the investigation of a consultant neurologist (see page 19 of the Appellant's bundle). She is in a vulnerable condition largely because of her health needs. She cannot on the basis of N v the UK assert that she has a right to medical treatment in this country as against what may be available in Zimbabwe, these are facts that must necessarily be taken into account in considering how the balance of considerations fall.

11. In that respect, she has been in the UK since October 2002, having lived here for fourteen years, and in the context of enjoying family life with her children and her grandchildren, to whom she is very close. There was ample opportunity for the Secretary of State to remove her. This could have been done in 2005. It was not. A good nine years went by, during which time the Appellant has formed close family ties with her three children and grandchildren. What the House of Lords said in EB (Kosovo) in the very clear judgment of Lord Brown, was that delay may have consequences in three particular respects, one of which was that the longer the time goes by when the Appellant is not removed, the greater her chances of casting down roots, and the greater the realisation on her part, that she is not to be removed.

12. I must take these considerations into account when I apply the five step approach in Razgar adopted by Lord Bingham (at paragraph 17). It is clear that the decision interferes with the Appellant's Article 8 rights. The interference has consequences of such gravity as to engage Article 8. It is in accordance with the law. It may even be necessary in a democratic society for the economic wellbeing of the country. However, it is not proportionate to the legitimate public end that is sought to be achieved. I take into account that it is in the public interest, as is made clear by part 5 of the latest Rules, that immigration control is maintained.

13. However, Lord Brown was clear in EB (Kosovo **)** that the very importance of immigration control, as a consideration to be applied, diminishes with the passage of time, in relation to a person who should have been removed but is not removed by the authorities.

14. I am satisfied that if the Appellant were to be removed she would not be able to enjoy her family life in Zimbabwe with her children and grandchildren in this country. The effect of her removal would be the breakdown of her family life. That family life cannot be replicated if she were to be removed to Zimbabwe .

15. On the totality of the evidence before me, I find that the Appellant has discharged the burden f proof and the reasons given by the Respondent do not justify the refusal. Therefore, the Respondent's decision is not in accordance with the l aw and the applicable Rules."

SSHD's grounds of appeal

7. The SSHD's grounds of appeal were f ivefold . It was first submitted that the judge was wrong to treat delay as having " determinative weight " because the claimant knew that she stayed on in the UK in breach of her visa and made no efforts to depart voluntarily. Secondly, the point was made that any family or private life the claimant had was developed when she knew she had no legitimate expectation to continue it. In the third place it was argued that the FtTJ had failed to conduct the Article 8 proportionality assessment in accordance with s.117 of the Nationality, Immigration and Asylum Act 2002 and the judge's incorrect reference to these provisions as part of the 'Rules' indicated their misapplication. In what w ere expressed as further limbs to the third ground, but were effectively two additional grounds, the SSHD contended that rather than approach Article 8 open-endedly the judge should have considered the claimant's inability to succeed under the Immigration Rules as "a weighty proportionality factor in favour of removal' ; and that the judge's conclusion that removal to Zimbabwe would mean the "breakdown" of the claimant's family life was not made out, as her relationship s with family members in the UK could still be maintained via modern communication means and visits.

Submissions

8. In submissions Mr Melvin accepted that between 2005-2011 the SSHD had not taken steps to remove the claimant, but, maintained that it was incumbent on her to leave the UK rather than remain unlawfully and any assessment of the delay factor had to take that into account as well as the fact that in her case there had been a delay on her part in making a further application between 25 October 2005 and 31 March 2010. It was clear from the second ground of appeal that the SSHD had considered t he weight to be accorded to her relationships with family and friends in the UK as diminished by the fact that she developed or maintained these at a time when she knew her immigration status was precarious. Mr Melvin submitted that this ground coalesced with the third ground, which maintained that by virtue of the coming into force of s s.117A- 117 D of the 2002 Act , judges had to show that they had taken enumerated considerations into account. Plainly the judge had not done so in relation to the precariousness provision set out in s.117B (5) .

9. As regards family life, Mr Melvin submitted that not only did the SSHD maintain her position as set out in the refusal letter that the claimant had not established family life ; her grounds also ma de clear that she took issue with the judge's assessment that the claimant's departure from the UK would entail "breakdown" of her family life. That was wrong because on the one hand she still had family in Zimbabwe and on the other hand her own relationship with family members here could be maintained by electronic means or by their visiting. Mr Melvin also questioned whether the judge had allowed the appeal on a correct basis, since he referred to the decision being "not in accordance with the law", when it plainly was . He also referred to it being not "in accordance with the applicable Rules" when he himself had recorded both parties as agree ing before him that the claimant could not win under the Rules.

10 . Picking up on a point made in amplification of the third ground, Mr Mel vin also criticised the judge for considerin g that he was entitled to conduct "a freestanding" Article 8 assessment, when since 9 July 2012 the Immigration Rules embodied Article 8 considerations and set out the SSHD's view o f the public interest.

11 . Mr Joshi submitted that whatever the judge wrote at [15] , it was clear from [10] that he had allowed the appeal under Article 8. In relation to the delay p oint , the judge could not be faulted for following the authority of EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL

41 . The claimant had continued reporting to i mmigration o ffice r s at Loughborough Reporting Centre throughout the time she was appeal rights exhausted. The Respondent did not take any steps to remove her. Delay could reduce the significance to be given to immigration control when conducting the Article 8 balancing exercise. Lord Brown in EB (Kosovo) clearly did not consider that claimants were prevented from relying on delay just because they overstayed. Further , the judge who granted permission to appeal had expressly stated that there was "no legal error" in the FtTJ relying as he did on delay. In relation to the SSHD's second ground, it was clearly the judge's view that the claimant had done all she could to make her stay less precarious. It was also relevant that during much of the period between 2005-2011 the SSHD had herself accepted that returns to Zimbabwe should not take place because the country was dangerous.

12 . As regards s . 117, this had been raised by the claimant in the skeleton argument produced on her behalf at the hearing before the FtTJ and it could not seriously be suggested that he had failed to take it into account just because he incorrectly referred to its provisions as "Rules". "Part 5" had no other possible meaning than the new Part 5A of the 2002 Act contained in s s .117A- 117 D .

Sect ion s 117 A-117D

13. Section 19 of the 2014 Immigration Act introduced into the Nationality, Immigration and Asylum Act 2002 a new Part 5A containing new sections 117A- 117 D . As explained by Aikens LJ in YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292 at [12] . '[t] his new Part is headed "Article 8 o f the ECHR: Public Interest Considerations". The new sections 117A- 117 D set out statutory guidelines that must be applied when a court or tribunal has to decide whether an immigration decision to remove someone from the UK would be in breach of his Article 8 rights. The new section 117A is headed "Application of this Part"; the new section 117B is headed "Article 8 public interest considerations in all cases" and the new 117C is headed "Article 8 additional considerations in cases involving foreign criminals" ' .

14. In full ss. 117A-117D provide:

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 .

117C Article 8 additional considerations in cases involving foreign criminals.

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom , and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

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).

(2) In this Part, "foreign criminal" means a person—
(a) who is not a British citizen,
(b) who has been convicted in the United Kingdom of an offence, and

(c) who –

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under—
(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or (c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc), has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

We shall say a little more about ss.117A-117D shortly.

Our Decision

15. We should first of all make clear that we do not construe the grant of permission to appeal as limiting in any significant way the SSHD's grounds. It is true the only reason given for the grant was by reference to the ss.117A-117D issue, but the grant did not expressly preclude the other grounds and in relation to the first ground (which challenged the judge's treatment of delay as a "determinative" factor), all that was said was that there was "no legal error by the judge in taking into consideration the delay as this all forms part of the balancing exercise". That left unaddressed the nub of the first ground which alleged not that the FtTJ had erred by taking delay into consideration, but in treating it as determinative.

16. Second, whilst we agree that in [15] the judge was incorrect to state that the decision under appeal was not in accordance with the law or the Immigration Rules, we concur with Mr Joshi that this error was immaterial because he made clear in [10] his satisfaction that the claimant had shown a violation of Article 8.

17. Third, we regard the SSHD's critique of the judge for embarking on an assessment under "freestanding Article 8" as missing the mark because the claimant had made her FLR(O) application prior to 9 July 2012, i.e. at a time when the Immigration Rules did not seek to incorporate Article 8 elements in any systemic way.

18. Fourth, we regard the SSHD's grounds as open to a number of criticisms. To the extent that the first ground sought to argue that the judge was wrong to treat delay as "determinative", that is belied by the evident fact that he saw the case as requiring him to balance a number of considerations (the precise phrase he used being a "balance of considerations") and that he expressly took into account a number of other factors, e.g. that the claimant was 66 years old and HIV positive. Nowhere did he say or imply that he considered that the delay factor was "determinative". By giving itself the subtitle "legitimate expectation" the second ground risked being understood as an attack on a "straw man", since the claimant had never claimed she had a legitimate expectation. In stating in the third ground that the judge's reference to 'Rules' in [12] "indicate[d] that the provisions of s.117 have been misapplied". The author laid himself open to the charge that he had ignored the obvious fact that the judge could only have had ss.117A-117D in mind. The Rules contained no "Part 5" dealing with Article 8 considerations.

19. Nonetheless, the grounds read as a whole did raise pertinent issues: they raised, inter alia, clear challenges to the way in which the judge had approached the issue of delay; his lack of regard for the precarious nature of the claimant's immigration status; his failure to take account of ss.117A-117D considerations; and his assessment that removal to Zimbabwe would mean "breakdown" of family life.

20. It is convenient to address first of all the third ground which concerned ss.117A-D. In order to explain our assessment of it, it is necessary to say a little more about this new provision. For the purposes of this appeal several features of ss.117A-117D are noteworthy.

21. First, as highlighted in YM (Uganda), from 28 July 2014 the effect of ss.117A-117D of the 2002 Act is that judges are required statutorily to take into account a number of enumerated considerations. That is clear from the language of s.117A(2): " In considering the public interest question, the court or tribunal must (in particular) have regard—" (emphasis added). Sections 117A-117D are not, therefore, an a la carte menu of considerations that it is at the discretion of the judge to apply or not apply. Judges are duty-bound to "have regard" to the specified considerations.

22. Second, the provisions are only expressed as being binding on a "court or tribunal". It may be that the SSHD will consider it in the interests of good administration and consistency of decision-making on Article 8 claims at all levels to have express regard to ss.117A-117D considerations herself (and we see more and more decision letters where she does just that), but she is not directly bound to do so.

23. Third, whilst expressed in mandatory terms, the considerations specified are not expressed as being exhaustive: note use of the phrase "in particular" in s.117A(2): " In considering the public interest question, the court or tribunal must (in particular) have regard— ".

24. Fourth, it is clear that s.117B enumerates considerations that are applicable "in all cases", which must include foreign criminal cases. Thus when s.117C (which deals with foreign criminals) states that it sets out "additional" considerations that must mean considerations in addition to those set out in s.117B.

25.Fifth, we do not regard ss. 117A-117D as being any kind of radical departure from or "override" of previous case law on Article 8 so far as concerns the need for a structured approach. In particular, it does not disturb the need for judges to ask themselves the five questions set out in Razgar [2004] UKHL 27. Indeed it seems to us that in effect ss.117A-117D are essentially a further elaboration of Razgar 's question 5 which is essentially about proportionality and justifiability [1] (Lord Bingham's question 5 asks, assuming that in reply to previous questions it has been established that there had been an interference with the right to respect for private and family life, " [i]f so, is such interference proportionate to the legitimate public end sought to be achieved?"). We derive this from the definition given in s.117A(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)." (Emphasis added)

26. Sixth, bearing in mind that ss.117A-117D focus only on certain of the steps judges must take when dealing with Article 8 grounds (and they do not, for example, deal with whether private or family life exists or whether there has been an interference with it), it cannot be said that its provisions are intended to modify existing learning as to when it is or is not an error of law for a judge to have express regard to specific elements of a structured approach. To adapt the expression employed by the Master of the Rolls in MF (Nigeria) [2013] EWCA Civ 1192 at [50] in the different context of considering the impact of the new Immigration Rules on Article 8 case law, what matters is "substance", not "form". In AJ (Angola) [2014] EWCA Civ 1636, Sales LJ at 49 identified as one of two categories of case in which an identified error of law by the First tier Tribunal or Upper Tribunal might be said to be immaterial, the situation where "despite its failure to refer to the relevant legal instruments, the tribunal has in fact applied the test which it was supposed to apply according to those instruments". Hence, it will not necessarily be an error of law for a judge to omit to refer

expressly to ss.117A-117D considerations, albeit it may well be if he or she fails to address them in substance.

27. Applying these observations to this appeal, it is clear that it was incumbent on the judge to apply ss.117A-117D considerations: although the claimant's application and the respondent's decision preceded this date, the FtTJ determined this case on 29 October 2014 and was therefore bound to apply its provisions. At the same time, there is no legal error in his decision simply because he failed to identify its provisions precisely and confused its provisions with ones found in the Immigration Rules. Legal error would only arise if he failed to apply relevant ss. 117A-117D provisions in substance. The Applicant was not a foreign criminal; hence the only considerations potentially relevant to her were those contained in s.117A, 117B and 117D.

28. Mr Joshi sought to submit that on the basis of findings of fact made by the judge he was not required to take into account any s.117B considerations because the only one of any potential relevance was confined to private life cases whereas the judge had found the claimant enjoyed family life. He drew attention to the fact that the precariousness criterion set out at s. 117B(5) was confined in scope to private life: "(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."

29. A major difficulty with that submission is that the judge gave no reasons for his finding that the claimant enjoyed family life in the UK. Given that the SSHD had rejected the claimant's claim to have a family life in the UK within the meaning of Article 8 and considered that her relationships had rather to be regarded as coming within her "private life", it was incumbent on the judge to explain why he took a different view. Mr Joshi submitted that there was evidence before the judge substantiating her claim to enjoy family life within the meaning of Article 8, but that did not relieve the judge of the duty to identify it and explain why he considered it gave the lie to the contrary position of the SSHD.

30. Furthermore, as noted earlier, the judge clearly saw his conclusion that the claimant has shown a violation of Article 8 as involving a "balance of considerations" encompassing not just the claimant's family life but also her age, poor health and vulnerability and her length of stay in the United Kingdom. A number of these factors indisputably lay in the domain of private life (her poor health being an aspect of her moral and physical integrity: see e.g. Bensaid v UK (2001) 33 EHRR 205, Razgar per Lord Bingham at [5]-[10]; JA (Ivory Coast) v Secretary of State for the Home Department [2009] EWCA Civ 1353 and GS (India) & Ors v Secretary of State for the Home Department [2015] EWCA Civ 40 [109]).

31. It must also be borne in mind that the claimant had remained in the UK unlawfully since late 2005. Accordingly both s. 117B(4)(b) and (5) considerations had potential application.

32. Another difficulty is that being a non-exhaustive specification of certain Article 8 considerations, ss.117A-117D do not disinvest a judge of the need to apply established principles of case law dealing with considerations not covered. As Mr Melvin correctly observed, both UK and Strasbourg case law on Article 8 identifies the issue of whether ties with other persons have been formed at a time when an applicant is aware that his or her immigration status is precarious as a relevant factor in respect of both family life and private life. As stated in the recent Grand Chamber judgment in Jeunesse v Netherlands Application no. 12738/10), 2 Oct 2014:

"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)."

Whether or not by reference to s.117B or to established case law the First tier Tribunal judge was required to have regard to this criterion. Any decision on the "public interest question" as defined by s.117A(3) would have been incomplete without it.

33. Mr Joshi contended that it did not matter that the judge had not engaged specifically with s.117 because ss.117A-117D in no way reverse or modify the principles set out in EB (Kosovo). He reminded us of what Lord Bingham of Cornhill had said at [13]-[16] of that decision:

"Delay

1. In Strbac v Secretary of State for the Home Department [2005] EWCA Civ 848, [2005] Imm AR 504, para 25, counsel for the applicant was understood to contend, in effect, that if the decision on an application for leave to enter or remain was made after the expiry of an unreasonable period of time, and if the application would probably have met with success, or a greater chance of success, if it had been decided within a reasonable time, and if the applicant had in the meantime established a family life in this country, he should be treated when the decision is ultimately made as if the decision had been made at that earlier time. For reasons given by Laws LJ, the Court of Appeal rejected this submission, for which it held Shala v Secretary of State for the Home Department [2003] EWCA Civ 233, [2003] INLR 349 to be no authority. While I consider that Shala was correctly decided on its facts, I am satisfied that the Court of Appeal was right to reject this submission. As Mr Sales QC for the respondent pointed out, there is no specified period within which, or at which, an immigration decision must be made; the facts, and with them government policy, may change over a period, as they did here; and the duty of the decision-maker is to have regard to the facts, and any policy in force, when the decision is made. Mr Drabble QC, for the appellant, did not make this submission, and he was right not to do so.

2. It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under article 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it.

3. Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship. Thus in R (Ajoh) v Secretary of State for the Home Department [2007] EWCA Civ 655, para 11, it was noted that "It was reasonable to expect that both [the applicant] and her husband would be aware of her precarious immigration status". This reflects the Strasbourg court's listing of

factors relevant to the proportionality of removing an immigrant convicted of crime: "whether the spouse knew about the offence at the time when he or she entered into a family relationship" see Boul tif v Switzerland (2001) 33 EHRR 50, para 48; Mokrani v France (2003) 40 EHRR 123, para 30. A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.

4. Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes. In the present case the appellant's cousin, who entered the country and applied for asylum at the same time and whose position is not said to be materially different, was granted exceptional leave to remain, during the two-year period which it took the respondent to correct its erroneous decision to refuse the appellant's application on grounds of non-compliance. In the case of JL (Sierra Leone) , heard by the Court of Appeal at the same time as the present case, there was a somewhat similar pattern of facts. JL escaped from Sierra Leone with her half brother in 1999, and claimed asylum. In 2000 her claim was refused on grounds of non-compliance. As in the appellant's case this decision was erroneous, as the respondent recognised eighteen months later. In February 2006 the half brother was granted humanitarian protection. She was not. A system so operating cannot be said to be "predictable, consistent and fair as between one applicant and another" or as yielding "consistency of treatment between one aspiring immigrant and another". To the extent that this is shown to be so, it may have a bearing on the proportionality of removal, or of requiring an applicant to apply from out of country. As Carnwath LJ observed in Akaeke v Secretary of State for the Home Department [2005] EWCA Civ 947, [2005] INLR 575, para 25:

"Once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant factor, then the weight to be given to it in the particular case was a matter for the tribunal"."

34. We need not decide whether he is right about the ratio of EB (Kosovo) being unaffected by ss. 117A-117D because even if delay remains as relevant to an Article 8 proportionality assessment in the three ways identified by Lord Bingham, it can only do so if the judge's assessment also takes into account s.117B considerations. That is so for two reasons, one being the basic verity that if EB (Kosovo) stands for any proposition of law inconsistent with statute, the latter must prevail; the other being that Lord Bingham clearly saw the proportionality assessment as one that had to be made in light of any changes in government policy: "….the facts, and with them government policy, may change over a period, as they did here; and the duty of the decision-maker is to have regard to the facts, and any policy in force, when the decision is made" [13]. It follows that if the government has enacted statutory provisions governing Article 8 proportionality assessment, that change must be taken into account. Renvoi to EB (Kosovo) is not enough.

35. We would add that quite separately from the judge's failure to apply s.117B, we consider he also erred in his approach to the claimant's family life. Even if we were to overlook his failure to explain the basis on which he considered he was entitled to find that the claimant's relationship with her adult daughters and grandchildren amounted to family life within the meaning of Article 8 (and we are not prepared to overlook that), assessment of the proportionality of interference in such relationships must also take into account a person's family life relationships as a whole and must give consideration

to the significance or otherwise of relationships with close family members in the claimant's country of return as well as in the UK. Despite the unchallenged evidence that the claimant had a son in Zimbabwe and two brothers, the judge made no reference whatsoever to them. This failure resulted, in turn, in his improbably considering that return to Zimbabwe would not just lead to a breakdown of her relationship with family members in the UK but a "breakdown of her family life" per se. He was in effect saying that her removal would amount to the destruction or flagrant denial of her right to respect for family life. That was contrary to the undisputed evidence about continuing family ties in Zimbabwe. If against this it were to be argued that the judge must have considered the claimant's ties with family in Zimbabwe were not family life ties within the meaning of Article 8 (that was the thrust of the claimant's sister's statement), then that would only magnify the problem that he has failed to make reasoned findings on either set of family ties.

36. We find that the above errors were errors of law vitiating the judge's decision and necessitating that we set it aside.

37. We heard submissions as to how we should proceed to deal with the claimant's case if we decided (as we have) to set it aside, Mr Melvin saying he was content to leave it to us, Mr Joshi saying we should order a further hearing. We are persuaded that justice would best be served by adjourning the case for a further hearing in order to re-make the decision. We had initially thought we had sufficient before us to re-make it ourselves without further ado. On reflection, we consider that more evidence is needed. Neither the claimant nor her witnesses gave evidence before the FtTJ notwithstanding that there were clear differences between her and the respondent over the nature and quality of her family life relationships in the UK. In our judgment the evidence presented to support the claimant's claim to be financially and emotionally dependent on her children in the UK needs testing. In addition, if the SSHD wishes to maintain that it was reasonable to expect the claimant to leave the UK from May 2005 onwards, she needs to explain how that would have been consistent with Home Office policy not to enforce returns to Zimbabwe for at least some of the period between 2005-2012. It may be in this regard that one relevant consideration in this case is that the claimant did say in an earlier statement of 14 December 2011 that she had "permission to live in Zambia" (see paragraph 3l0 of SSHD's refusal letter) and so she could have gone to that country as an alternative; but that just reinforces the need for an oral hearing at which the claimant has the opportunity to give oral evidence and be cross-examined. This hearing should take place in the Upper Tribunal.

38. For the above reasons the FtTJ materially erred in law and his decision is set aside.

39. It is directed that there be a further hearing at which the claimant is afforded the opportunity of giving oral evidence and the SSHD is afforded the opportunity of cross-examining her. If other witnesses are to be called, the claimant's representatives must submit a specific request stating their names and the likely time their further evidence is thought likely to take. The claimant's representatives are also to file up-to-date witness statements from any such person or persons. The claimant is directed to notify the Upper Tribunal regarding witnesses within 14 days from service of this decision.

40. No anonymity direction is made.

Signed Date

Upper Tribunal Judge Storey