14 November 2018

PRESS SUMMARY

Rhuppiah (Appellant) v Secretary of State for the Home Department (Respondent)
[2018] UKSC 58
On appeal from [2016] EWCA Civ 803

JUSTICES: Lord Wilson, Lord Carnwath, Lord Hughes, Lady Black, Lord Lloyd-Jones

BACKGROUND TO THE APPEAL

Ms Rhuppiah, a Tanzanian national, entered the UK in 1997 with leave to reside here as a student for three months. The Home Secretary granted further leave to her to reside in the UK as a student on 12 occasions, but some of these applications for leave were made after the previous leave had expired.

While they were studying at the same college, Ms Rhuppiah met Ms Charles, who suffers from ulcerative colitis, a gravely debilitating condition. They have resided together since 2001. Ms Rhuppiah cooks food suitable for Ms Charles's medical condition and accompanies her to Bristol, to hospital and in effect everywhere. Instead of paying her for looking after her in these respects, Ms Charles provides her with largely free board and lodging. Ms Rhuppiah, a Seventh Day Adventist, cares for Ms Charles out of friendship, faith and habit. Were Ms Rhuppiah to leave the UK, Ms Charles's health would be compromised, her life turned upside down, and she would have to turn to the state for care.

After her final grant of leave expired in November 2009, Ms Rhuppiah twice failed to secure indefinite leave to remain in the UK, first because her residence here over the past ten years had not always been lawful, and second because she applied on the wrong form and by the time she reapplied the Immigration Rules, HC395 ("**the rules**") had changed, fatally for her reapplication. The Home Secretary was then obliged to determine whether her reapplication could nevertheless succeed outside the rules, on the basis of her right to respect for the private life she had established in the UK, including her friendship with Ms Charles, under article 8 of the European Convention on Human Rights. The Home Secretary's determination on this basis was also negative.

Ms Rhuppiah challenged the Home Secretary's decision at the First-tier Tribunal ("**FTT**"). Under section 117B(5) of the Nationality, Immigration and Asylum Act 2002 ("**the 2002 Act**"), little weight should be given to an applicant's private life if it was established in the UK at a time when his or her immigration status was precarious. The FTT dismissed Ms Rhuppiah's challenge on the basis that this provision applied to her; and that, besides, she was not *"financially independent"* (another consideration, which section 117B(3) of the 2002 Act required the Home Secretary to weigh against her right to respect for her private life) as she depended on support from her father and from Ms Charles.

Ms Rhuppiah appealed unsuccessfully to the Upper Tribunal and the Court of Appeal. Her appeal has now become academic, because she has now lived continuously in the UK for long enough to secure leave to remain by a different route. The Supreme Court nevertheless heard the appeal, because of the public importance of providing a definitive interpretation of the word *"precarious"* in section 117B(5).

JUDGMENT

The Supreme Court unanimously allows the appeal. Lord Wilson gives the only judgment.

REASONS FOR THE JUDGMENT

Section 6 of the Human Rights Act 1998 requires the Home Secretary to act compatibly with the rights contained in the European Convention on Human Rights, including the right under article 8 to respect for private and family life. Removing an applicant from the UK may interfere with this right. Therefore, if the Home Secretary refuses a person's application for leave to remain in the UK under the rules, he must nevertheless consider whether to grant leave on the basis of their right under article 8. Article 8 gives him a limited discretion to determine whether the interference is justified **[4]**.

Section 117A(2) of the 2002 Act prompts decision-makers exercising this discretion to have regard to the public interest considerations in section 117B, which include: the maintenance of effective immigration controls; that persons in the UK can speak English and are financially independent; and that little weight should be given to a private life established by a person at a time when they are in the UK unlawfully *or* when the person's immigration status is precarious **[20-21]**. A person's immigration status in the UK can therefore be precarious even when he or she is lawfully present here **[24]**. Equally, the concept of *"little weight"* and the wording of section 117A(2) give decision-makers a limited degree of flexibility to uphold an article 8 claim on the basis of the applicant's right to respect for private life, even if it was established when the applicant's immigration status was precarious **[49]**.

The Court of Appeal accepted that Ms Rhuppiah's own immigration status was precarious, but suggested that some immigrants could have an immigration status which was not precarious even though they did not have indefinite leave to remain in the UK. It added that the concept of precariousness might fall to be applied having regard to the person's overall circumstances. The Supreme Court holds that the application of the concept of precariousness does not depend on such a subtle evaluation of the overall circumstances as suggested by the Court of Appeal **[25, 42]**.

The European Court of Human Rights ("**ECtHR**") has approached the concept of precariousness in the context of the right to *family life* by asking whether the family life was created at a time when the parties knew that the immigration status of one of them made its persistence in the host state precarious from the outset **[28]**. Therefore, it distinguished the situation of an applicant who (though not present unlawfully) was no more than tolerated by the host state while it determined her various applications for residence permits and consequential appeals, from that of *"settled migrants"* who had formally been granted a right of residence. The Supreme Court has previously addressed this ECtHR decision, suggesting that family life will be precarious if created when an applicant was here unlawfully or had only a temporary right to remain in the UK **[34-45]**.

Section 117B imports the concept of precariousness from the ECtHR case law. But the section only applies to an applicant's *private life* **[37]**. In a case not cited to the Court of Appeal, the Upper Tribunal previously held that a person's immigration status was precarious for the purpose of section 117B(5) if his continued presence in the UK would be dependent upon a further grant of leave **[38-39]**. The Supreme Court now approves this decision. Everyone who, not being a UK citizen, is present in the UK and who has leave to reside here other than to do so indefinitely, has a precarious immigration status for the purposes of section 117B(5) **[44]**. This 'bright-line' interpretation is consistent with the ECtHR and Supreme Court's language in the decisions referred to above **[43]**.

The FTT nonetheless erred in concluding that Ms Rhuppiah was not financially independent within the meaning of section 117B(3). The Supreme Court holds that *"financially independent"* in section 117B(3) means *"not financially dependent upon the state"*. It therefore allows Ms Rhuppiah's appeal **[52-58]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html