Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number:** HU/13568/2017

THE IMMIGRATION ACTS

Heard at Glasgow
On 30 January 2017

Decision and Reasons Promulgated
On 13 February 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

E K
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr T Haddow, Advocate, instructed by D Duheric & Co, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant applied for leave to remain in the UK as a victim of domestic violence. The respondent refused that application by a decision dated 7 March 2017. Under reference to paragraph E-DVILR.1.3 of the immigration rules, the respondent held that the evidence submitted did not establish the claim.

2. The appellant sought to appeal to the FtT on human rights grounds. The respondent argued that the FtT had no jurisdiction because the decision

was not the refusal of a human rights claim. In a decision promulgated on 19 May 2018 FtT Judge Green held that the appellant had made such a claim and the FtT did have jurisdiction. That is not now in dispute.

3. FtT Judge Doyle dismissed the appellant's appeal by a decision promulgated on 25 June 2017.

4. Mr Govan conceded that the FtT's finding at [21 -22] that the appellant did not have any private life in the UK was wrong as a matter of law.

5. It was common ground that the decision of the First-tier Tribunal fell to be set aside, that there was no basis on which to revisit its findings of primary fact, and the UT should make a fresh decision, based on those facts and on submissions.

6. Mr Govan did not dispute that the facts found by the FtT at [10] bring the appellant within the scope of the rules for a grant of leave arising from domestic violence. However, he said that the appellant nevertheless required to provide evidence of the type sought by the respondent, and that the appropriate course would be for her to make a further application, relying on the FtT's findings. He submitted that as the appellant's immigration status had been precarious, little weight was to be given to her private life, and the appeal should again be dismissed.

7. It was accepted for the appellant that the facts, as the FtT found, fall short of the private life requirements of the rules, 276ADE.

8. There was debate over the extent to which the domestic violence provisions are designed to produce an outcome which mirrors human rights obligations. As I understood parties' positions, there was in the end no real dispute. The provisions do not strictly correspond to human rights obligations on the state. Some applications of this nature are human rights applications, and some are not. Ability to satisfy the provisions is not determinative, but is relevant to the present private life claim.

9. Section 117A of the 2002 Act, so far as material, provides:

> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts —
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, …

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

10. And section 117B:

(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.

...

11. In *TZ and PG* [2018] EWCA Civ 1109 the Senior President of Tribunals said:

> “I suggested at [19] that there exists a structure for judgments in the FtT where article 8 is engaged. That was referred to by Lord Thomas in *Hesham Ali* at [82 to 84] and recommended by him. I strongly endorse his recommendation. Although there is no obligation in law for a tribunal to structure its decision-making in any particular way and it is not an error of law to fail to do so, the use of a structure in the judgments in these appeals would almost certainly have avoided the appeals, given that the ultimate conclusion of the tribunals was correct. To paraphrase Lord Thomas: after the tribunal has found the facts, the tribunal sets out those factors that weigh in favour of immigration control – 'the cons' – against those factors that weigh in favour of family and private life – 'the pros' - in the form of a balance sheet which it then uses to set out a reasoned conclusion within the framework of the test(s) being applied within or outside the Rules. It goes without saying that the factors are not equally weighted and that

> the tribunal must in its reasoning articulate the weight being attached to each factor."

12. There is no reason why the applicant should be required to repeat her application to the respondent. She has already engaged in many stages of procedure, and she would be raising nothing new.

13. Compliance with the rules does not equate to a right to remain on private life grounds. In many cases no such right would arise, e.g., a businessman or a student, without more. However, the domestic violence provisions are in part 8 of the rules, "family members", which is indicative, and compliance with those provisions is relevant, as found at [8] above. It is difficult to see the public interest in refusing leave in a case which meets a rule, particularly a rule which is at least partly designed to respect and protect private life.

14. Mr Haddow submitted, rather tentatively, that based on ECtHR authority the appellant's precariousness of status, being based to a large extent on a period when she could legitimately expect her residence to be permanent, was distinguishable from precariousness as defined in *Rhuppiah* [2018] UKSC 58 at [44]. I agree with Mr Govan that the definition in *Rhuppiah* excludes such a distinction.

15. Mr Haddow submitted, with rather greater justification, that this was a case where section 117A(2) (a) enabled the tribunal to find that private life justified departure from the result indicated by section 117B(5), applying the limited degree of flexibility explained at [49] and [58] of *Rhuppiah*.

16. The appellant's command of English and ability to maintain herself are essentially neutral. She sought to add to her private life claim by reference to factors including her 10 years of residence, education, work history, friendships, and good immigration history. Those are all meritorious, but they would not, but for the domestic violence aspect, amount to a good case, either in or out of the rules.

17. The appellant sought in the FtT to build a case of great difficulties in returning to Bosnia. That was not relied upon in submissions before me, and was plainly exaggerated.

18. The one clear point against the appellant is the statutory provision for little weight to be given to her private life.

19. Balancing the "pros and cons", there is negligible if any weight to be given to the public interest. That is outweighed by even a little weight on the other side, and even more once something is added by way of the limited flexibility available.

20. The decision of the FtT is set aside, and the following decision is substituted: the appeal, as originally brought to the FtT, is allowed.

21. The FtT made an anonymity direction. The matter was not addressed in the UT. Anonymity has been preserved herein.

Dated 1 February 2019
UT Judge Macleman