



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/14455/2013

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgated**

On 12th May 2015

On 11th June 2015

Before

**UPPER TRIBUNAL JUDGE DAWSON
UPPER TRIBUNAL JUDGE LINDSLEY**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

D O B

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr K Norton, Senior Home Office Presenting Officer

For the Respondent: Mr S Harding, instructed by J. McCarthy Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State. We shall refer to the respondent as the claimant. This is our joint decision: both members of the panel have contributed to the writing of this decision.

The Issues

2. The claimant faces administrative removal. The Secretary of State has accepted that the claimant, a national of Jamaica who has been in the

UK since 2001 without leave to remain but for an initial six months, is entitled to leave to remain under paragraph 276ADE (v) of the Immigration Rules (as he has lived in the UK for half of his life) but for the fact that it is said he cannot meet the suitability requirements at paragraphs S-LTR 1.5 and S-LTR 1.6 of Appendix FM because of his criminal behaviour and associations.

3. The Secretary of State contends that the claimant cannot meet these suitability requirements because he falls to be refused under S-LTR 1.5 as a persistent offender who shows a particular disregard to the law and because under S-LTR 1.6, the claimant's presence is not conducive to the public good because of his conduct, character and associations.
4. The First-tier Tribunal (FtT) allowed the claimant's appeal on the basis that the claimant's offending had not caused serious harm and because he was not a persistent offender who had shown a particular disregard for the law and so did not fall to be refused under S-LTR 1.5. Further, he did not fall to be refused under S-LTR 1.6 because there were no reasons rendering it undesirable for him to be allowed to remain in the UK when his convictions, conduct, character and associations were considered. As such he fulfilled the requirements of paragraph 276ADE of the Immigration Rules.
5. The Secretary of State asserts that the FtT erred in law in determining this appeal by failing to apply the correct legal test encapsulated in these two provisions of S-LTR.

Background

6. The claimant was born in September 1994. He arrived in the UK on 13th July 2001 with his mother, Ms A N, also a citizen of Jamaica as family visitors. She made further applications for him to remain as her dependent but these were refused by the Secretary of State and all appeals were dismissed by 21st April 2004. The claimant came to the attention of the police and local authorities thereafter, however it was first on 14th September 2012 that he was encountered and detained as an overstayer by the Immigration Service, who served him with notice of removal.
7. On 19th September 2012 the claimant made an application for leave to remain. By this time his relevant family members were his foster carer/*de facto* mother Ms M L, M L's two children, his biological brother CAP and his friend Ms KC. He has no contact with his biological mother, or knowledge of her whereabouts.
8. Initially this application was certified under s.94 of the Nationality, Immigration and Asylum Act 2002 but this decision was reversed following judicial review proceedings; and on 24th April 2013 the Secretary of State made the decision to refuse the claimant leave to remain. This decision is the subject of this appeal.

9. As outlined above the claimant's appeal against the decision to refuse leave to remain under paragraph 276ADE of the Immigration Rules was allowed by Judge of the First-tier Tribunal Blandy in a determination promulgated on the 29th August 2014.
10. Permission to appeal was granted by Judge of the First-tier Tribunal JM Holmes on 19th September 2014 on the basis that it was arguable that the First-tier judge had erred in law.

Evidence & Proceedings before the FtT

11. The Secretary of State relied upon evidence in the form of three statements from Mr Geoffrey Worsdell (formerly DC Worsdell), a witness statement from Police Intelligence Officer Eleanor Daniels and a witness statement from Police Constable Suaznabar who produced three DVDs of clips from *YouTube*. In addition there were a large number of reports about the claimant from the Police Crime Reporting Information System (CRIS), a custody record relating to the claimant, a Police National Computer Record relating to his brother C P, a report produced by the Youth Offending Team on the claimant by Ms Nancy Stewart dated 16th May 2012, two CRIS reports on the claimant's mother Ms A N, and a map of the area where the claimant lived.
12. For his part, the claimant produced an independent risk assessment report from Ms Denise E Marshall, a copy of his original Jamaican passport showing his entry stamp, a medical card and documents from Lambeth College.
13. The hearing before the FtT took place over three days, (10th and 11th June and 19th August 2014). Mr Worsdell gave evidence for almost the entire first day; the second day and part of the third day were taken up by the evidence of the claimant; and evidence was heard from Ms M L on the third day when submissions were also made.

Conclusions of the FtT

14. It is accepted by all parties and the FtT that the claimant has the following criminal record and or has accepted he had committed the following criminal acts:
 - 7/5/2007 theft of trainers for which he received a reprimand
 - 2/4/2010 theft of a bike for which he was cautioned
 - 7/2010 possession of an offensive weapon for which he received a warning
 - 19/7/2010 attempted theft of a computer for which he received a warning
 - 6/5/2011 robbery of a bus pass for which he received a 6 month referral order

- 13/6/2011 criminal damage of a car for which he received a 3 month referral order
 - 18/1/2012 violent disorder (throwing a bottle) in a riot for which he received 4 months detention and training
 - 23/5/2012 smoked cannabis – admitted offence no police action
 - 23/6/2012 obstructing a police officer for which he received a three year conditional discharge
15. It is uncontroversial that whilst all the above acts (except the smoking of cannabis) form the claimant’s criminal record, only the referral orders, the detention and training and conditional discharge are criminal convictions as these penalties were decided upon by a court after a finding of guilt.
16. It was argued before the FtT that the claimant had “led a criminal lifestyle since arriving in the United Kingdom” and that there had been an escalation in his offending behaviour in the sense of frequency and gravity of the offences and that the claimant was a member of a criminal gang, called the “Notre Dame Gang”.
17. It was also argued that the appellant’s true identity was MAC, and not DOB, on the basis of information provided to the Secretary of State by the Jamaican High Commission.
18. At paragraphs [18] to [20] of its decision the FtT found that the claimant had not been dishonest about his identity, and that there was no evidence before it that the Jamaican High Commission had found his identity to be MAC. This finding is not challenged by the Secretary of State in this appeal.
19. The FtT analysed the fifty five encounters between the claimant and the police set out in the respondent’s evidence and considered whether the evidence regarding each encounter was an indication of criminal activity or gang association. The FtT analysed these matters at [21] of its decision over 55 subparagraphs. The DVDs, the evidence of all the witnesses and the reports of Ms Nancy Stewart and Ms Denise Marshall were considered at [22] to [31] of the decision. The FtT found no evidence of criminal activity on the claimant’s part except for as set out at paragraph 15 above.
20. The FtT said regarding S-LTR 1.5 as follows:
- “36. I do not consider that the consequences of any of the offences, or even all of them taken in aggregate can be said to amount to “serious harm”. It is then necessary to consider whether, in the alternative, the appellant is a “persistent offender who shows a particular disregard for the law”. I do not consider that these offences, committed over a number of years whilst the appellant was still a child render the appellant a persistent offender and I do not find that they demonstrate that he shows a particular disregard for the law. I do find it interesting that he has

always pleaded guilty to the offences of which he has been convicted, and has never, so far as I can see, been convicted of an offence to which he pleaded not guilty. I consider that this does demonstrate a respect for the law. It is difficult to know precisely what the phrase “a particular disregard for the law” is intended to mean but it seems to imply that the individual concerned must have a disregard for the law that is over and above that demonstrated by a persistent offender. I find on looking at all the evidence as a whole that the appellant is neither a persistent offender nor has he shown a particular disregard for the law. For these reasons I find that the appellant’s application for leave to remain does not fall for refusal by virtue of the provisions of S-LTR 1.5.”

21. As to S-LTR 1.6 the FtT concluded at [37] to [44] of the decision that the evidence showed that the claimant was only on the periphery of any gang and had no involvement in any criminal enterprise as a gang member. The FtT found the other evidence amounted only to suspicion; and that there was a lack of real evidence linking the claimant to any crime except that set out at paragraph 15 of our decision above. In the words of the FtT: “Heaping suspicion upon suspicion does not add up to any more than mere suspicion”, and there was a: “lack of any real evidence against the appellant in relation to many of the instances when he was apparently suspected of a crime.” The FtT concluded that merely associating with people who have criminal records was not sufficient to say that it was undesirable for the claimant to remain in the UK. Whilst it was clearly the case that the claimant had on a number of occasions behaved badly and committed criminal offences these were generally relatively trivial, and that in the context of his family and home background his record was perhaps surprisingly minimal. The FtT noted that the reports of Ms Marshall and Ms Stewart showed that the claimant had the potential to lead a “good and honest and productive life as an adult” and concluded that:

“... neither the appellant’s conduct, even taking into account his convictions, nor his character or his associations render it undesirable for him to be allowed to remain in the United Kingdom, nor do I find that there are any other reasons rendering it undesirable for him to be allowed to remain in the United Kingdom.”

The Grounds of Challenge

22. The Secretary of State’s written grounds of appeal can be summarised as follows:
- The finding that the appellant was not a persistent offender under S-LTR 1.5 at [36] was contrary to the evidence.
 - It was not open to the Tribunal to find the appellant was not a “persistent offender” given the finding at [35] that he had eight incidents of criminal behaviour over six years.
 - The Tribunal had misinterpreted the meaning of “a particular disregard for the law” at S-LTR 1.5. The interpretation was too

generous at [36]. Pleading guilty when the appellant had broken the law did not show respect for it.

- It was not open to the Tribunal to look at the appellant's likely future conduct in relation to S-LTR 1.6 as is done at [43]. The assessment should have only been of past behaviour.
- It was wrong for the First-tier Tribunal Judge to have referred to his having friends who had criminal records at [42] of the decision, and to have set out terms for bail at [47] of the decision.

The Immigration Rules

23. The relevant parts of paragraph 276ADE read as follows:

276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

(i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

...

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment);

24. The relevant parts of Appendix FM S-LTR read as follows:

S-LTR.1.5. The presence of the applicant in the UK is not conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law.

S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.

Submissions on Error of Law

25. Mr Norton contended that the FtT had erred in law as it had applied an impermissible legal interpretation of S-LTR 1.5 with regards to the meaning of "persistent offender who shows a particular disregard for the law". He explained that there was no irrationality challenge to the tribunal's conclusions on the facts and it was accepted that all the

evidence had been considered. As noted above there was no challenge to the finding that the claimant had not caused serious harm through his offending, and thus did not fall to be refused under the first limb of S-LTR 1.5. Mr Norton accepted that no policy guidance from the Secretary of State had been put to the FtT regarding the definition of the meaning of “persistent offender with a particular disregard for the law”.

26. He argued that in accordance with Bah (EO (Turkey) - liability to deport) [2012] UKUT 00196 and Farquaharson (removal - proof of conduct) [2013] UKUT 000146 that the FtT had not applied the right standard of proof to the evidence and therefore had not seen that on the balance of probabilities it showed persistent offending. He argued that offending included all the incidents described in evidence by the Secretary of State. Even if this were not the case the accepted criminal convictions and admission of guilt to crime set out at paragraph 15 of this decision sufficed to show persistent offending as more than two convictions amounted to persistent offending. Mr Norton argued that “particular disregard for the law” added nothing as all people with two convictions or more had by definition shown a particular disregard for the law.
27. As set out in the grounds Mr Norton contended that the FtT had erred in law in the application of S-LTR 1.6 because they had looked in part at least at the likely future behaviour of the claimant and not just at past behaviour as would be correct. Mr Norton accepted that this challenge was not the strongest part of his case however.
28. Mr Norton did not pursue the ground relating to the bail conditions or reference to the criminal record of the Judge’s friends.
29. Mr Harding argued that absent a rationality challenge, the grounds of appeal were in reality simply a disagreement with the result. There had been an extremely thorough exploration of the issues by the FtT over a three day hearing which resulted in a thorough decision, which looked at every single allegation made by the Secretary of State in turn. It was open to the FtT to find that the evidence put by the Secretary of State did not, on the balance of probabilities, show that the claimant fell to be refused under S-LTR 1.5 or 1.6. The challenge had to fail as the Judge looked at the evidence, gave proper reasons for his conclusions and clearly applied the correct provisions of the Immigration Rules.
30. It was submitted by Mr Harding that the FtT had correctly interpreted S-LTR 1.5 as being concerned solely with criminal convictions and admissions of guilty to crime. This was supported by the wording at S-LTR 1.6 which referred to criminal convictions in conjunction with 1.5, and also fitted with the use of this word in the criminal juvenile justice context. On a plain reading S-LTR 1.5 was the provision which dealt with criminal convictions/ criminal record and S-LTR 1.6 dealt matters which did not amount to convictions. The Tribunal in Farquaharson did not refer to the appellant in that case being an offender at any point in their decision: but the evidence before the Tribunal showed to the civil

standard of proof that Mr Farquaharson's conduct meant it was not conducive to the public good to allow him to remain.

31. Mr Harding argued that in terms of the accepted criminal record of the claimant it was rightly found by the FtT that he was not a "persistent offender, and further it had been correct to factor in the appellant's difficult home and family situation in coming to this conclusion.
32. A "particular disregard for the law" was not obviously just a tautology: it was open the tribunal to give it the meaning of not including someone who behaved in a straight forward fashion towards the criminal justice system. Those who had a particular disregard might be those who did not attend court or who flouted bail conditions. It was also appropriate to consider the less grave nature of the offences showed less of a particular disregard for the law.
33. In relation to S-LTR 1.6 Mr Harding submitted that the FtT had looked at all the evidence carefully and come to reasoned conclusions. It had not simply focused on the future.
34. We invited Mr Harding and Mr Norton to comment on the definition of "persistent offender" used by the CPS in their legal guidance relying upon the Sentencing Guidelines Council Definitive Guideline as follows:

"In determining whether an offender is a persistent offender for these purposes, a court should consider the simple test of whether the young person is one who persists in offending:

...

iii) in most circumstances, the normal expectation is that the offender will have had some contact with authority in which the offending conduct was challenged before being classified as persistent; a finding of persistence in offending may also arise from orders which require an admission or finding of guilt these include reprimands, final warnings, restorative justice disposals and conditional cautions. Since they do not require such an admission, penalty notices for disorder are unlikely to be sufficiently reliable;

iv) a young offender is certainly likely to be found to be persistent (and, in relation to a custodial sentence, the test of being a measure of last resort is most likely to be satisfied) where the offender has been convicted of, or made subject to a pre court disposal that involves an admission or finding of guilt in relation to, imprisonable offences on at least three occasions in the past 12 months."

35. Both parties submitted that they found it to be of limited assistance as it was obviously guidance for criminal sentencing. Mr Norton said that it would be overly restrictive to apply this definition in a civil immigration

context; where as Mr Harding commented that it had not been before the FtT.

Discussion

S-LTR 1.5

36. This claimant is subject to administrative removal proceedings and not deportation action but it is notable that identical wording to that at S-LTR 1.5 appears at paragraph 398C of the Immigration Rules allowing for the deportation conducive to the public good of those whose offending has caused serious harm or those who are persistent offenders who show a particular disregard for the law.
37. We look first to the plain meaning of the words in the second provision of S-LTR 1.5. The Shorter Oxford English Dictionary (sixth edition) definition of “persistent” provides two main options of “continuing firmly or obstinately in a course of action especially against opposition” or of “continuing to exist or occur over a prolonged period, enduring”. “Offender” is defined in current usage as: “a person who (or occasionally a thing which) offends; a person who breaks a law, rule or regulation; a person who commits an offence; a person who gives offence, displeases or excites resentment.”
38. We note the guidance in Mahad (Ethiopia) v Entre Clearance Officer [2009] UKSC 16 at paragraph 10 of that judgement. Lord Brown, who gave the lead judgement, placed reliance on Lord Hoffman’s analysis in Odeola v SSHD [2009] UKSC 25 that the construction of an Immigration Rule relies upon the language of the rule construed against the relevant background, and concludes that: “The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meanings of the words used,”.
39. Applying these principles we find, the natural and ordinary meaning of the words “persistent offender” in the context of S-LTR 1.5 is someone who breaks laws over a prolonged period.
40. We further find that persistent offender under S-LTR 1.5 is confined to those whose law breaking is established by conviction or admission, and thus likely to be reflected in the criminal record of an appellant. Mere suspicion is not enough to establish the breaking of a law. It is important that deference is given to the cardinal principle of presumption of innocence. “Offender” has strong connotations of those convicted or recorded within the criminal justice system as having committed criminal offences, as indicated by the ordinary meaning of the words and the CPS guidance.
41. The cases of Bah and Farquharsan do not suggest that this approach is not correct. They are authority that the acts behind criminal

proceedings that do not result in conviction of an appellant can still be established on the civil standard of proof before a Tribunal as evidence of “conduct” that makes it not conducive to allow an appellant to remain in both the deportation and removal context. Clearly these principles therefore allow the Secretary of State and a tribunal to rely upon such material in their consideration of S-LTR 1.6. The cases are not authority that “offender” should be interpreted to include those who are alleged by the criminal justice system to have committed crimes but where there is no clear (and usually formal) admission of guilt by the appellant or conviction by a court.

42. Further, the wording of S-LTR 1.6 indicates that there may be convictions that do not fall within S-LTR 1.5, suggesting that criminal convictions should be the primary focus of S-LTR 1.5. It is clear that a wide range of matters can be brought into play under S-LTR 1.6; and thus this approach adds clarity whilst not excluding any relevant material from the consideration of an appellant’s suitability, and his or her ability to meet the criteria of the Immigration Rules on this basis.
43. Mr Norton’s proposition that “a particular disregard for the law” is meaningless or adds nothing cannot be correct. It is plain that the drafters of the rule believed that it added a qualification to the group of “persistent offenders” who were to be found unsuitable under this clause of S-LTR 1.5. “Particular” indicates a requirement to show a greater or more intense disregard for the law over and above the fact that the appellant has already been shown to be a “persistent offender”.
44. We find that “a particular disregard for the law” might be shown in a number of different ways. It might be that a persistent offender shows a particular disregard for the criminal justice process by, for instance: obstructing the trial process; committing perjury; prolonging trials unnecessarily by pointless pleading; or by committing offences on bail or licence. It might be that the particular disregard for the law is shown because the offences are by their very nature, or the way in which they were executed, at the more serious end of the spectrum of offending (although we appreciate that this sub category of S-LTR 1.5 is already narrowed to matters which do not cause serious harm). It also connotes a greater degree of responsibility for the wrong doing than would be found in a child or juvenile offender (or perhaps other more vulnerable offender such as those with mental health problems or a low IQ) who simply lacks impulse control or who is lead or intimidated by others into criminal behaviour.
45. S-LTR 1.5 uses the present tense. It is necessary to show that the appellant is a persistent offender who shows a particular disregard for the law. It is therefore clear that events reasonably proximate to the decision or hearing are likely to have greater relevance to an appellant falling to be refused in this way than historic matters.

The Test

46. Whether someone is “a persistent offender with a particular disregard for the law” is not simply a matter of crude arithmetic or totting up. There may be some cases where the number and frequency of the offences contained within a person’s criminal record is such that it brings him or her within the definition however most cases will require an evaluative analysis of all of the offences in play, and the motive or drive behind their commission.

S-LTR 1.6

47. We are satisfied that it is permissible to look at the future prospects of someone when examining this provision as it requires consideration of whether there is “other reasons” why it would not be conducive to the public good not to allow someone to remain, and material going to future likely developments in a person’s life could be relevant to this consideration.

Conclusions in this Case

48. Applying the analysis we have outlined above we find that it was open to the FtT to have allowed the claimant’s appeal for the reasons set out by the tribunal. Whilst the FtT considered certain evidence showed the claimant was not a “persistent offender”, the same material in our view was more relevant to showing he had no “particular disregard for the law” in the discussion of S-LTR 1.5. We also consider that some further factors noted in the discussion with regarding S-LTR 1.6 were more relevant to “a particular disregard for the law”. But when considered as a whole we find no material error of law in the reasoning by the FtT, nor any error as to the test it was required to apply.
49. It is particularly notable at [21] over 55 subparagraphs that the tribunal clearly acknowledged all of the allegations of criminal behaviour made against the claimant by the Secretary of State, and made a careful and sustainable evaluation of each incident and its impact on others. At [22] to [31] there is also a detailed analysis of the other evidence before the FtT in the form of DVDs, witness evidence and expert reports.
50. It was rationally open to the FtT at [36] to find that nine admitted criminal acts over a period of six years did not amount to “persistent offending”. We are certainly not persuaded by Mr Norton’s submission that two criminal convictions would always be seen as persistent offending. In accordance with our analysis each case must be viewed on its individual facts. We find it unlikely however that an offender is a persistent offender without his or her having had at least three convictions in the past year at the time of decision/hearing. This claimant had just one criminal conviction (obstructing a police officer) and one admission of criminal behaviour (smoking cannabis) in the year prior to the Secretary of State’s decision giving rise to this appeal. The claimant had no criminal offences committed in the year prior to the Tribunal hearing. In this context we have given consideration to the fact

that he had been detained for almost two years at the date of hearing but, on the evidence before the FtT, he had no “adjudications” for any untoward behaviour on his part whilst in detention either.

51. We agree that, in addition, it was rationally open to the FtT to find that this claimant had not shown “a particular disregard for the law” as is done at [36]. The tribunal noted the evidence indicated when the claimant was guilty he had pleaded to the offence and otherwise cooperated with the criminal justice system. We find the FtT’s conclusion is supported by the fact that the claimant’s offences were found by the FtT at [43] to be mostly at the more trivial end of the spectrum and that they were committed by him as a child living in very difficult social and family circumstances.
52. The consideration of S-LTR 1.6 by the FtT likewise discloses no error of law. There is detailed consideration at [38-40] of whether the evidence indicates that the claimant is a member of a gang, and a placing of the evidence personal to the claimant in the context of that relating to other gang members provided by the Secretary of State. The FtT concluded at [41] that the claimant is not a member of a gang. The remaining evidence regarding the claimant’s friends, accepted criminal record and behaviour is then considered at [42] and [43]. The FtT thoroughly considered all of the evidence going to the claimant’s conduct, character and associations and also gave consideration to any other reasons, in terms of his likely future behaviour, as to why it might not be conducive to the public good or undesirable to allow him to remain.

Decision:

The making of the decision of the FtT did not involve the making of an error on a point of law. The appeal by the Secretary of State is dismissed.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we continue the anonymity order made by the First-tier Tribunal. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We do so as there are sensitive issues concerning the appellant’s childhood.

Signed:

Date: 9th June 2015

Upper Tribunal Judge Lindsley