



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/18475/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 17 October 2019

Decision & Reasons Promulgated  
On 22 October 2019

Before

UPPER TRIBUNAL JUDGE FINCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

R W

(ANONYMITY ORDER MAINTAINED)

Respondent

**Representation:**

For the Appellant: The Appellant did not attend and was not legally represented  
For the Respondent: Ms A. Fijiwala, Home Office Presenting Officer

**DECISION AND REASONS**

**BACKGROUND TO THE APPEAL**

1. The Respondent is a national of Jamaica. The Appellant accepts that Respondent arrived in the United Kingdom in September 1997 but does not accept that he has lived here continuously since that time.
2. Six of the Respondent's children live here; as do his mother and brother. He is in contact with his eldest son, who is now an adult, and also his second youngest child, who is six years old and who is a British citizen.
3. The Respondent was convicted for six offences between 12 August 2016 and 4 February 2019. His last offence post-dated that decision under appeal.
4. On 19 May 2017 the Respondent applied for leave to remain on the basis of his family life with his children but his application was refused on 28 August 2018 on the basis that he did not meet the suitability requirements contained in section S-SLTR.1.6 of Appendix FM to the Immigration Rules because his presence was not conducive to the public good.
5. The Respondent appealed and his appeal was allowed by First-tier Tribunal Judge Gibbs in a decision promulgated on 17 July 2019 on the basis that he met the requirements of paragraph 276ADE(1)(iii) of the Immigration Rules. The Appellant appealed against this decision and First-tier Tribunal Judge Saffer granted her permission to appeal on 11 September 2019.

#### **ERROR OF LAW HEARING**

6. By 11.25 the Respondent had not attended the hearing or given any reason for not doing so. The notice of hearing had been sent to the address last given by the Respondent as his home address on 27 September 2019 and had not been returned to the Tribunal. The Respondent had not provided any telephone number on which he could be contacted. Therefore, I found that it was in the interests of justice to continue with the hearing in the Respondent's absence. The Home Office Presenting Officer made oral submissions and I have taken these into account when reaching my findings below. She was also of the view that the appeal should be remitted to the First-tier Tribunal as the correct test had not been applied by First-tier Tribunal Judge Gibbs.

#### **ERROR OF LAW DECISION**

7. First-tier Tribunal Judge Saffer granted the Appellant permission to appeal on the basis that it was arguable that First-tier Tribunal Judge Gibbs erred in law when she found that the Respondent was not a persistent offender. He also found that the Appellant's other grounds of appeal may be arguable.
8. In paragraph 24 of her decision, First-tier Tribunal Judge Gibbs accepted that the Respondent had been living in the United Kingdom for a continuous period of twenty years. Therefore, he was potentially entitled to leave to remain under paragraph 276ADE(1)(iii) unless he failed to meet any of the suitability requirements contained in Appendix FM to the Immigration Rules.
9. In the refusal letter the Appellant had asserted that the Respondent's offending brought him within paragraph S-LTR.1.6. of Appendix FM to the Immigration Rules which states:

“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 paragraph S-LTR.1.3. to 1.5.), character, associations, or other reasons make it undesirable to allow them to remain in the UK”.
10. First-tier Tribunal Judge Gibbs did not address this paragraph directly but instead, found at paragraph 20 of her decision, that:

“The appellant's evidence is that the battery and criminal damage events were domestic in nature and that despite the charges no serious violence was involved. He explained his failure to comply with the Community Order was due to the fact that he was living rough and was unable to attend on a weekly basis as he was required to do. As I have said I find that the appellant is a credible witness. I find that the criminal convictions occurred within a three year period, which when viewed in the context of residence in the UK since 1997 leads me to conclude that the appellant is not a persistent offender and, as he is currently under a suspended prison sentence, he has every reason to behave himself going forward”.
11. The failure to address paragraph S-LTR.1.6. was, in itself, an error of law.
12. In her refusal letter, the Appellant had not relied on paragraph S-LTR.1.5. which states:

“The presence of the applicant in the UK is not conducive to the public good because, in the view of the Secretary of State, ...they are a persistent offender, who shows a particular disregard for the law”.

13. However, as submitted by the Home Office Presenting Officer, the fact that an appellant was a persistent offender would also be relevant to the question of whether it would be undesirable to allow him to remain in the UK and would need to be assessed in the context of the recent case of *Tolga Binbuga v Secretary of State for the Home Department* [2019] EWCA Civ 551, which endorsed the decision in *Chege v Secretary of State for the Home Department* [2016] Imm AR 833. In paragraph 53 of the latter case, the Upper Tribunal found that “put simply, a “persistent offender” is someone who keeps on breaking the law... the question whether he fits that description will depend on the overall picture and pattern of his offending over his entire offending history up to that date. Each case will turn on its own facts”.

14. In paragraph 57 the Upper Tribunal also found that:

“In order to answer the question whether someone is a persistent offender, the decision-maker (be it the Tribunal or the Secretary of State) must consider the whole history of the individual from the commission of the first offence up to the date of the decision and ask themselves whether he can properly be described as someone who keeps on committing criminal offences”.

15. Therefore, in so far as the question of persistent offending was relevant to the test contained in paragraph S-LTR.1.6., the approach taken by First-tier Tribunal Judge Gibbs did not conform with the one recommended by the Court of Appeal which was that the relevant period started at the time of the first offence and continued until the date of the decision. In the current case it was also relevant that the Appellant had continued to offend after the date of the decision under appeal.

16. However, I am not persuaded that paragraph 276ADE required the Judge to balance the public interest against the Respondent’s family circumstances. The test was that contained in paragraph S-LTR.1.6.

17. Once the Judge had found that the Respondent was entitled to leave under the Immigration Rules, he was not required to go on to decide that he was also entitled to leave to remain outside the Immigration Rules. But if she did make such a decision, as she did in paragraph 27, she was under an obligation to provide reasons for the decision (See *MK (duty to give reasons) Pakistan* [2013] UKUT 00641 (IAC)). In addition, she should have applied sections 117 A-D of the Nationality, Immigration and Asylum Act 2002.
18. As a consequence, I find that there were errors of law in First-tier Tribunal Judge Gibbs' decision.

## **DECISION**

- (1) The Appellant's appeal is allowed.
- (2) First-tier Tribunal Judge Gibbs' decision is set aside in its entirety.
- (3) The appeal is remitted to the First-tier Tribunal for a *de novo* hearing before a First-tier Tribunal Judge other than First-tier Tribunal Judges Gibbs and Safffer.

# Nadine Finch

Signed  
Upper Tribunal Judge Finch

Date 17 October 2019