



IAC-AH-KRL-V1

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

Appeal Number: IA/33564/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 13 January 2016**

**Decision & Reasons Promulgated  
On 8 February 2016**

**Before**

**UPPER TRIBUNAL JUDGE LINDSLEY  
DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**and**

**MR OLALEKAN ADEYI  
(NO ANONYMITY ORDER MADE)**

**Respondent**

**Representation:**

For the Appellant: Mrs A Everett, a Home Office Presenting Officer

For the Respondent: Mr M Symes of Counsel

**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.

## **Background**

2. The claimant is a national of Nigeria, born on 15 November 1993. The claimant and his family, that is his mother and younger brother, were granted visit visas to enter the United Kingdom in 2004. The claimant's mother and brother arrived in the UK in March/April 2004 and the claimant arrived on his own aged around 10 to 11 years in November 2004. The claimant and his family remained in the UK unlawfully when their visas expired.
3. In 2006 the claimant's mother travelled to Nigeria and left the claimant and his younger brother alone at home. The claimant and his brother were placed in the care of Social Services. On return to the UK the claimant's mother was charged with, and convicted of, two counts of, child cruelty and neglect and was sentenced to twelve months' imprisonment on 3 July 2006. On 12 June 2007 the claimant's mother resumed care of the claimant and his brother under a supervision order.
4. On 11 August 2006 the claimant's mother made an application for leave to remain in the UK for herself and her two children. This application was refused on 10 June 2009. On 9 October 2009 the claimant's mother was served with a notice of liability to deportation. The claimant and his brother, being named as dependants, were also served with deportation notices. The claimant's mother appealed against that decision on 29 October 2009. Her appeal was dismissed on 13 April 2010. The Tribunal found that the claimant, his mother and brother could return to Nigeria as a family unit and that the claimant and his brother were young enough to adapt to life in Nigeria. Permission to appeal to the Upper Tribunal was refused on 11 May 2010 and on 1 June 2010 appeal rights became exhausted. The deportation orders for the claimant's mother the claimant and his brother were signed on 13 July 2010. On 8 November 2011 removal directions were set for 2 December 2011. They were subsequently cancelled on receipt of an application to revoke the deportation orders. The claimant's deportation order as a dependant of his mother was revoked on 9 January 2012, as he was over the age of 18 years and no longer a dependant. His mother's application for revocation of the deportation order was refused on 20 January 2012 and no appeal was lodged.
5. On 14 September 2012 the claimant was arrested by the Police. He was served with an IS.151A notice as an overstayer and released on temporary admission with reporting conditions.
6. In October 2012 the claimant's mother died unexpectedly of a heart attack at the age of 48 years.
7. On 10 April 2014 the claimant's solicitors made written representations on behalf of the claimant requesting leave to remain in the UK on the basis that he had been in the UK since the age of 8, his mother had brought him to the UK, she had been charged with child abandonment, the claimant had been placed in care under a police protection order, his mother had passed away recently and his brother was in foster care. This application was refused for the reasons set out in a letter dated 29 July 2014.

8. The reasons for refusal were that the Secretary of State considered that the claimant did not meet the suitability requirements under Section S-LTR, in particular 1.5, of the Immigration Rules 395 (as amended) (the 'Immigration Rules') on the basis that the presence of the claimant in the UK is not conducive to the public good because he is a persistent offender who shows a particular disregard for the law. The Secretary of State referred to the fact that the claimant had received ten convictions for fourteen offences in the UK between 9 February 2010 and 13 June 2013. The Secretary of State believed that the claimant had and would continue to pose a serious risk to the community and that refusal of leave to remain and subsequent requirement to leave the UK was an appropriate measure. The Secretary of State considered the claimant's claim under Article 8 of the European Convention on Human Rights ('Article 8') in respect of family life and considered that the claimant's removal would not breach his rights under Article 8 on the basis of family life. In respect of private life, the Secretary of State considered that the claimant had not made a positive contribution to society during his time in the United Kingdom and had shown a complete disregard for the laws of the UK. The Secretary of State considered that any interference with the claimant's private life was proportionate when balanced against the pursuit of effective immigration control, the prevention of disorder and crime and the protection of rights and freedoms of others. The Secretary of State also considered whether there were any exceptional circumstances in the claimant's case, finding that there were none. It is this decision that is the subject of the appeal to the First-tier Tribunal.

### **The Appeal to the First-tier Tribunal**

9. The claimant appealed to the First-tier Tribunal against the Secretary of State's decision. In a decision promulgated on 14 July 2015 First-tier Tribunal Judge Plumtre allowed the claimant's appeal. The judge found that the claimant did not fall within paragraphs 398(b) and (c) of the Immigration Rules, the claimant was not a persistent offender and that his offending had not caused serious harm. The judge accepted that in the past he had shown a disregard for the law. When considering Article 8, and in undertaking the proportionality balancing exercise, the judge found that the seriousness of the claimant's offences was not that great, gave particular weight to the fact that he had never been sentenced to any period of imprisonment, noted the comparative leniency of all the sentences imposed, gave weight to the length of the claimant's stay in the UK, that he had had a difficult childhood and that he had not committed any offences since May 2013. When taking account of the factors set out in section 117B of the Nationality and Immigration Act 2002 (the '2002 Act') the judge considered that although little weight should normally be given to private life established when the claimant was in the UK unlawfully this was set against the fact that it was the conduct of his parent that resulted in the claimant being in the UK unlawfully.

### **The Appeal to the Upper Tribunal**

10. The Secretary of State applied for permission to appeal to the Upper Tribunal. First-tier Tribunal Judge Ransley granted permission to appeal on 23 October 2015. The

grant of permission states that it is arguable that, i) the judge erred by considering paragraph 398 of the Immigration Rules, ii) that the judge's finding that the claimant is not a persistent offender is irrational and iii) that the judge erred in failing to consider the financial requirements in section 117B, whether there would be significant obstacles to the claimant's integration in Nigeria and in applying Maslov v Austria [2009] INLR. Thus the appeal came before us.

### **Submissions of the Parties**

11. The grounds of appeal set out three grounds.

#### **Ground 1 - making a material misdirection of law.**

12. The Secretary of State submits that the First-tier Tribunal materially erred in law because the judge assessed the claimant's appeal under the deportation provisions in the Immigration Rules. No deportation decision has been made. The claimant's application was refused by the Secretary of State because she considered that his case falls for refusal under the suitability grounds specifically S-LTR.1.5. Directions for removal were given under section 10 of the Immigration and Asylum Act 1999. It was submitted that the Tribunal has considered the claimant's case incorrectly under the wrong Immigration Rules.

13. In her oral submissions Ms Everett submitted in relation to ground 1 that the error of law was material because the First-tier Tribunal Judge refers throughout to deportation, it is very difficult to ascertain from the decision what the judge's reasons are because the judge considers them through the lens of deportation. Ms Everett did accept however that the claimant would have a higher hurdle to overcome in relation to deportation, rather than removal and the suitability requirements under the Immigration Rules.

#### **Ground 2 - irrational findings and failing to give adequate reasons for findings on material matters**

14. It is submitted that the Tribunal's findings, at paragraphs 52 to 61, that the claimant's offending has not caused serious harm nor is he a persistent offender is wholly inadequate and the judge has failed to provide adequate reasons. It is asserted that it is irrational for the Tribunal to find that the claimant's offending, i.e. fourteen offences in a period between February 2010 and June 2013, does not meet the definition of a persistent offender. The Secretary of State relies on the case of R v G (TT) [2004] EWCA CRIM 3086 and asserts that this judgment clarifies that there is no rigid baseline when considering what constitutes persistence of offending. It must be a fact specific exercise. The Tribunal have completely failed to give any reasons whatsoever as to why the claimant's offending does not fall within the category of being a persistent offender. The fact that the claimant has received so many convictions for a large number of offences over a sustained period of time, the evidence of the police demonstrates his undesirable conduct and his probation officer has found that he has the potential to cause serious harm if he re-offends is all clearly evidence that the claimant is a persistent offender. Further, when considering that

the claimant has not offended since 2013 the Tribunal fails to note that the claimant would have been on his best behaviour as he was then fully aware that he could face deportation or removal because of his conduct.

15. In relation to ground 2 Ms Everett submitted that the Tribunal, at paragraph 56, applauds the claimant for not being stopped by the police and that there is a tension between the findings in this paragraph and the findings of the judge in paragraph 60 where the judge appears to accept that part of the claimant's problems arose as a result of him being a young black male known to the police. Ms Everett submitted that the judge has not taken into consideration the fact that lack of offences committed by the claimant recently could have been because he was aware of the potential for removal. She asserted that there were a very large amount of convictions in a relatively short space of time. In response to a question from Judge Lindsley regarding the claimant's assertion that the requirement for a persistent offender is that they are currently a persistent offender. Ms Everett did not have any submissions on this point.

**Ground 3 - making a material misdirection of law.**

16. The Secretary of State submits that given the claimant's case falls for refusal under the suitability grounds this overrides any Article 8 considerations. It is also submitted that when considering the claimant's Article 8 rights within the Immigration Rules and outside the Rules the Tribunal has erred as to why he would meet these and why it would be disproportionate to remove the claimant. It is asserted that the Tribunal has failed to fully consider Section 117B of the 2002 Act and has failed to consider whether the claimant is financially independent. The Secretary of State asserts that the claimant has funded himself from his criminal activities and that it is unclear that the claimant will be able to support himself and not be a burden on taxpayers. Further the Tribunal failed to consider that the claimant has been a burden on the taxpayer as a result of his criminal activities. The Secretary of State asserts that the Tribunal has erred in finding that the claimant has no ties to Nigeria, as the correct assessment is whether there are very significant obstacles to the claimant's integration in Nigeria. It is asserted that the claimant spent the first eleven years of his life in Nigeria and therefore spent a large part of his youth and formative years there. In the Secretary of State's Reasons for Refusal Letter information is provided that the claimant has an uncle in the UK who has not only sponsored the visa applications of his mother but also sponsored several visa applications for the claimant's father to visit the UK. The Secretary of State submits that there is every reason to believe that the claimant's uncle will be able to assist the claimant in tracing his father or provide him with support during his reintegration. The Secretary of State also asserts that the Tribunal's reliance on the case of Maslov v Austria [2009] INLR 47 is in error as the case does not apply to the claimant who has never had settled status in the UK, has spent a major part of his childhood and youth in Nigeria, as well as the UK and has ties to Nigeria.
17. In relation to ground 3 Ms Everett submitted that the determination is insufficiently reasoned. At paragraph 63 the judge said that the claimant had no knowledge of

Nigeria. However, he clearly lived there until he was the age of 11. She therefore submitted that it was a step too far to say he could have no knowledge of Nigeria. This was not supported by the evidence. There is no consideration of the evidence regarding the claimant's uncle which was set out in the Reasons for Refusal Letter. He supported visa applications from the claimant's father. In response to a question from Judge Lindsley as to whether or not the claimant's father has ever visited the UK, Ms Everett indicated that she did not know. Ms Everett submitted that the fact that the claimant has lived here nearly half of his life is not automatically an obstacle in terms of reintegration. On the facts of this case the finding at paragraph 68 regarding the claimant's brother, she submitted that it is not clear how often the claimant and his brother see each other. She also submitted the fact that someone does not have anyone in another country is not necessarily an obstacle in terms of integration. She submitted that there is confusion in the determination about what provision is being looked at. When considering Article 8 it is not clear that the judge is not considering Article 8 through the lens of deportation as the judge refers to the case of Maslov. Ms Everett submitted that there is no proper finding on Article 8 and whether or not there are obstacles to the claimant's integration into Nigeria. Ms Everett indicated that it was not her position that the claimant could not succeed outside the Immigration Rules, but there was insufficient reasoning in the decision; insufficient weight was put on the public interest; and it is difficult to see from the decision what weight has actually been put on public interest. The judge has not considered the financial independence requirements. The Article 8 evaluation was hampered by the failure of the judge to set out clearly what was being considered.

18. The claimant filed a Rule 24 (of the Tribunal Procedure (Upper Tribunal) Rules 2008) response. The claimant accepts that the First-tier Tribunal made an error of law in its approach to the appeal by referring to the deportation Rules. However, the claimant asserts this is not a material error of law. An appeal against deportation would have raised statutory presumptions under Section 117C of the 2002 Act. The legal framework would have erected a hurdle for the respondent to surmount far higher than he was in truth required to traverse for his appeal to have succeeded. So the fact that the Tribunal referred to the wrong legal framework is immaterial. It is submitted that there is nothing in the decision of the First-tier Tribunal that suggests the wrong factors were taken into account regarding either suitability under the Rules or the enquiry outside the Rules directly applying Article 8 of the ECHR. The factors identified by the judge at paragraph 53, i.e. the nature and seriousness of offending, length of stay, timing of offences and solidity of ties here as opposed to abroad were all plainly material to the enquiry as to the proportionality of the removal decision. The relevant aspects of the suitability Rules, i.e. character, conduct, serious harm and persistent offending were all addressed within the enquiry, which the First-tier Tribunal conducted between paragraphs 55 and 72.
19. Mr Symes indicated that he relied on the Rule 24 response. He accepted that there was an error of law in the Tribunal's consideration of the matter as a deportation issue and looking at the deportation Rules, but submitted that this was not a material error. As there is a higher standard on deportation the judge must have inevitably found that the claimant passed the general suitability under the Rules.

20. With regard to the second ground of appeal it is asserted (in the Rule 24 response) that the challenge that the Tribunal's decision is perverse is a demanding hurdle to overcome. The First-tier Tribunal's reasons are transparent. The claimant had set his face against his past misdemeanours and so posed no risk of serious harm to the public. In relation to the case of **R v G (TT)** all that authority shows is that 'persistent offender' is a widely drawn term allowing for some latitude of language in its use, i.e. it is a question of fact. It is asserted that the phrase in the Immigration Rules plainly looks at present circumstances as a result of the tense employed by the draftsman "they are" and "shows a particular disregard". The First-tier Tribunal was therefore entitled to find that there was no present offending risk and that whether or not the claimant had been a persistent offender historically he was not one now. It is also submitted that the Sentencing Council guidelines state that the test of whether the young person is one who persists in offending, gives as an example imprisonable offences on at least three occasions in the past twelve months. It is submitted that these are strong indications that even in the context of sentencing the definition of persistent offender implies a present risk of committing misdemeanours.
21. With regard to the second ground of appeal Mr Symes submitted that this was a disguised rationality challenge. He submitted that the reasoning in the decision was transparent. The claimant has set his face against offending. The Tribunal judge was perfectly able to find that the claimant does not pose a serious risk of harm. With regards to the more technical challenge regarding the definition of persistent offender Mr Symes submitted that the wording is in the present tense. He also submitted that the Reasons for Refusal Letter did not make these arguments. This has been brought up for the first time in the grounds of appeal. He submitted that it is too late to treat this as a test case to rule on the meaning of persistent offender. The judge took a perfectly reasonable approach.
22. Regarding the third ground of appeal -Article 8, the rule 24 response asserts that the Tribunal did not overlook Section 117B of the 2002 Act. This is addressed at paragraph 69 of the decision. The judge took into account the English language requirements and the precarious nature of the claimant's residence. It is also clear that the First-tier Tribunal Judge did not give any affirmative weight to his employment prospects, though it is clear by the phrase '*he had been handicapped by the death of his mother and hence really has no one to help him to regularise his status in the UK*' the First-tier Tribunal Judge took account of the fact that he had been unable to establish himself on such a footing as would permit him to earn a living. It is also submitted that in the requirement in 117B(3) the focus is on financial independence, not an enquiry into the costs of historic criminality. The First-tier Tribunal fully evaluated the claimant's social, cultural or family ties. Given the claimant arrived in the UK aged 10 and had last had contact with his father eight years ago, there was no reason to think he would be able to integrate in Nigeria.
23. With regard to the third ground in oral submissions Mr Symes asserted that the judge has just done enough in terms of setting out reasoning. He referred to paragraphs 63, 66, 68 and 69. The judge found that there was no family and no help

to integrate in Nigeria. The judge considered Article 8 outside the Rules. The judge was impressed by the length of residence in the UK contrasting with the lack of links to Nigeria. In conducting a proportionality exercise the judge's conclusion was perfectly reasonable in finding that it was a disproportionate interference with the claimant's rights. With regard to Section 117B he submitted that the judge took account of the claimant's precarious status and although the judge did not look explicitly at the financial position, the judge did look at the parent's conduct. It was the mother who caused the claimant to be in the position that he is in. He was innocent. He could not work or study as a result of his mother's actions. The critical issue Mr Symes submitted was the compelling case outside the Rules. It was inevitable that the judge would have found a compelling case and a lack of public interest in removing the claimant.

## Discussion

### The Issues

24. The three grounds of appeal can be set out succinctly as follows. Firstly, the First-tier Tribunal erred in law by considering the appeal on the basis of the deportation provisions of the Immigration Rules. Secondly the judge's finding that the claimant was not a persistent offender was irrational and inadequately reasoned. Thirdly that there were errors and insufficient reasons for the findings that it would be disproportionate to remove the claimant.

### Ground 1 - application by the judge of the deportation provisions

25. As set out above it was conceded by the claimant's representative that the judge erred in considering paragraphs 398 and 399 of the Immigration Rules. The claimant is subject to administrative removal proceedings and not deportation action. The claimant's application for leave to remain in the UK was refused because the Secretary of State considered that he fell for refusal under the suitability grounds of appendix FM, specifically S-LTR.1.5.
26. The judge, at paragraph 6, sets out that the application for leave to remain was refused under the suitability requirements set out in S-LTR of Appendix FM. However, the judge and the parties then appear to agree to have proceeded on the basis that this was a deportation case. At paragraph 10 the judge states:
- "Since the burden of proof lay on the respondent to establish that the appellant's deportation was conducive to the public good, by agreement with both representatives, the SSHD presented its case first."
27. It is clear that the judge then considered the appeal in light of the deportation provisions. She did not refer to the suitability requirements in S-LTR subsequent to the mention of those provisions in paragraph 6. Throughout the decision the judge conducts an evaluation of the evidence and makes findings through the lens of the deportation provisions. Howsoever the confusion arose we find that the judge erred by considering the claim under the deportation provisions. Core to the Secretary of State's case is whether or not the claimant is a persistent offender. This ought to have



been considered under the suitability requirements of S-LTR.1.5 not the deportation provisions but we note that wording at S-LTR.1.5 and at paragraph 398C of the Immigration Rules is identical in that it poses a test allowing for refusal/deportation because refusal/deportation would be conducive to the public good because “their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law”. The relevant aspects of the suitability requirements namely, character, conduct, serious harm and persistent offending were all addressed by the judge. We do not therefore consider that the error is material. We consider below the findings of the judge in light of the requirements of S-LTR.1.5.

Ground 2 – is the claimant a persistent offender?

28. The Secretary of State considers that the claimant fell for refusal under Paragraph S-LTR.1.5. on the basis that he is a persistent offender. There is no definition in any of the Immigration Acts or in the Immigration Rules of ‘persistent offender’. There is no definition in the Interpretation Act 1978. The words should therefore be given their natural and ordinary meaning.
29. We look first to the plain meaning of the words in the 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.’
30. 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 the law over a prolonged period.
31. 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.
32. We have considered the cases of **Bah (EO (Turkey) – liability to deport) [2012] UKUT 196** and **Farquaharson (removal – proof of conduct) [2013] UKUT 146**. Those cases do not suggest that this approach is incorrect. They are authority for the proposition 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 the UK in both the deportation and removal context. Clearly a wide range of matters can be brought into play under S-LTR 1.6. These principles therefore allow the Secretary of State and a tribunal to rely upon such material in their consideration

of S-LTR 1.6. as the wording indicates that there may be conduct which does not fall within S-LTR 1.5 that can be taken into account. 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.

33. As set out above, Mr Symes provided a copy of the Sentencing Guidelines Council's publication 'Overarching Principles – Sentencing Youths - Definitive Guidelines'<sup>1</sup>. At section 6 the following is set out

'6. Persistent offenders

...

6.3 "Persistent offender" is not defined in legislation but has been considered by the Court of Appeal on a number of occasions. However, following the implementation of the 2008 Act, the sentencing framework is different from that when the definition was judicially developed, particularly the greater emphasis on the requirement to use a custodial sentence as "a measure of last resort".

6.4 A dictionary definition of "persistent offender" is "persisting or having a tendency to persist"; "persist" is defined as "to continue firmly or obstinately in a course of action in spite of difficulty or opposition".

6.5 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:

i) 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 classed as "persistent"; a finding of persistence in offending may be derived from information about previous convictions but 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;

ii) 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 3 occasions in the past 12 months.'

34. The guidance provided in respect of sentencing for criminal offences cannot be determinative of the interpretation of the phrase 'persistent offender' for immigration law purposes. What we do note from the extract set out above is that there is nothing inconsistent in the approach advocated in relation to defining

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<sup>1</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/web\\_overarching\\_principles\\_sentencing\\_youths.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/web_overarching_principles_sentencing_youths.pdf)

persistent offender for the purposes of sentencing in relation to criminal proceedings with the approach that we have adopted.

35. We do not find that the case of **R v G (TT) [2004] EWCA CRIM 3086** relied on by the Secretary of State provides assistance. This case is in relation to criminal proceedings. It appears to confirm that defining persistent offender is a fact based exercise.
36. 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 also connotes an evaluation of the degree of responsibility for the wrongdoing. For example, 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 led or intimidated by others into criminal behaviour may be less likely to be considered to have a particular disregard for the law.
37. Mr Symes submitted that the phrase used in S-LTR 1.5 ‘*they are a persistent offender who shows a particular disregard...*’ plainly looks at present circumstances as it uses the present tense. He also submitted that as paragraph 6.5 from the sentencing guidelines refers to ‘one who persists’ and refers to offences in the past 12 months this provides a strong indicator that it is a present risk. We consider that this must be correct. We are of the view that it is necessary to show that the claimant’s convictions for criminal offences demonstrate that he currently **is** to be regarded as 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 the claimant falling to be refused in this way than historic matters.
38. We find that the test as to 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 including the motive or drive behind their commission, the age or particular characteristic of the offender and the proximity of the offending at the date of decision or hearing.

*Application of the test to the findings of the First-tier Tribunal*

39. At paragraph 52 the judge accepted that the claimant had shown in the past a disregard for the law. The judge in paragraph 61 sets out:
 

“I am aware that there is currently no definition of persistent offender...I find that the appellant does not fall within the category of “persistent offender “and cannot sensibly be so described ...”
40. Whilst the finding in that paragraph is not supported by any reasoning it must be read in light of the decision as a whole. The First-tier Tribunal set out in detail the

evidence in the case (paragraphs 18 -46). The claimant's criminal convictions were set out in a table in the First-tier Tribunal's decision. There is no dispute that the convictions are as recorded by the judge<sup>2</sup>. There are 10 convictions for 14 offences as follows:

- 9/2/10 - Possession of cannabis - absolute discharge
- 10/2/10 - Using threatening behaviours - referral order 9 months  
- Possession of offensive weapon - referral order 9 months
- 26/5/10 - Battery - Supervision requirement Youth Rehabilitation Order
- 27/4/11 - Breach ASBO - Fine £100
- 4/5/11 - Burglary dwelling - Supervision requirement Youth Rehabilitation Order
- 3/8/12 - Possession cannabis - No penalty
- 13/9/12 - Driving whilst disqualified - offence committed on bail - 12 weeks young offender's institution suspended 18 months. Supervision order 12 months, curfew 3 months with electronic tagging  
- Using vehicle whilst uninsured - no separate penalty
- 20/12/12 - Failing to comply with community order - supervision order continued - 6-hour work requirement
- 2/5/13 - Driving whilst disqualified - 16-week young offender's institution suspended for 18 months. Supervision requirement electronic tagging  
- Failure to stop vehicle when required by police - no separate penalty
- 13/6/13 - Failure to comply with community order - resulting from original conviction 13/9/12 - order revoked  
- Using a vehicle whilst uninsured - no separate penalty

41. The judge considered the claimant's offending against the criteria identified in the case of **Akpinar [2014] EWCA Civ 937**. Whilst that evaluation is essentially a proportionality exercise some of the factors are relevant to the establishment of whether or not the claimant is a persistent offender. The factors we have identified as relevant to an assessment are the nature of the offences and the motive or drive behind their commission, the age or particular characteristic of the offender at the time of the offences and the proximity of the offending to the date of decision or hearing.

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<sup>2</sup> There is a typographical error in the table set out in the decision -the 9/2/10 date is recorded as 9/12/10 and the sentence in relation to the offences of 2/5/13 is recorded against the wrong offence

42. The judge at paragraph 60 set out that she accepted *'that the offending and CRIS reports establish conduct that is certainly not attractive, is clearly anti-social and confrontational to the police ...'*
43. At paragraph 56 she took into consideration the fact that the claimant had not offended since June 2013, which was a period of 2 years as at the date of the hearing. She accepted the claimant's evidence about the driving offence in 2013 that he wanted to get caught (paragraph 57). The judge found that the claimant had tried to turn his life around as evidenced by the *'several impressive letters in support from Newham Social services, UserVoice and Manor Green College'* (paragraph 58). The judge took into consideration the claimant's age and the lack of any meaningful family support since the death of his mother (paragraph 56).
44. The judge also considered the probation officer's report giving weight to the statement that although the claimant has the potential to cause serious harm he is unlikely to do so unless his circumstances change, and to the fact that he has made good progress.
45. The evidence of DC Petrov included, in addition to the convictions, a number of arrests and interventions, which did not result in charges, cautions or convictions. The judge in considering the evidence of DC Petrov found that there is no evidence to support any allegation that the claimant is a gang member or that he has criminal associations (paragraph 62). As we set out above these matters would be relevant to an assessment of suitability under SLT-R 1.6. As confirmed at the hearing the Secretary of State did not refuse the claimant's application under S-LTR 1.6. These matters are not therefore relevant to this case, which concerns suitability on the basis that the claimant is a persistent offender who shows a particular disregard for the law.
46. We consider that the claimant's record of offending is an unedifying one. However, the judge took the convictions into consideration when evaluating that offending against the backdrop and the circumstances in which it arose and gave particular weight to the fact that he had never been sentenced to any period of imprisonment and noted the comparative leniency of all the sentences imposed. She also took into account the fact that the claimant had not offended for 2 years together with the progress made by the claimant as attested to by the various agencies involved. Given the period involved in not committing crime we do not consider that the judge erred in law or acted irrationally in not considering that the claimant might simply be on his best behaviour during this period because of the threat of removal.
47. We therefore conclude that it was rationally open to the First-tier Tribunal on the facts of this case to find that the claimant was not a persistent offender and that there was no misapplication of the legal test required to assess this aspect of the Immigration Rules. There was therefore no material error of law in the First-tier Tribunal's findings on this aspect.
48. On that basis the claimant did not fall for refusal under paragraph SLR-T 1.5 of appendix FM to the Immigration Rules.

Ground 3 - making a material misdirection of law

49. It is also submitted that when considering the claimant's Article 8 rights within the Immigration Rules and outside the Rules the Tribunal has erred. It is clear that the First-tier Tribunal did not consider the correct Immigration Rules. It appears that the Tribunal considered the claimant's Article 8 claim outside the Immigration Rules (paragraph 63) conducting a proportionality exercise and importing a test of social, cultural and family ties (paragraph 68)<sup>3</sup>. Although the First-tier Tribunal did not consider the correct test, which is an error of law, we ultimately find that this was not material as from the material within the Article 8 ECHR consideration it is clear that the judge would have found that there were very significant obstacles to the claimant's integration into Nigeria had she correctly directed herself to consider the appeal under paragraph 276ADE (1)(vi) of the Immigration Rules. We are supported in this conclusion by the fact that the judge clearly had in mind the previous paragraph 276ADE (1)(vi) test of "has no ties (including social, cultural or family) with the country to which he would have to go if required to leave" see paragraph 68 of the decision.
50. It was confirmed by the parties' representatives at the hearing that the claimant had not spent at least half of his life in the UK; therefore paragraph 276ADE(v) does not apply<sup>4</sup>. The relevant provision under the Immigration Rules is paragraph 276ADE (vi) which at the relevant time provided:
- '(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
- ...
- (vi) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the United Kingdom.'
51. Relevant to the "very significant difficulties to integration" test the First-tier Tribunal found the following in the Article 8 ECHR proportionality exercise: that the claimant had had a very difficult childhood; that the UK is his home; that he has no knowledge of Nigeria and no meaningful family there with whom he has had any contact in the past eight years; that his father had not been in touch with him since 2007 and had established a new family which did not include the claimant; and that he has lived in the UK for over half his life. The Secretary of State has not

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<sup>3</sup> The Secretary of State also referred to the 'no ties' test in the reasons for refusal letter – see paragraph 24 of the letter.

<sup>4</sup> The First-tier Tribunal found that the claimant had lived more than half his life in the UK (paragraph 66).

demonstrated that any of these findings is unsound or conclusions that the Tribunal was not entitled to reach. We therefore consider that given these conclusions, which clearly are directly relevant to the test of very significant obstacles to the claimant's integration into Nigeria being met, there is no material error of law in the decision of First-tier Tribunal and that the conclusion that the appeal is to be allowed on Article 8 ECHR grounds is sufficiently reasoned.

52. As we have found that the claimant meets the requirements of paragraph 276ADE of the Immigration Rules on the basis of findings by the First-tier Tribunal there is no need to consider Article 8 outside of the Immigration Rules. We are not required therefore to consider the statutory provisions continued in sections 117A-D of the 2002 Act (see **Bossade (ss117A-D Interrelationship with Rules)** [2015] UKUT 00415 (IAC)). However, if we had done so we would have agreed with the submissions of Mr Symes that the assessment was not one which erred materially in law. The only real complaint of the Secretary of State is the lack of reference to the claimant's inability to be self-sufficient in the proportionality exercise. It is clear however that the judge understood the claimant not to be financially self-sufficient: his lack of immigration status is explicitly referred to in the analysis of proportionality, and earlier in the decision the judge relates this lack of status to his inability to work.

### **Notice of Decision**

53. The decision of the First-tier Tribunal did not involve the making of a material error on a point of law.
54. The appeal of the Secretary of State is dismissed and the conclusion of the First-tier Tribunal allowing the claimant's appeal upheld.
55. We have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence we do not consider it necessary to make an anonymity direction.

Signed P M Ramshaw

Date 2 February 2016

Deputy Upper Tribunal Judge Ramshaw