Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11867/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23rd March 2018	**On 1st May 2018**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

MR CARDON MUYENGWA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Moffatt, instructed by Legal Rights Partnership
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Zimbabwe born on 22 November 1974. He appeals against the decision of First-tier Tribunal Judge Graham, dated 14 July 2017, dismissing his appeal against the refusal of leave to remain as a spouse and as a parent of British citizen children on human rights grounds.

2. The Appellant appealed on the grounds that the judge made the following errors of law:
   (i) The burden of proving the suitability provisions was on the Respondent and she failed to provide documents relating to the drink driving offences. The judge failed to apply the correct burden of proof;

(ii) The judge failed to apply the correct test in concluding that the Appellant was a persistent offender;
(iii) The judge failed to determine whether the Appellant showed a particular disregard for the law;
(iv) The judge failed to consider the Respondent's guidance;
(v) The judge failed to consider the Appellant's case outside the Immigration Rules under Article 8;
(vi) The judge erred in assuming that the Appellant could return to the UK by applying for entry clearance;
(vii) The judge failed to conduct a proper analysis of the impact of the Appellant's removal on the entire family;
(viii) The judge failed to conduct a proper analysis of the best interests of the children and to properly apply section 117B(6) of the Nationality and Immigration Act 2002.
(ix) The judge relied on authorities not referred to at the hearing, but failed to consider the authority relied on by the Appellant, which was not a deportation case;
(x) The judge made speculative findings.

Permission was granted by First-tier Tribunal Judge Hodgkinson on 23 January 2018 on all grounds except ground (v).

The Appellant's immigration history

3. The Appellant arrived in the UK in October 2000. He has been continuously resident since then. The Appellant is married to a British citizen and has two British citizen children. He was granted discretionary leave to remain in the UK on 9 June 2009 for three years, extended for a further period of three years to 12 January 2016. On 6 January 2016, the Appellant applied for further leave to remain in the UK. This application was rejected and returned as invalid and the Appellant submitted a further application, which was refused on 22 April 2016.

4. The Appellant has four convictions for drink driving and related offences between 2006 and 2016. The basis of the Respondent's refusal is that the Appellant does not meet the suitability requirements of Appendix FM by reference to paragraph S-LTR1.5, 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, their offending has caused serious harm or they are a persistent offender who shows particular disregard for the law." In considering Article 8 outside the Rules, the Respondent concluded that there were no exceptional circumstances and the Appellant's prolonged and persistent criminal conduct over the past ten years outweighed his right to family life. His British children, aged 3 and 11, could continue to reside in the UK whilst he attempted to regularise his stay.

5. The First-tier Tribunal Judge concluded that the Appellant was excluded under the suitability requirements in that he was a persistent offender and therefore his presence in the UK was not conducive to the public good. The judge also found that the Appellant's removal would not be disproportionate.

The Appellant's previous convictions

6. The Appellant was convicted of the following offences:
   (1) 17 May 2006: Failing to provide a specimen for analysis. Fined £150 and disqualified from driving.
   (2) 11 June 2007: Driving a motor vehicle with excess alcohol, driving whilst disqualified and using a vehicle whilst uninsured. Community order to do unpaid work of 180 hours and disqualified from driving. Subsequently varied to four months imprisonment following breach of a community order on 12 July 2007 and further offences of driving whilst disqualified and using a vehicle whilst uninsured committed on 10 October 2007. Sentenced to four months imprisonment on 8 November 2007 and disqualified from driving.
   (3) 19 August 2009: Driving a motor vehicle with excess alcohol, driving whilst disqualified, driving a motor vehicle taken without consent and using a vehicle whilst uninsured. Suspended sentence; four months, suspended for two years and disqualified from driving.
   (4) 19 January 2016: Failing to provide a specimen for analysis. Sentenced to three month's imprisonment and disqualified from driving.

Submissions

7. Ms Moffatt relied on her skeleton argument and submitted that the judge had failed to appreciate that the burden was on the Respondent to establish that the Appellant could be excluded under the suitability requirements. At paragraph 6 of the decision the judge set out the burden and standard of proof stating that in immigration appeals the standard of proof is the civil standard of the balance of probabilities and the legal burden falls on the Appellant to discharge the burden of proof. Ms Moffatt submitted that in assessing whether the Appellant was a persistent offender the judge failed to appreciate that the onus was on the Respondent to establish this fact. This error was material because at paragraph 19 the judge stated:

> "I make the following findings. I am concerned that the Home Office bundle does not contain a PNC printout of the Appellant's criminal convictions or the Judge's sentencing remarks in relation to the offences. The absence of these documents is important as I have no material details of the offences, i.e. the degree to which the Appellant was over the legal alcohol limit, the consequences of the offences and any aggravating features, i.e. whether the public were placed at risk, whether the Appellant had passengers in the vehicle etc. In addition, I do not have the precise date of the 2015 [sic 2009] offence. Therefore, I am unsure whether the offence occurred before or after his son's still birth in June 2009."

8. The judge noted the absence of the PNC printout and the sentencing remarks. Accordingly, there was missing information and the judge failed to recognise that the burden was on the Respondent to show that the Appellant could not meet the suitability requirements. The circumstances of the final offence were relevant and

were not addressed by the judge. The central question in issue in the appeal, identified in the decision at [16], was whether the Appellant should be excluded under the suitability requirements. Ms Moffatt submitted that, given the exclusionary nature of the suitability requirements and their reference to wrongdoing, for the purposes of the burden and standard of proof they are germane to the general grounds of refusal. The burden was on the Respondent to demonstrate that the Appellant properly fell within the suitability requirements, but the judge failed to direct herself accordingly. This error was material because the sentencing remarks and the date of the 2009 offence were relevant to determining whether the Appellant was a persistent offender. His last offence could be distinguished from the others and the 2009 offence was linked to the still birth of the Appellant's child. Without the missing information the judge could not determine these points properly or at all.

9. The second point relied on by Ms Moffatt was that the decision cited the guidelines, but the judge failed to apply them. The guidelines specifically stated that the length of time a person has spent in the UK will be an appropriate consideration. For example, a person who has committed four offences in ten years might not be viewed as a persistent offender, but a person who committed three offences in six months might be. Ms Moffatt submitted that where there was a practical definition given in the guidance, which was on all fours with the Appellant's situation, then it was irrational not to take it into account and give reasons why the outcome was different in this case.

10. Further, the judge failed to consider relevant factors including whether there was an escalation in offending. The test for a persistent offender had two limbs: persistent offending and a particular disregard for the law. The judge did not direct herself as to the full legal test. The additional threshold of a 'disregard for the law' should have been set out and the judge should have given reasons why that additional threshold was met. The reasons at paragraphs 22 to 25 of the decision did not distinguish between the two limbs and therefore the judge had failed to properly direct herself.

11. Ms Moffatt submitted that the judge failed to consider the circumstances of the last offence, which were not set out in the decision. The last offence was not related to drink driving. The Appellant had failed to provide a breath specimen. The judge simply recorded that the final offence resulted in a custodial sentence, which was insufficient in the circumstances. There was evidence from the Appellant and his wife of his remorse and that they had worked hard to overcome his alcohol dependency. There was no clear finding as to whether the Appellant remained alcohol dependent.

12. In addition, the judge failed to consider whether it was reasonable for the children to leave the UK. The judge in fact never asked herself this question. Section 117B(6) was not included in the judge's proportionality assessment. That section stated that where there is no deportation order there is no public interest where the Appellant has a genuine and subsisting parental relationship with a qualifying child, a British citizen child, and it will not be reasonable for the child to leave then UK. The judge

had not taken into account the devastating effect on the children, in particular the Appellant's witness statement at paragraph 11 and his wife's witness statement at paragraph 4, 5 and 11. Acknowledging that the Appellant and his family were close was not sufficient to deal with the devastating effects of the Appellant's removal.

13. Ms Moffatt submitted that it was not open to the judge to avoid permanent separation. The Appellant would be excluded from the UK and it was speculative to say that he could overcome that difficulty. The judge could not rely on relocation to render a decision proportionate. She failed to consider the Appellant's evidence of his wife's own fear of return to Zimbabwe. At paragraph 13 of the decision the judge dealt with the death of the Appellant's wife's sister, but not fear of return. The Appellant's wife did not have a choice. If the judge was going to rely on choice in the proportionality assessment she must make findings on the Appellant's account, namely whether his wife was fearful of returning.

14. Mr Melvin relied on the Rule 24 response and submitted that there was a lack of materiality of reversing the burden of proof. The Appellant's convictions were not challenged and these were sufficient to render him a persistent offender. It was clear from the judge's findings and the Appellant convictions that the Appellant had a clear disregard for the law. The offences were similar. They were all related to alcohol. There was no elevated test or elevated threshold. The judge had taken all points into consideration and the failure to mention the phrase 'particular disregard to the law' was not material. The findings made establish this point. There was no separate test and on the facts Immigration Rule S-LTR1.5 was satisfied. The Appellant had a conviction and a further three year ban for his last offence. The circumstances of the offence did not change the situation. The Appellant was convicted of failing to provide a specimen. He had shown a particular disregard for the law in failing to do a breath test.

15. Mr Melvin submitted that ample consideration was given to the best interests of the children and there was no material error in the judge's failure to state the opinion of the Appellant's spouse on the difficulties that the children would have. There was ample consideration of Section 117B(6) and the judge considered in the alternative whether the Appellant's spouse could go to Zimbabwe. There was no need to consider any fear of return given that the judge had already concluded that the family could remain in the UK.

16. Persistent offender had a different definition in the statute and under the suitability requirements. This was a refusal of an application for further discretionary leave to remain. Due to the Appellant's convictions he was not a suitable person to be granted leave. The public interest was not limited by Section 117B(6).

17. In response, Ms Moffatt submitted that the judge had put the burden on the wrong individual and applied the wrong test in failing to require the Respondent to make out her case. The judge's findings were informed by the legal burden, which in this case had fallen on the wrong party. She submitted that I had to be sure that there

would be no difference in outcome had the judge properly applied the legal burden, which should have been done given what was at stake.

Evidence relevant to the best interests of the children

18. In his witness statement the Appellant states:

> "11. If I am forced to return overseas then this would devastate my family life. I understand that with this ground of refusal I would not even be able to apply to return to the UK. I would face refusal on the same basis. I will face prolonged if not permanent separation from my wife and children. This would have profound implications for my family members. I would no longer be able to be part of my wife and children's lives. We have always been together. We are a very close knit family. I am involved in every aspect of my children's lives. I take A to and from school. I attend their parents' evenings. I spend a considerable amount of time with them reading and helping them with their schoolwork and generally playing with them and just being there. The children have never known a day in their lives without me. I have not had the courage to tell them about my possible permanent exclusion. I really do believe that this would devastate them. B is doing very well at school and I fear that my exclusion will knock her for 6.
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> 12. A is particularly close to me. He spends most of his time with me. I get him out of bed get him ready for school, take him to school and bring him back. I prepared his food and his clothes. I play with him and generally keep him motivated. He is very clingy towards me and he doesn't like being away from me for any length of time. If I am away from him for any length of time he just cries and asks after me. As soon as I get back he is the first to the door. If I was forced to return overseas then I am certain that would really have a devastating effect on A."

19. In her witness statement the Appellant's wife states:

> "4. B is now aged 12. She has started secondary school. She attends [……...] School which is the best school in the area. We have worked very hard on her education. Both Cardon and I have spent a lot of time supporting her with her homework and studies generally. We both understand the value of good education and want her to do as well as possible in her studies. She is very bright and with the strong support that we have both been providing for her I have no doubt whatsoever that she will do very well.
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> 5. A is aged 4. He attends nursery school. Again, Cardon and I spend considerable time with him by reading together, playing with him and generally motivating him. He is also very bright and academically minded. Both of the children are extremely happy, settled and well grounded. Any disruption in their lives is bound to have a profound

impact on them. There can be nothing more significant and profound than having their father removed from their lives. To date we have not even discussed this issue with the children. Obviously A is too young but B has the wherewithal. The sole reason we have not mentioned it to either of them is that we do not want to distract them in any way. I know how these things can affect children. They have a habit of even taking small things to heart but this is such a significant issue and I am certain that it would have a significant impact on them, in particular on B. She is going through a very important phase of change in her life. She is also entering a very important phase in her education. I am fearful that any minor distraction would distract her but the prospect of losing her father would be truly profound. She is very close to her father and a typical daddy's girl. She is closer to Cardon than me. She always says that she finds it easier to approach Cardon than me. In that way she is typical of girls her age. I honestly fear how she would react if Cardon is forced to return. I just cannot imagine anything more significant that could affect B than the loss of her father from her life.

11. I also wish to mention that if Cardon is forced to return to Zimbabwe then it looks like we would face prolonged if not permanent separation given the grounds on which he would be removed. I feel that it would be tantamount to punishing me and the children for Cardon's offences. We are not responsible for his behaviour in any way whatsoever. Indeed I worked hard to help him overcome his alcohol problem. I would also struggle to cope with raising my children on my own. At the moment I work full time and I am the main breadwinner. Indeed Cardon has not been able to work since his last application therefore I am the only breadwinner in the family. If Cardon is forced to return then inevitably I would also to go part time which would mean that we would become a burden on public funds. Whilst we do receive child benefit and some child tax credits inevitably the burden would be far greater and that would remain the case for the foreseeable future. If Cardon is able to remain here then not only would he be able to be part of the children's lives which is the most important thing but it would avoid us being a burden on public funds altogether. Not only would Cardon's removal have profound implications for me and the children but it would mean longer term dependence on public funds as well. That would create the worst possible scenario for everyone concerned. If Cardon is able to remain with us then not only will that protect the integrity of our family but also avoid our dependence on public funds. Given this and the fact that Cardon does not pose a risk of reoffending I implore the Tribunal to allow his appeal."

Discussion and Conclusions

20. The nine grounds can be encompassed under the four heads of challenge, addressed by Ms Moffat in the following order: the failure to apply the correct burden of proof,

the failure to apply guidance, the misapplication of paragraph S-LTR1.5 of the Immigration Rules and the misapplication of section 117B(6).

Burden of proof

21. The relevant requirements of R-LTRP1.1(c) and (d) of Appendix FM of the Immigration Rules are that the applicant must not fall for refusal under S-LTR suitability of leave to remain. S-LTR1.5 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 their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law".

22. The Appellant was convicted on four occasions between 2006 and 2016 for driving under the influence of alcohol and other motoring offences. The Appellant accepts that he has been convicted of the same offence four times over a ten year period (paragraph 9 of his statement). The Secretary of State concluded that the Appellant's latest motoring conviction, failing to provide a breath specimen in January 2016, demonstrated that he had not learned from previous mistakes and continued to show a flagrant disregard for the law.

23. It was submitted that following JC (China) [2007] UKAIT 00027, MZ (Pakistan) [2009] EWCA Civ 919 and Mumu (paragraph 320; Article 8; scope) [2012] UKUT 00143 (IAC) the burden of proof fell on the Respondent. These cases were concerned with paragraphs 320 and 321A of the Immigration Rules and general grounds for refusal of leave. In relation to all the general grounds contained in Part 9, the burden of proof rests on the decision maker to establish any contested precedent fact. In this case the Respondent has established a precedent fact because it was accepted that the Appellant had four convictions for drink driving and failing to provide a breath specimen. The judge's failure to state that it is for the Respondent to show that the Appellant's conduct is not conducive to the public good was not material to the judge's findings. In any event, the Respondent made clear her view in the refusal letter and the judge properly applied the relevant Immigration Rule. I find that there was no material error of law in the judge's application of the burden of proof.

Guidance

24. The judge set out the Home Office Guidance on the interpretation of paragraph S-LTR1.5 in full at paragraphs 17 and 18:

> "References to a persistent offender who in the view of the Secretary of State has shown a particular disregard for the law involves a case-specific assessment of the nature, the extent, the seriousness and the impact of the person's offending." The guidelines state: "You must take into account the following non-exhaustive list of factors. However, you must note this is not the same as

the aggregate offences threshold which routinely triggers consideration for deportation."

The factors to be considered are:

- the number of offences committed;
- the seriousness of those offences, including the degree of public nuisance and the cost of reoffending;
- any escalation in the seriousness of the offences;
- the timescale over which they were committed;
- the frequency within which they were committed, and
- any action taken to address the cause of the offending.

25. The judge acknowledged the deficiencies in the Respondent's evidence in relation to the PNC printout and the judge's sentencing remarks. However, it was accepted that the Appellant had the four convictions relied upon by the Secretary of State and had received the sentences set out for those convictions. The judge then applied the guidance in assessing those convictions and looking at whether the Appellant was a persistent offender who had a particular disregard for the law. The judge dealt with each element of the guidance. There was an example in the guidance, that somebody who had committed four offences in ten years might not be viewed as a persistent offender, but someone who had committed three in just six months might be. I am not persuaded by Ms Moffatt's submission that the judge should have given reasons for finding the contrary in this case. The judge applied the guidance. She was not bound to follow examples given in the guidance as an aid to interpretation.

Immigration Rules

26. I find that the judge took into account all relevant factors. The circumstances of the last offence did not alter the position. The Appellant had failed to provide a breath specimen and had been sentenced to a term of imprisonment. This offence clearly showed a blatant disregard for the law in failing to cooperate with the police officer. The circumstances of that offence were that the Appellant was at a party when police arrived and stated that his vehicle had been involved in an accident. He refused to provide a breath specimen because he had been drinking alcohol since his arrival at the party. It transpired that his vehicle had not been involved in an accident. The judge considered the circumstances of this offence, at paragraph 11, and stated that the Appellant attempted to draw a distinction between this offence and his earlier offences of driving with excess alcohol. She rejected this submission at paragraph 22 and gave cogent reasons for doing so. This offence is alcohol related and an example of the Appellant's 'particular disregard for the law'. The judge concluded, at paragraph 26, that by committing repeated criminal offences the Appellant had shown a disregard for the law.

27. The matters set out at paragraphs 20 to 25 show that the judge considered all elements of the guidance: The Appellant's convictions, the period of time over which they took place and the reasons for why he might have committed such offences. The judge was not obliged to deal first with persistent offending and then with

'particular disregard for the law'. The judge's finding that the presence of the applicant in the UK was not conducive to the public good because he is a persistent offender who shows particular disregard for the law was one which was open to her on the evidence. The judge would have come to the same conclusion had she applied the two-limb test advocated by Ms Moffat.

Section 117B(6)

28. It is evident from reading the decision as a whole that the judge considered the witness statements and the Appellant's close relationship with his children. She found that the Appellant's wife and family appeared to have no influence on his drinking and she gave cogent reasons for coming to this conclusion at paragraph 21. The judge considered the alcohol awareness course, which predated the offences in 2009. The Appellant had not sought any help since he attended the course in 2008 and was subsequently convicted of further offences. The evidence supported her conclusion that the suitability requirements were not met because the Appellant's behaviour speaks for itself. He has continued to offend, he has committed four offences of drink driving and refusing to provide a specimen. He received a custodial sentence for the latter, which demonstrates an escalation in the seriousness of the offences. Although they took place over ten years the latest offence was recent and he had failed to take any action to address his offending behaviour, save for a course in 2008. The Appellant could not satisfy the Immigration Rules.

29. The judge properly addressed the public interest and took into account the best interests of the children. The public interest was not limited under Section 117B(6) and the judge was entitled to take into account the Appellant's criminal behaviour. She set out all relevant factors in relation to the best interests of the children at paragraph 28 which clearly demonstrated that she had in mind the paragraphs referred to in the witness statements. I am not satisfied that she failed to have regard to those witness statements or that she needed to set out those parts of the witness statement in full. It is evident from her findings at [27] and [29] that she was aware this is a close family and the effect on the children will be significant. She appreciated the relevance of these matters in the assessment of proportionality. The judge acknowledged that this was not a deportation case and that the Appellant had been refused leave to remain. She took into account all relevant circumstances in the assessment of proportionality. The children would not have to leave the UK, they could remain here with their mother.

30. The judge found that the public interest in section 117B(1) weighed in favour of the Appellant's removal, notwithstanding his removal would split the family (paragraph 26). She took into account the public interest in allowing the Appellant to remain in the UK under section 117B(6) (paragraph 27). She considered whether his wife could accompany the Appellant to Zimbabwe as an alternative. Her finding that the Appellant could apply for entry clearance if he could demonstrate that he had resolved his alcohol problem was not speculative and formed no part of her proportionality assessment. Her conclusion that the Appellant is a persistent offender whose actions, taken together with his failure to address his offending,

outweighed the public interest under Section 117B(6) in allowing him to remain in the UK was one which was open to her on the evidence before her.

31. I find that there was no error of law in the decision dated 14 July 2017 and I dismiss the Appellant's appeal.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

J Frances

Signed Date: 27 April 2018

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed Date: 27 April 2018

Upper Tribunal Judge Frances