Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/12691/2016**

THE IMMIGRATION ACTS

Heard at Field House in London
On 09 September 2019

Decision & Reasons Promulgated
On 18 September 2019

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

NABIL KETFI
(ANONYMITY NOT DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Ms S Jones (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. On 30 September 2016 the Secretary of State refused to grant the claimant leave to remain in the United Kingdom (UK) on human rights grounds. The claimant appealed that decision and argued before the First-tier Tribunal (the tribunal) that he satisfied the requirements of paragraph 276 (ADE) (1) (iii) of the Immigration Rules (20 years continuous UK residence) and that he ought, in any event, to succeed under Article 8 on the European Convention on Human Rights (ECHR) outside the Immigration Rules. The tribunal dismissed his appeal, deciding that although he had had more than 20 years continuous UK residence he could not benefit from paragraph 276 ADE because his presence in the UK was not conducive to the public good so that he fell foul of the suitability requirement at paragraph S-LTR.1.6. of the Rules. The

tribunal also decided he did not succeed outside the rules under Article 8 of the ECHR. So, it dismissed his appeal. But, in a decision of 12 March 2019, I set aside the tribunal's decision. I did so because I thought the tribunal had erred in law through misdirecting itself as to the correct legal test it was required to apply under paragraph S-LTR.1.6 and through conflating the content of that rule with that of S-LTR.1.5. I decided that the decision would be re-made in the Upper Tribunal, after a further hearing, with none of the tribunal's findings preserved.

2. The matter, therefore, came before me on 09 September 2019. The claimant was not represented. That was surprising because he had been represented before the tribunal and at the error of law hearing which had led to my setting aside the tribunal's decision. But he told me that he was not in a position to pay for legal representation. He clarified that he did not think he would be in a position to do so within the relatively near future. He agreed that in those circumstances matters should proceed. Accordingly, with the assistance of an interpreter whom he appeared to understand throughout the proceedings, he represented himself and gave evidence before me. Ms S Jones, a Senior Home Office Presenting Officer, represented the Secretary of State. I am grateful to each of them.

3. The Secretary of State had confirmed, in a response to directions I had issued when setting aside the tribunal's decision, that she would now wish to rely upon the content of S-LTR.1.5 as well as S-LTR.1.6. So, that clarified the issues under the Immigration Rules. There remained, of course, a consideration under Article 8 of the ECHR outside the rules. But as to the rules, put simply, a claimant will ordinarily succeed if able to show continuous residence in the UK for at least 20 years under paragraph 276 ADE (1) (iii). But that is not so if the applicant falls foul of any of the suitability grounds in Section S-LTR1.2 to S-LTR.2.3 as contained in Appendix FM to the Immigration Rules. Those relevantly provide:

> S-LTR.1.5. The presence of the applicant in the UK is not conducive to the public good because, in view of the Secretary of State their offending has cause serious harm or they are a persistent offender who shows a particular disregard for the law.
>
> SLTR.1.6. The presence of the presence of the applicant in the UK is not conducive to the public good because their character (including convictions which do not fall within paragraphs S-LTR.1.3-1.5, character, associations, or other reasons make it undesirable to allow them to remain in the UK.

4. By way of background, the claimant, who is a national of Algeria, was born on 18 March 1968. He entered the UK illegally in 1993. It appears that at some time relatively shortly afterwards he had sought asylum but had been unsuccessful. On 06 June 2012 he applied for leave to remain in the UK on the basis of long residence but that application too was unsuccessful. However, he appealed and on 23 May 2014 he was notified that his appeal had been allowed. After that he was granted leave to remain for a period of six months. That relatively short period of leave was given because when the tribunal allowed his appeal in 2014 it explained it was doing so with a view to his being given a period of limited leave solely for the purpose of allowing him the opportunity to institute proceedings to regain contact with his UK based son (see below). But the claimant did not apply for an extension of leave within the currency of that period of leave and it seems did not take steps to commence any contact proceedings. When he did eventually apply for further leave he was out of

time. The claimant told me that he had completed all the relevant paperwork for the application to have been made in time but seemed to suggest that his legal representatives had simply failed to send it. But there is no corroborative evidence of that. In any event, he made his out of time application in November 2015 and it was that application which led to the refusal of 30 September 2016 and, ultimately, to this appeal.

5. As the claimant was unrepresented I confirmed with him that he wished to rely upon various documents previously submitted on his behalf, by his now former legal representatives. He said that he did. Two witness statements had previously been submitted on his behalf but he told me he could not recall the content of them. Those statements are dated 16 October 2017 and 18 September 2018 respectively. So, I took him through them. He confirmed that he agreed with the bulk of what had been said in those statements but made some corrections. Putting his oral evidence and his written evidence together and incorporating those corrections, the claimant's case as presented to me was as follows: He had left Algeria in 1993 because there was then a civil war in that country and he felt unsafe. He had entered the UK unlawfully but now regrets doing so. On 11 October 1997 he had married a British citizen and, in May 1998 a child was born to the couple. That is his son Karim. However, the marriage ran into difficulties and the claimant, for a time, lost touch with Karim and Karim's mother. But he has two brothers who live in the UK and who are citizens of the UK and they assisted him in tracing Karim. This led to his meeting Karim and Karim's mother in 2015. But there has been no meaningful contact with Karim since that time and Karim's mother is reluctant for there to be any such contact. The claimant has committed a number of criminal offences. Whilst acknowledging that is so, he says that it is primarily if not exclusively because he has no right to work in the UK, has no right to claim benefits and, whilst he does some occasional cash in hand work, he is unable to support himself. So, he has had to offend to survive. But he says he does have respect for the law and that it is simply his circumstances that have led to his offending. He also says that he suffers from diabetes and depression. As to connections in his home country of Algeria, his father passed away many years ago and whilst his mother is still alive she is elderly and infirm. He has two sisters in Algeria but they have their own husbands and children and would not be able to assist him if he were to return to that country. He asks that his appeal be allowed so that he can remain in the UK.

6. If the claimant is to succeed either under the Immigration Rules or under Article 8 of the ECHR outside the rules he must show, to a balance of probability, that he satisfies the relevant requirements. He must do so on the basis of matters as they stand as at the date of the hearing before me. In considering whether the claimant is able to succeed I have taken full account of his oral evidence, the documentary evidence which was before the tribunal when it heard the appeal, some further documentary evidence in the form of an updated record of the claimant's criminal convictions and the submissions which were made to me by Ms Jones for the Secretary of State and by the claimant on his own behalf.

7. The Secretary of State accepts that the claimant has the requisite twenty years continuous residence to enable him to succeed under paragraph 276 ADE (1) (iii) if he does not fall foul of the suitability requirements as contained in Appendix FM. But

the Secretary of State argues that he does fall foul of those requirements specifically with respect to S-LTR1.5 and S-LTR1.6 as set out above.

8. S-LTR.1.5 focuses upon the claimant's offending. There is no dispute as to the fact of his convictions. A 'summary of convictions' revealed, prior to 28 March 2019, 14 convictions relating to 16 specific offences. This included offences of failing to surrender to bail, shoplifting, theft, disorderly behaviour, failing to comply with the requirements of a community order and failing to surrender to custody. The offences, it is fair to say, are far from being at the more serious end of the scale but they do span a long period of time commencing, as they do, in 2001 and ending (so far) in March 2019. For the most part the claimant has received non-custodial sentences though on 28 January 2005 he was sentenced to 18 days imprisonment and on 24 January 2014 he was sentenced to 32 weeks imprisonment. On 24 July 2014 he was sentenced to 12 weeks imprisonment and on 13 May 2016 he was sentenced to 16 weeks of imprisonment suspended for 12 months. The more recent offence of 28 March 2019, which I was only told about on the day of the hearing, was one of failing to surrender to a warrant issued by a Magistrates Court. The claimant explained that that was because he had failed to pay a fine previously imposed upon him.

9. Ms Jones did not argue that, with respect to S-LTR.1.5, the claimant had, through his offending, caused serious harm. Rather, she contended that he is a persistent offender who shows a particular disregard for the law.

10. In *Chege v SSHD* [2016] UKUT 00187 (IAC) the Upper Tribunal considered the meaning of the term 'persistent offender'. It made it clear that persistence, by its nature, required some continuation of the behaviour concerned and said that the behaviour or offending need not be continuous or even regular. The Upper Tribunal accepted that a person who had acquired a persistent offender status might subsequently lose it through not repeating the offending behaviour. It was said that, put simply, a persistent offender 'is someone who keeps on breaking the law'. But it was also said that much will depend upon the facts of a particular case and the nature and circumstances of the offending.

11. I have concluded that the claimant is a persistent offender. He has committed a number of offences over an extensive period of time. His most recent offence, whilst not a serious one, does demonstrate that the behaviour continues. I note the claimant's frank acceptance of his offending record (and it is to his credit that he was frank about this before me) but the offences started a long time ago, there have been a lot of such offenses, and there is nothing to suggest that the offending behaviour has ceased. So, as I say, I find that he is a persistent offender as the term is used in S-LTR.1.5. But there is further limb to the test. The Secretary of State has to demonstrate that not only is he a persistent offender but that he is a person 'who shows a particular disregard for the law'.

12. As to that aspect, the claimant himself says that he respects the law. It is just that his circumstances have been such that it has been necessary for him to commit some offences in order to be able to survive in the UK. I appreciate that, inevitably, if a person is not able to work and is not entitled to benefits and is not able to call upon regular family support, there will probably come a temptation to commit low-level crime in order to acquire life's essentials or the means to purchase them. But that does not explain, for example, use of disorderly behaviour in respect of which the

claimant was convicted on 25 February 2013. It does not explain the failure to comply with the requirements of a community order in respect of which the claimant was convicted on 28 August 2013. It does not explain the offence of using threatening, abusive, insulting words/behaviour or disorderly behaviour to cause harassment/alarm/distress in respect of which he was convicted on 17 January 2016. Further, although the claimant says he respects the law it does not seem to me that he has demonstrated that he is not able to return to Algeria. He has not secured international protection in the UK so, on the face of it, there is no reason why he cannot return there, where he has family members, and seek to make a new life for himself there though I do not pretend that doing so would be very easy. But the point I make here is that, in effect, he has elected to continue to live in the UK in circumstances where he feels he has to commit crimes to survive, rather than to return to Algeria where, on the face of it, he might not or would not have to do so. At least, in Algeria, he would be permitted to work and generate an income thereby. So, I have concluded that the claimant has demonstrated a particular disregard for the law through the commission of a range of offences and through an election of a lifestyle incorporating what he says is a need to commit such offences, in circumstances where, he could have simply returned to Algeria. I conclude, therefore, that the Secretary of State has successfully demonstrated that the requirements of S-LTR.1.5 are satisfied.

13. As to S-LTR.1.6, it is not now necessary for me to consider that provision. But if the convictions did not fall within the scope of S-LTR.1.5 I would have considered that they were relevant to S-LTR.1.6 and that his commission of the range of offences would bring him within its scope too.

14. The upshot of my above findings is that the claimant is not able to take advantage of paragraph 276 (ADE) (iii) of the Immigration Rules.

15. That then leaves Article 8 of the ECHR outside the rules. In considering that I bear in mind the five-fold test set out in the case of Razgar v SSHD [2004] UKHL 27. I have also taken into account the content of Section 117B of the Nationality, Immigration and Asylum Act 2002.

16. I would accept that Article 8 is engaged bearing in mind the claimant's very extensive residence in the UK and bearing in mind that he does have an adult son in the UK as well as two brothers. Since it is clear that any interference with Article 8 rights is lawful and is in pursuance of the legitimate aim of immigration control, I must now consider the question of proportionality.

17. As to that, I am statutorily mandated to give only little weight to the claimant's private life in the UK. But that does not mean I should give no weight to it and, as I say, the period of residence has been unusually lengthy and is a period which, ordinarily, had there been no suitability issues, would have led to the claimant receiving a grant of indefinite leave to remain. But the offending history is relevant. Further, although the claimant does have an adult son, Karim, residing in the UK, his own evidence before me was to the effect that there is no current meaningful contact between the two. I do have two witness statements, one from each of the claimant's UK based brothers, those statements having been prepared for the original tribunal hearing. But they are strikingly brief and do not tell me anything regarding the depth of the family relationship the claimant has with either of them. Although the claimant's father is

sadly deceased, the claimant's mother is in Algeria and will, at least, notwithstanding her infirmity, be of some emotional support and comfort to the claimant if he is to be returned to Algeria. He will be returning to a country with which he will still have some familiarity and he does, of course, speak an appropriate language. In the circumstances I have concluded that this is a case where requiring him to leave the UK would be clearly proportionate.

18. In the circumstances, whilst I do have some sympathy for the claimant and whilst I am grateful to him for his frankness before me, I have to dismiss his appeal.

Decision

The decision of the First-tier Tribunal has been set aside. In re-making the decision I dismiss the claimant's appeal from the Secretary of State's decision of 30 September 2016.

Anonymity is not directed. The First-tier Tribunal did not grant anonymity and there does not appear to be any reason to do so.

Signed **M R Hemingway**
Judge of the Upper Tribunal

Dated **11 September 2019**

To the respondent
Fee award

Since the appeal has been dismissed there can be no fee award.

Signed **M R Hemingway**
Judge of the Upper Tribunal

Dated **11 September 2019**