Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09636/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 February 2018	**On 27 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR CARLTON LEWIS ROPER
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms Z Ahmad, Senior Home Office Presenting Officer
For the Respondent: Ms M Nollet, Legal Representative, Migrant Legal Action

DECISION AND REASONS

Background

1. The appellant in this case is the Secretary of State and the respondent is Mr Carlton Lewis Roper, a national of Jamaica, born on 17 December 1962. However for the purposes of this decision and reasons I refer to the parties as they were before the First-tier Tribunal where Mr Roper was the appellant.

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2. Mr Roper entered the UK on 29 September 1988 as a visitor. On 3 December 2015 he applied for leave to remain on the basis of his family and private life. The respondent considered the appellant's application under Paragraph 276ADE On 31 March 2016 the respondent refused his application, on the sole ground that the appellant fell for refusal on the suitability grounds. Mr Roper appealed to the First-tier Tribunal. The First-tier Tribunal allowed the appellant's appeal in a decision promulgated on 12 October 2017.

3. The Secretary of State appealed on the following grounds:

Ground 1: that the First-tier Tribunal Judge had reversed the burden of proof at paragraph [16], attributing the burden to the respondent.

Ground 2: It was contended that the First-tier Tribunal had failed to provide adequate reasons for concluding that the appellant did not present a risk of further offending, had given no consideration to the nature of his offences and had failed to make a broad assessment given the relevant factors that can include "character, associations or other reasons". It was submitted that the Tribunal had materially misdirected itself at paragraph [23] in stating that the Secretary of State had not pointed to any public interest in the appellant's exclusion. It was further contended that the assessment at paragraphs [25] and [26] failed to provide cogent reasoning and did not give explicit consideration to other sources of support for the partner.

Preliminary Issue

4. The First-tier Tribunal permission judge, on 2 November 2017, granted permission as it was arguable that the judge had erred in placing the burden of proof upon the respondent. Ms Nollet contended that therefore the further grounds of appeal were not arguable. As I indicated at the hearing that is not the case; where permission to appeal limits the grounds of appeal, this should be made explicitly clear, including by issuing the appropriate notices to the parties informing the applicant of the right to apply to the Upper Tribunal for permission to appeal on grounds on which the applicant has been unsuccessful in the application to the First-tier Tribunal. (see **Ferrer (limited appeal grounds; Alvi) [2012] UKUT 00304 (IAC))**. I considered all grounds arguable.

Error of Law Discussion

5. Although Ms Ahmad did not specifically concede the appeal she was unable to point to any authority which might support her claim that the burden of proof in demonstrating that an applicant was not conducive to the public good was on the appellant rather than the respondent. Ms Ahmad relied on **Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT 41 (IAC)** and noted that an individual needs to meet the suitability requirements. However she was unable to point to any authority in relation to the suitability requirements which were in issue before the

First-tier Tribunal, S-LTR.1.6 (as identified at paragraphs [5] and [19] of the decision and reasons).

6. S-LTR.1.6 of Appendix FM provides as follows:

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

7. Ms Nollet relied on **JC (Part 9 HC395, burden of proof) China [2017] UKAIT 00027** including at paragraphs 10 to 14 which confirmed that in relation to the general grounds of refusal the burden of proof is on the decision maker to establish the precedent facts relied on. The general grounds have an exclusionary rather than inclusionary intent and an applicant who does not show why they qualify rather the decision maker is seeking to show why they should be disqualified. Although this does not relate specifically to the suitability requirements in Appendix FM the suitability grounds for refusal are analogous and Ms Ahmad was unable to point to any authority for an alternative proposition.

8. Ms Ahmad submitted that although the respondent had the burden to establish that the behaviour claimed of occurred, the burden then switched to the appellant. Even if that were the case and the burden switches to the appellant, to show why it is not undesirable for them to remain in the UK, the First-tier Tribunal's findings indicate that the appellant provided evidence in relation to the nature of the convictions and his life and character generally. It is evidence that the appellant discharged any burden on him. Any error therefore, at [16], in stating that the burden of proof was with the respondent was not material. Indeed Ms Ahmad could see no reason to suggest that the Tribunal had erred in refusing an adjournment prior to the First-tier Tribunal (when the appellant's representatives requested additional time to produce further evidence of the appellant's convictions). The Tribunal in refusing that adjournment reminded the parties that it was for the respondent to establish with evidence that the suitability condition applies.

9. I take into consideration the Tribunal had before it an extract from the respondent's guidance in relation to the suitability requirements including that "it is possible for an applicant to meet the suitability requirements, even where there is some low-level criminality" and I accept Ms Nollet's argument that the judge had this guidance in mind.

10. Although the Tribunal might ideally have phrased paragraph [16] differently, there was ultimately no error in the judge's approach to the burden of proof.

11. In relation to the remaining grounds, I am of the view that they disclose nothing more than a disagreement with the findings of the First-tier Tribunal. The appellant had provided evidence including of the supportive role he played in his partner's life and that of his family and provided evidence, which the Tribunal accepted, that there had been no further offending since 2011.

12. Although it was submitted that the Tribunal had failed to engage with the nature of the convictions at [24], that is precisely what the judge did at [20] where the Tribunal set out the three offences. In 1992 the appellant was convicted for possession of controlled drugs when he was fined £150 and costs of £25; the second offence of possessing an offensive weapon where he was fined £100, which took place on 19 January 2005 and the third conviction for using threatening abusive and insulting words or behaviour on 2 December 2011 for which he was given 100 hours of community service and costs of £100 were awarded against him.

13. The Tribunal also took into consideration the gap between the offences; there was no error in that approach. Although the respondent indicated that it was precisely the gap between the offending which needed to be taken into consideration it cannot be said that the judge did not consider all the material factors including the substantial period of time between the offences. The Tribunal considered that none of the offences showed any particular pattern and that the Tribunal had no reason to doubt the appellant's account as set out in the witness statement in relation to the circumstances of the offences. The Tribunal also took into consideration that the appellant was genuinely remorseful and, in the Tribunal's view unlikely to repeat these offences. It was also open to the Tribunal to take into account that, in addition to no further offending, the appellant had not come to the attention of the police since 2011. The Tribunal set out the appellant's evidence including that he was now more mature and had provided a recent example of avoiding confrontation and temptation and the Tribunal, at [21] and [22], accepted his account.

14. It cannot be properly said that the judge did not give adequate reasons for the conclusions reached and Ms Ahmad conceded that the high bar of irrationality was not reached in this case. The Tribunal also took into consideration that the sentences were relatively light, again a finding which was open to the Tribunal.

15. Although the grounds of appeal took issue with the Tribunal's findings in relation to the positive contribution that the appellant had made, including to his partner and family and in assisting the partner with her illness, as it was argued that there was no explicit consideration of other social support that the partner could have including extended family and local authority assistance, that was not the purpose of the consideration that the Tribunal undertook; this formed part of the wider consideration of the appellant's character required under S-LTR.1.6, rather than any availability of alternative care if the appellant were not in the UK (which was not at issue in that consideration). I take into account that it was agreed by the parties before the First-tier Tribunal (paragraph [5]) that the only issue before the Tribunal was suitability. Even if that were not the case , a person's value to the community is a factor which may be legitimately be considered in the Article 8 proportionality balancing exercise (see Lama (video recorded evidence – weight – Art 8 ECHR) [2017] UKUT 00016 (IAC))

Notice of Decision

16. The decision of the First-tier Tribunal does not contain an error of law such that it should be set aside and shall stand.

No anonymity direction was sought or is made.

Signed   Date: 23 February 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

As the appeal is allowed I make a full fee award of any fee paid.

Signed   Date: 23 February 2018

Deputy Upper Tribunal Judge Hutchinson