Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01682/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 March 2020	**On 18 March 2020**

Before

UPPER TRIBUNAL JUDGE PITT

Between

M H
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Turner, Counsel, Imperium Chambers
For the Respondent: Ms S Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

1. Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

2. This is an appeal against the decision issued 11 September 2019 of First-tier Tribunal Judge Watson which refused the protection and human rights claim of MH.

3. MH is a citizen of Albania born in 1988. He entered the UK in 2012, doing so illegally, using a false Greek identity card. On 6 August 2012 he was arrested for production of a controlled drug – Class B – Cannabis and on 1 November 2012 was sentenced to 27 months' imprisonment. He served seven months of his sentence and then used the Facilitated Return Scheme and was deported to Albania on 5 March 2013. It is undisputed that shortly afterwards in 2014 the appellant re-entered the UK illegally and in breach of the deportation order and has remained ever since. It is also undisputed that he formed a relationship with a dual Argentinian/Spanish national, L, and on 7 July 2017 applied for an EEA residence card as her unmarried partner. On 6 October 2018 he married L and on 17 October 2018 applied for a residence card showing him to be the spouse of a qualified EEA national.

4. The respondent refused the application for a residence card in a decision dated 26 March 2019. The respondent relied on Regulation 24 of the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations) maintaining that refusal of the residence card was justified on the grounds of public policy, public security or public health as defined in Regulation 27. The respondent found the appellant's personal conduct shown by the criminal offence committed in 2012 and the appellant's immigration history, entering the UK illegally twice, the second time in breach of a deportation order, meant that he posed a genuine, present and sufficiently serious threat to fundamental interests of the UK. The respondent went on to find that the decision to refuse the residence card was proportionate.

5. The appellant appealed to the First-tier Tribunal and the appeal came before First-tier Tribunal Judge Watson on 9 September 2019.

6. In paragraphs 18 to 37 of her decision, First-tier Tribunal Judge Watson considered whether the appellant met the provisions of paragraph 27(5)(c). She concluded that the appellant's criminal offences and his "disregard" for immigration laws showed his conduct to represent a genuine, present and sufficiently serious threat to fundamental interests of the UK. In paragraphs 38 to 44 of the decision the judge found that the refusal of a residence card was proportionate after applying the criteria set out in Regulation 27(6) and Schedule 1 of the EEA Regulations.

7. The first ground of appeal challenges the finding that the appellant posed a genuine, present and sufficiently serious risk to fundamental interests of the UK. Paragraph 12 of the grounds maintains that in paragraphs 18 and 22 the First-tier Tribunal decision disclosed a material error of fact in this assessment. The judge said this:

> "18. The fundamental interests of society which are relevant in this Appeal are listed in Schedule 1 above. The Appellant's offence is a conviction for supply of class A drugs listed as contrary to the fundamental interests of society (Schedule 1.7.(g)).
>
> …

> 22. The Appellant has shown that he was prepared to engage in a serious criminal enterprise producing cannabis to a value of £100,000 and to make money by supplying class A drugs. HHJ Mercer's sentencing remarks accepted that the appellant was cultivating the drugs for others and he was sentenced on this basis. (RB 192)."

As above, the appellant was convicted of production of a controlled drug – Class B – Cannabis and not supply of a Class A drug.

8. When considering this ground, I took into account that in paragraph 22 the First-tier Tribunal did appear to refer obliquely to the conviction, mentioning the production of cannabis and cultivation of drugs. I also took into account that the FTTJ found that the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society not only because of the criminal offence but because of his immigration history, stating in paragraph 27:

> "27. All the above conduct I find represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. One of the interests of society is preventing unlawful immigration and abuse of the immigration laws. The appellant's conduct has been contrary to this as well as to the wider societal harm by his drug offence."

9. It remained my view that this aspect of the grounds had merit. Notwithstanding the reference to aspects of the correct offence in paragraph 22 of the decision and the appellant's immigration history also weighing against him, the decision does disclose a material error of fact which amounts to an error of law. The judge based the assessment of whether the appellant represented a genuine, present and sufficiently serious threat to a fundamental interest of the UK on an incorrect and more serious offence and the nature of the offence was a fundamental aspect in the assessment that had to be conducted. The assessment of whether the appellant poses a genuine, present and sufficiently serious threat to a fundamental interest must therefore be set aside to be re-made. As the appellant's criminal history is also a material factor in the proportionality assessment which might also have reached a different conclusion had it been based on the correct offence of production of Class B drugs, that part of the decision must also be set aside to be remade.

10. The remainder of the grounds had little merit. The judge set out the provisions of Regulation 27(5) in the decision and it is not arguable, as maintained in paragraph 13 of the grounds, that the judge did not have proper regard to those provisions. The judge addressed the evidence on the wife's medical difficulties lawfully, proceeding on the basis that she suffered "from several illnesses including fibromyalgia"; see paragraph 8. The judge gave rational reasons for finding that the appellant's partner could obtain adequate treatment in Albania, Spain or Argentina. The judge was not required to find the wife's salary to be a determinative or even significant factor, having accepted in paragraph 35 that she "has a job and is self-supporting."

11. The judge was clearly entitled to place little weight on the report of Jasmine Smith where nothing in the report shows she has expertise or experience on criminal or medical matters, for example. The judge took a correct approach in finding that the

report was not reliable in those, and other, regards. Her report indicated in paragraph 8 that the appellant told her that he has two brothers and four sisters in Albania so the it is not arguable the judge was in error in finding that the appellant has a number of relatives in Albania.

12. It remains the case that the Regulation 27 assessment of whether the appellant poses a genuine, present and sufficiently serious risk to a fundamental interest in the UK and, if so, whether the decision to refuse a residence card was proportionate, are holistic assessments, strongly informed by the nature and seriousness of an appellant's criminal offences. It is therefore my conclusion that the decision of the First-tier Tribunal discloses an error on a point of law such that all of the decision has to be set aside to be re-made *de novo*. Where the re-making must be *de novo* it is appropriate for the remaking to take place in the First-tier Tribunal in line with paragraph 7 of Part 3 of the Senior President's Practice Statement dated 25 September 2012.

Decision

13. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade *de novo* by the First-tier Tribunal.

Signed:  Date: 10 March 2020

Upper Tribunal Judge Pitt