Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: EA/06988/2019**

THE IMMIGRATION ACTS

Heard at Manchester CJC **Decision & Reasons Promulgated**
On 5th October 2021 **On 11th November 2021**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EMILIAN GJYRIQI

(ANONYMITY ORDER NOT MADE)

Respondent

DECISION AND REASONS (V)

For the appellant: Mr A McVeety, Senior Presenting Officer

For the Respondent: Mr D Gillard, instructed by Metro Immigration Specialists

1. This is the appeal of the Secretary of State. However, to avoid confusion, I have referred below to the parties as they were at the First-tier Tribunal.

2. The appellant is an Albanian national with date of birth given as 4.7.95.

3. The Secretary of State has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 3.12.20 (Judge Cox), allowing the appellant's appeal against the decision of the Secretary of State, dated 6.12.19, to refuse his application for an EEA Residence Card as the family member (spouse)

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of an EEA national, Melinda Ivanki, exercising Treaty rights in the UK, pursuant to the Immigration (EEA) Regulations 2016 (the Regulations), as amended.

4. The relevant background can be summarised as follows. The appellant was caught illegally entering the UK in the back of a lorry in 2015. His application for international protection was refused as he had already claimed asylum in Germany. In September 2016 he was convicted of criminal offences of possession of Class B controlled drugs and possession of an identity document with intent, for which he was sentenced to 12 months immediate imprisonment. The identity document was a Lithuanian driving licence, with which he intended to pose as an EEA national in order to obtain work. In consequence of his conduct, he was deported from the UK in November 2016.

5. In breach of the deportation order, the appellant covertly re-entered the UK in February 2018. In May 2019 his application for an EEA Residence Card as the Extended Family Member (EFM) of an EEA national was refused for failure to enrol his biometrics. In October 2019 he made a further application for an EEA Residence Card as the spouse of Ms Ivanki, having married her in September 2019 but having refused to attend a Home Office marriage interview. In October 2019, he was notified of his liability to be deported and on 6.12.19 his Residence Card application was refused on grounds of public policy and/or public security, on the basis that he represents a genuine, present and sufficiently serious threat to the fundamental interests of society.

6. First-tier Tribunal Judge Cox allowed the appellant's appeal, stating at [27] of the decision that the respondent "has not satisfied me that the appellant's personal conduct represents a genuine, present and serious threat." The judge was "satisfied that there has been a fundamental change in (the appellant's) circumstances. Not only is the appellant now married to an EU national, but, as importantly, the respondent has accepted that this is a genuine and subsisting relationship. As such, so long as the appellant's wife is working in the UK, the appellant has a right to work and he does not have any incentive to obtain or use false documentation".

7. At [29] of the impugned decision, the judge stated that "on the totality of the evidence and, on balance, I find that the respondent has not satisfied me that the appellant's exclusion is justified on grounds of public policy or public security. The respondent has not demonstrated that the appellant's personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Accordingly, I find that the respondent's decision to apply regulation 24 of the regulations and refuse to issue the appellant with a residence card was unlawful".

8. Permission to appeal was refused by the First-tier Tribunal on 14.4.21. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge

Kekic granted permission on 10.5.21, considering the grounds arguable, namely that in finding that the appellant did not pose a present, genuine and sufficiently serious threat to the fundamental interests of society, the judge failed to consider his conviction for drugs offences and gave inadequate reasons for finding that he was a 'changed man' following his marriage when he had in fact refused to attend a requested marriage interview. It was also arguable that the relevant sections of the Regulations had not been considered and that there was no evidence to support the finding that the appellant could not be rehabilitated in Albania.

9. By email dated 29.9.21, the appellant has lodged further submissions and supplementary documents, to which I have had appropriate regard.

10. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal.

11. For the respondent, Mr McVeety pointed to the judge's own findings at [20], [21], [22], [23] and [27] of the decision, setting out the judge's apparent view at [20] that the facts suggested that the appellant presented a sufficiently serious threat to one of the fundamental interests of society, referring to the appellant's "blatant disregard of immigration rules" and his breach of the deportation order. The judge regarded the appellant's conviction in relation to the false document as a "serious offence". At [21] the judge noted the appellant's failure to report when required and his failure to attend the marriage interview. At [22] the judge regarded the appellant's explanation, that he feared what would happen if he reported, as "not a satisfactory explanation". The judge found that the failure to attend the marriage interview "suggests that he had not changed his ways and (this) weighs against him". At [27] the judge concluded that the appellant had shown a "complete disregard for UK laws and this seriously damages his credibility".

12. The difficulty with the decision, and Mr Gillard's suggestion that the judge had made a balanced decision is that having identified serious and compelling adverse factors, the judge appears to have regarded the fact that the appellant is now married and in a genuine and subsisting relationship as giving him the right to work and "he no longer has an incentive to use false documentation to find work", as sufficient to outweigh those serious concerns earlier identified by the judge. At [27] the judge stated that "I am satisfied that there has been a fundamental change in his circumstances" and that "so long as the appellant's wife is working in the UK, the appellant has a right to work and he does not have any incentive to obtain or use false documentation". Whilst Mr McVeety suggested that the reasoning was speculative with no supporting evidence of a change of attitude, even on the face of the decision the reasoning is patently inadequate and, more significantly, the judge paid little regard to the factors set out in the Regulations and in particular in Schedule 1. Mr McVeety also pointed out that the judge had made no mention of the drugs conviction.

13. Mr Gillard responded by pointing out that the refusal decision did not rely on the drugs conviction, for which the appellant received no separate penalty, referring me to the Crown Court sentencing remarks. Mr Gillard insisted that the judge had referred to both positive and negative factors and he characterised the respondent's submissions as a mere disagreement with the reasoned decision.

14. Mr McVeety agreed that the respondent had no right to refuse permission to work but observed that the issue of a genuine and subsisting relationship was not relevant to the issues under the public policy considerations.

15. For the reasons set out herein, I am more than satisfied that the First-tier Tribunal failed to adequately address the relevant considerations under the Regulations, resulting in a flawed assessment that cannot stand. Having indicated that I found material error of law in the decision of the First-tier Tribunal sufficient to set it aside, I invited the parties to make any further submissions they deemed necessary before I remade the decision. Mr Gillard argued for the matter to be remitted to the First-tier Tribunal but had no further substantive submissions to make. Mr McVeety had nothing further to add, observing that the facts are not in dispute and there was no need for any further evidence. In the circumstances, I agreed that this was a matter that could be remade in the Upper Tribunal and that I would do so, reserving the decision and my reasons to be given in writing. There was no purpose in remitting the matter to the First-tier Tribunal, given that no further evidence was necessary and the facts are not in dispute.

16. As the appellant has not acquired a permanent right of residence, he cannot benefit from any enhanced level of protection under the Regulations. It is clear that his conduct was serious, as the First-tier Tribunal Judge also agreed, undermining the basis on which rights to reside in the UK are granted under the Regulations. Not only was he convicted (by his guilty pleas) of a drugs offence, but he had possession of a Lithuanian driving licence with the intent to pose as an EEA national exercising Treaty rights in the UK. At the First-tier Tribunal hearing, the appellant admitted that he had used the driving licence to obtain work in the UK to which he was not entitled. The intent to use a false identity to gain an advantage under the Regulations to which he was not entitled is a serious matter, as the First-tier Tribunal Judge found, and the appellant appears to have admitted acting on that intention.

17. It is also highly significant that he has twice entered the UK unlawfully, the second time in breach of the deportation order. I agree with the First-tier Tribunal Judge that this demonstrates a blatant disregard for immigration laws At [21] the judge noted that the appellant also failed to attend immigration appointments, both when he was released from detention under a reporting requirement, and when he was invited for a marriage interview. His explanations for failure to report and to attend the interview were found by the First-tier Tribunal Judge to be not satisfactory and "suggests that he had not changed his ways and (this) weighs

against him". His conduct is on any measure outrageous and entirely self-serving. The respondent has to be able to demonstrate that it can enforce immigration control and take action against those who return to the UK in breach of a deportation order. At [27] the judge described his conduct as showing a complete disregard for UK laws. Although the judge was persuaded that there had been a fundamental change in the appellant's circumstances and that he now had no incentive to obtain or use false documentation, I do not accept that reasoning or submission. There is no real evidence that he had changed his ways other than that there were no further convictions. It is also significant that the judge entirely ignored the appellant's conviction for a drugs offence, or take any account of the harm which illicit drugs cause to those who are addicted to them or to the wider society. Despite Mr Gillard's arguments to the contrary, I am satisfied that this is a relevant and significant consideration in the context of public policy and public security, protecting the public from those who use illicit drugs and the associated effects and consequences.

18. More significantly, the judge failed to have regard to the considerations set out in Schedule 1 to the Regulations, which was not mentioned in the decision. Contrary to Mr Gillard's submissions, Schedule 1 was referred to in the refusal decision. In particular, paragraph 3 provides that where there is a custodial sentence the greater the likelihood that the person's continued presence in the UK represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. I am satisfied that significant weight should be attached to the appellant's convictions, which suggest that he does present a threat to one or more of the fundamental interests of society.

19. Paragraph 7(a) explains that the fundamental interests of society include preventing unlawful immigration and abuse of the immigration laws and maintaining the integrity and effectiveness of the immigration control system. The respondent must be entitled to act to prevent the abuse of immigration laws that the appellant has demonstrated. Paragraph 7(c) refers to preventing social harm, which is a logical consequence of drug offending. Paragraph 7(f) is concerned with the ability to remove an EEA national with a conviction, including where the conduct of that person is likely to cause or has in fact caused public offence, and thereby maintaining public confidence in the ability of the relevant authorities to take such action. I am satisfied that the appellant's conduct is such as to cause public offence at his complete disregard for immigration laws and his serious offending behaviour. Paragraph 7(g) refers to tackling offences likely to cause harm to society, including wider societal harm where the offences relate to the misuse of drugs, also relevant in the present case. In summary, it is clear that the appellant's conduct affects more than one of the fundamental interests of society.

20. The respondent has also pointed out that the judge gave no consideration to the ability of the appellant to rehabilitate in his own country of Albania or that the

prospects of such are, in the absence of evidence, not to be considered as materially different in that other Member State.

21. The appellant may be in a genuine and subsisting relationship with an EEA national, and I give full weight to the fact that he has not subsequently offended, but he entered into that relationship in the full knowledge that he had no right to be in the UK and was illegally present. His past conduct was sufficiently serious to warrant his deportation and there is no reason why that deportation order should not stand. In the light of that conduct, including both commission of criminal offences and re-entering the UK in breach of the deportation order, has to be given significant weight, particularly bearing in mind that he does not benefit from any enhanced level of protection under the Regulations.

22. Under Regulation 24, the respondent only has to demonstrate that the refusal of the Residence Card is justified on grounds of public policy, public security, or public health. For the reasons set out herein, I am satisfied that it was justified.

23. Regulation 27(5) requires a decision taken on public policy or public security grounds to be in accordance with the principles there set out, including that the decision must be proportionate, exclusively based on the appellant's personal conduct, and that his conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account his past conduct and that any threat does not need to be imminent. I have set out above how the appellant's conduct affects the fundamental interests of society in more than one aspect. His previous convictions alone do not in themselves justify the decision but the nature of those convictions, his intention to undermine the Regulations and immigration laws by the use of a false identity document, his conduct in twice entering the UK illegally, and in failing to keep immigration reporting or interview requirements, are weighty considerations. Effectively, the appellant has shown a complete disregard for UK law, both immigration and criminal law, as the First-tier Tribunal Judge found. His cavalier attitude to reporting and attending the marriage interview, suggested to the First-tier Tribunal and to me that he has not changed his attitude to immigration law and controls.

24. I have taken into consideration the appellant's age and length of residence in the UK, noting that he has only been here a few years and has spend most of his life in Albania. He is young enough to return and integration in society there, where his formative years were spent and where he speaks the language. Even the length of time his has been in the UK is to be given less weight given that he has spent time in prison and in detention. Little weight can be given to alleged social integration when he was committing criminal offences undermining the fundamental interests of society. He is in a genuine and subsisting relationship, but one entered into when the appellant was fully aware he had no business being in the UK, having been removed and blatantly disregarding the deportation order by re-entering in

breach of it. I do not accept that the mere fact that he has not offended further and, in the view of the First-tier Tribunal, has no incentive to use false documentation, is sufficient to outweigh the several serious considerations set out above.

25. I have to bear in mind that this appeal was not concerned with whether the appellant should now be deported or whether his relationship is genuine and subsisting, which is not challenged by the respondent, but only whether he was entitled to a Residence Card, or more accurately, whether the respondent was entitled to refuse to grant the application for a Residence Card on public policy and/or public security reasons. Taking the evidence in the round, balancing all factors in favour and against, I am satisfied that, notwithstanding an apparent settling down in a genuine and subsisting relationship, and the absence of further convictions, the respondent was fully entitled to refuse to issue a Residence Card on grounds of public policy and/or public security and that that decision was entirely rational and proportionate, and consistent with the principles and considerations set out in the Regulations and Schedule 1.

26. In summary, the reasons cited by the respondent in its refusal decision of 6.12.19 are, in my view, entirely proportionate and not disproportionate to the appellant's present circumstances. The refusal of a Residence Card was a decision entirely open to the respondent and one for which cogent reasons have been provided to justify that decision.

27. In the circumstances and for the reasons set out above, I find material error of law in the decision of the First-tier Tribunal. I set aside that decision and remake the decision by dismissing the appeal.

Decision

The appeal of the respondent to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside.

I remake the decision in the appeal against the respondent's refusal to issue a Residence Card by dismissing it.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 6 October 2021