Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/06688/2018

THE IMMIGRATION ACTS

Decided without a hearing	**Decision & Reasons Promulgated**
On 16 December 2020	**On 31 December 2020**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

ARTAN STAMATI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

REMAKE DECISION AND REASONS

Introduction

1. This is the remaking decision in this appeal following my previous error of law decision that the First-tier Tribunal had erred in law and that its decision should be set aside. That decision is set out in full as an annex. I expressly preserved the finding by the First-tier Tribunal that the appellant's repeated offending was very serious.

2. At the end of the error of law hearing on 22 September 2020, both representatives were of the view that a further hearing in this case would be unnecessary unless I considered that additional evidence was required. My error of law decision contained directions to the parties to file and serve any further written submissions if they so wished. In the event I formed the view that no further evidence was in fact

required and that I could remake the decision without a further hearing, pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008. I had regard to the overriding objective, the guidance set out by the Supreme Court in Osborn v The Parole Board [2013] UKSC 61; [2013] 3 WLR 1020, and the recent judgment of Fordham J in JCWI v The President of the Upper Tribunal (Immigration and Asylum Chamber) [2020] EWHC 3103 (Admin).

3. In compliance with my directions, the appellant's representatives submitted a bundle containing the evidence that was before the First-tier Tribunal. At the same time they confirmed that they had no further written submissions to make. Nothing was received from the respondent.

4. In order to ensure that the respondent had had every opportunity to make any further written submissions whether going to the substance of the case or to the method by which the remaking decision should be arrived at), I issued further directions, dated 26 November 2020. Having undertaken checks with the Upper Tribunal's records, nothing further has been received from the respondent as at the date stated at the end of this decision.

Background

5. The appellant, a citizen of Albania, first came to the United Kingdom in May 2015. In 2016 he was convicted of offences concerning the possession of criminal property (a very large sum of cash), possession with intent to supply a Class A drug, and possession of false identity documents. A deportation order was made against him, pursuant to section 3(5)(a) of the Immigration Act 1971. On 15 September 2016 he was deported to Albania. On 16 December 2016 he married a Greek national, KS, in Albania. She was ordinarily residing in the United Kingdom. The appellant re-entered the United Kingdom on or around 14 September 2017 and joined KS here. On 2 February 2018 he applied for a residence card as the family member of an EEA national, namely KS. In May of that year, he was convicted of possessing a Class A drug, driving a vehicle whilst uninsured, and being under the influence of drugs whilst driving. In July, KS gave birth to their son.

6. The application for a residence card was refused on 25 September 2018. The basis for this was Regulation 24(1) of the Regulations in conjunction with Regulation 27(3) and (5). It was said that the appellant's offending disclosed grounds of public policy and public security, that he represented a genuine, present, and sufficiently serious threat to the fundamental interests of society, and that deportation would be proportionate. The five fundamental interests of society specifically referred to in the decision letter were:

    i. preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system;

    ii. excluding or removing a… family member of an EEA national with a conviction… and maintaining public confidence in the ability of the relevant authorities to take such action;

iii. tackling offences likely to cause harm to society;

iv. combating the effects of persistent offending; and so

v. protecting the public.

7. The decision letter asserts that the appellant had re-entered the United Kingdom in breach of a deportation order.

8. The letter states in terms that the refusal of the application for a residence card did not "attach any requirement for [the appellant] to imminently leave the United Kingdom and does not place any restrictions on [the appellant's] claimed right of residence." It was said that the appellant would be contacted by the relevant casework unit in respect of whether a deportation order would be made against him in due course.

9. There was no dispute as to the genuineness of the marriage or the fact that KS had been exercising Treaty rights in the United Kingdom.

10. At the time of writing this remake decision, no such deportation action under the Regulations has been taken by the respondent.

Findings and conclusions

11. I begin by setting out a number of undisputed matters. The appellant became a direct family member of an EEA national when he married KS in Albania in 2016. He had this status when he re-entered the United Kingdom in 2017. There has never been any suggestion that his marriage was one of convenience, or that KS has not been exercising her Treaty rights in this country. It follows that the appellant has been at all material times a family member of an EEA national exercising Treaty rights in the United Kingdom. His right of residence in this capacity arises from the Directive and is not conditional upon the issuance of any documentation such as a residence card. The respondent's decision to refuse to issue a residence card did not require the appellant to leave United Kingdom, nor did it, in the words of the decision letter itself, "place any restrictions on [his] claimed right of residence." In light of what I have already said, the reference to the right of residence being "claimed" is misplaced.

12. The appellant's argument has been and remains that these basic facts have the effect that the respondent is unable to justify her decision to refuse to issue a residence card on public policy grounds.

13. When setting out my reasons in the error of law decision, I was, and remain, in no doubt that the appellant's central argument is effectively determinative of this appeal.

14. The judge's preserved finding that the appellant's offending record was very serious combined with my own assessment of the evidence as a whole leads me to find that

the appellant represents a genuine, present, and sufficiently serious threat *in general terms*. However, that is not, of itself, sufficient. Pursuant to regulation 27(5)(c) of the Regulations, the threat must affect one (or more) of the fundamental interests of society, as set out in Schedule 1 to the Regulations. In other words, must be a nexus between the threat and the fundamental interests.

15. The five facets of the fundamental interests of society relied on by the respondent in her decision letter are as follows:

    i. preventing unlawful immigration and abuse of the immigration laws and maintaining the integrity and effectiveness of the immigration control system;

    ii. excluding or removing an EEA national or family member of an EEA national with a conviction and maintaining public confidence in the ability of the relevant authorities to take such action;

    iii. tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences relating to the misuse of drugs or crime with a cross-border dimension…;

    iv. combating the effects of persistent offending;

    v. protecting the public.

16. These interests fall to be considered in the context of the appellant having a right of residence, with all its accompanying entitlements, entirely independent of the issuance of a residence card.

17. As matters stand, there is no question of him being removed from the United Kingdom. It cannot sensibly be said that the public will be protected, or the effects of persistent offending combated: the appellant is currently permitted to remain in United Kingdom and could potentially continue to commit crimes. It is extremely difficult to see how the refusal to issue a residence card, without accompanying deportation action pursuant to the Regulations, could be said to assist the maintenance of public confidence in the ability of the authorities to take action against relevant individuals. Indeed, the respondent's failure to instigate deportation action would appear to run contrary to this particular aim. As to preventing unlawful immigration, this is not a case in which the appellant was refused admission to United Kingdom on public policy grounds.

18. In my view, the reality of the situation was crystalised by Ms Cunha in her submissions at the error of law hearing. It was felt by the respondent that the refusal of a residence card would "inhibit" the appellant's ability to be "economically viable", and therefore to exercise his right of residence under EU law, by denying him a document which would be of assistance when satisfying potential employers of his right to work in this country. In a sense, this could be described as a form of constructive denial (or at least significant impediment) of his rights under EU law. Not to put too fine a point on it, this effect (whether intended or not) comes close to

being abusive of the rights afforded under the Directive. In my judgment, it clearly renders the respondent's ability to rely on the fundamental interests of society set out in the decision letter so diminished as to be incapable of constituting sufficient justification for the decision under appeal.

19. I turn to Regulation 24(1), which provides, in so far as is relevant:

> "The Secretary of State may refuse to issue… a residence card… if the refusal… is justified on grounds of public policy, public security or public health…"

20. As discussed in paragraph 17 of my error of law decision, I had held a concern that this provision may be seen as devoid of utility if justification for the refusal of a residence card to someone in the appellant's position is very difficult, if not impossible, to establish. However, with reference to paragraph 32 of my error of law decision, I conclude that the discretionary power under Regulation 24(1) does have useful application. An example of this is the extended family member applying for residence card who could be refused under the discretion within that provision.

21. The First-tier Tribunal had failed to address the proportionality exercise at all. In light of my conclusion on the appellant's primary contention, above, I can deal with this matter briefly. In the absence of any, or at least any adequate, justification for the respondent's decision, and combined with the interference with the appellant's practical ability to actually obtain work (an interference that has been expressly acknowledged and indeed relied on by the respondent), I am satisfied that the decision is also disproportionate.

22. Finally, I turn to the issue of the deportation order. The conclusion I reached in my error of law decision can simply be re-stated here. A deportation order made under section 3(5)(a) of the Immigration Act 1971 in respect of third country national without any EU law rights cannot in my judgment override or circumvent the subsequent acquisition of such rights by the subject of that order. If an individual does acquire EU law rights such as, for example, those pertaining to direct family member of an EEA national, they then become subject to a different legal regime, as contained in the Directive and, in so far as they are compatible with it, the Regulations. In the present case, there has never been a deportation order made under Regulation 32(3) of the Regulations. The appellant was never refused admission to the United Kingdom by virtue of being subject to such a deportation order. I conclude that whilst there was an extent deportation order against the appellant made when he had no EU law rights, this did not mean that he re-entered the United Kingdom in 2017 as an illegal entrant, as at that time he had acquired EU law rights and there was no deportation order pursuant to the Regulations.

23. As stated in my error of law decision, I do not see that this issue ultimately has any real bearing on this case. Even if it could be said that the appellant re-entered the United Kingdom in 2017 in breach of the deportation order made in 2016 and should therefore have been considered as an illegal entrant, that of itself has no material impact on his right of residence under EU law. Indeed, the respondent has expressly acknowledged this in the decision letter.

24. The appellant's appeal must be allowed.

25. It is of course entirely a matter for the respondent as to whether she will issue a deportation decision pursuant to the Regulations.

Anonymity

26. The First-tier Tribunal did not make an anonymity direction and I have not been asked to do so. I make no such direction.

Notice of Decision

27. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and it has been set aside.

28. I remake the decision by allowing the appellant's appeal against the respondent's refusal to issue him with a residence card under the Immigration (European Economic Area) Regulations 2016.

Signed: *H Norton-Taylor* Date: 16 December 2020

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of £140.00.

Signed: *H Norton-Taylor* Date: 16 December 2020

Upper Tribunal Judge Norton-Taylor

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/06688/2018

THE IMMIGRATION ACTS

Heard remotely by Skype for Business
On 22 September 2020

Decision & Reasons Promulgated

……

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

ARTAN STAMATI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms E Harris, Counsel, instructed by Rashid and Rashid Solicitors
For the respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the appellant against the decision of First-tier Tribunal Judge A J M Baldwin ("the judge"), promulgated on 17 September 2019, in which he dismissed the appellant's appeal against the respondent's refusal of his application for a residence card under the Immigration (European Economic Area) Regulations 2016 ("the Regulations").

2. The appellant, a citizen of Albania, first came to the United Kingdom in May 2015. In 2016 he was convicted of offences concerning the possession of criminal property (a very large sum of cash), possession with intent to supply a Class A drug, and

possession of false identity documents. A deportation order was made against him, pursuant to section 3(5)(a) of the Immigration Act 1971. On 15 September 2016 he was deported to Albania. On 16 December 2016 he married a Greek national, KS, in Albania. She was ordinarily residing in the United Kingdom. The appellant re-entered the United Kingdom on or around 14 September 2017 and joined KS here. On 2 February 2018 he applied for a residence card as the family member of an EEA national, namely KS. In May of that year, he was convicted of possessing a Class A drug, driving a vehicle whilst uninsured, and being under the influence of drugs whilst driving. In July, KS gave birth to their son.

3. The application for a residence card was refused on 25 September 2018. The basis for this was Regulation 24(1) of the Regulations in conjunction with Regulation 27(3) and (5). It was said that the appellant's offending disclosed grounds of public policy and public security, that he represented a genuine, present, and sufficiently serious threat to the fundamental interests of society, and that deportation would be proportionate. The five fundamental interests of society specifically referred to in the decision letter were:

    vi. preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system;

    vii. excluding or removing a… family member of an EEA national with a conviction… and maintaining public confidence in the ability of the relevant authorities to take such action;

    viii. tackling offences likely to cause harm to society;

    ix. combating the effects of persistent offending; and

    x. protecting the public.

4. The decision letter asserts that the appellant had re-entered the United Kingdom in breach of a deportation order.

5. The letter states in terms that the refusal of the application for a residence card did not "attach any requirement for [the appellant] to imminently leave the United Kingdom and does not place any restrictions on [the appellant's] claimed right of residence." It was said that the appellant would be contacted by the relevant casework unit in respect of whether a deportation order would be made against him in due course.

6. There was no dispute as to the genuineness of the marriage or the fact that KS had been exercising Treaty rights in the United Kingdom.

7. To date, no such deportation action under the Regulations has been taken by the respondent.

The judge's decision

8. The judge addressed the issue of whether the appellant had indeed re-entered the United Kingdom in breach of a deportation order. At [18] he concluded that the extant deportation order made in 2016 was not one made pursuant to the Regulations and, given that no subsequent deportation order under the Regulations had yet been made, the appellant had not in fact re-entered in breach of "the" deportation order.

9. The judge goes on to give careful consideration to the appellant's offending history. It is abundantly clear from what is said at [19] that he regarded the appellant's conduct as very serious indeed, having regard to the nature of the drugs offences, the use of false identification documents, and the fact that the appellant had re-offended after having come back to the United Kingdom in 2017. At [20] the judge concluded that the appellant's offending was the "starting point" in the case and that the respondent had shown that the appellant represented a genuine, present, and sufficiently serious threat affecting the fundamental interests of society. He goes on to state that the refusal to issue a residence card was proportionate. In the judge's view, the refusal of the residence card might have had the effect of focusing the appellant's mind on his past offending and the need to change his ways.

The grounds of appeal and grant of permission

10. Two grounds of appeal were put forward. First, it was said that when making the decision to refuse to issue a residence card, the respondent had entirely failed to identify any public interest factors (including the fundamental interests of society) which could have actually been affected by the decision. This was in the context that the decision did not involve removing the appellant from United Kingdom and did not affect his right of residence and consequent entitlements as the family member of an EEA national. It was said that the judge failed to address this argument and failed to identify on what basis the respondent had shown that the decision was properly connected to public policy considerations.

11. The second ground, as originally drafted, was linked to the first. As the appellant's right of residence in the United Kingdom was unaffected by the decision to refuse to issue the residence card, the absence of a document (namely a residence card) would only have the effect of making it more difficult for the appellant to satisfy potential employers of his right to work here. This represented a disproportionate interference with the appellant's EU law rights.

12. Permission to appeal was granted by First-tier Tribunal Judge Keane on 19 February 2020. Permission was granted on an unlimited basis, although the judge focused on the proportionality issue. He framed the arguable error in terms of a failure to have undertaken a full proportionality exercise, having regard to the appellant's family circumstances and suchlike.

13. In further written submissions from Ms Harris, dated 20 April 2020 and 21 May 2020, she sought permission to rely on what was described as an "additional ground",

namely that the judge had failed to undertake an adequate proportionality exercise (with reference to the observations of the Judge Keane in his grant of permission).

14. In written submissions from the respondent, dated 23 April 2020, what may be described as a purported "cross-appeal" was put forward on the basis that the judge was wrong to have concluded that the appellant did not re-enter the United Kingdom in breach of a deportation order. There was a deportation order in force at the time, albeit not one made under the Regulations.

The hearing before me

15. At the outset, I gave Ms Harris permission to rely on the additional ground on the basis that it was connected to the original second ground of appeal, that the respondent had been aware of it since May 2020, and that, in the event, Ms Cunha took no objection to this course of action. In the absence of any objection by Ms Harris and given the fact that the appellant had been aware of the cross-appeal point since April 2020, I granted Ms Cunha permission to rely on the respondent's ground of appeal.

16. Ms Harris' submissions followed the grounds of appeal. The only impact of the respondent's decision to refuse to issue a residence card was to make it more difficult for the appellant to find work. It effectively went to frustrate his EU law rights. This was at least arguably abusive. In respect of the judge's decision, he had failed to engage with the appellant's submission on this point and had seemingly inserted his own speculative reason for why the public interest may benefit from the respondent's decision. However, this was impermissible, as it was for the respondent to show that the public policy grounds were justified.

17. During the hearing I raised the question of whether Regulation 24(1) of the Regulations would have any utility if a refusal to issue a residence card without an accompanying deportation decision could not be shown to be justified. In response, Ms Harris gave the example of an extended family member who might apply for a residence card in that capacity. As the issuance of a card is in those circumstances discretionary, the public policy grounds issue would be relevant to the exercise of that discretion. If the extended family member's application was refused, they would be left with no EU law rights. This is in contrast to the appellant's situation: he was a direct family member and so had a right of residence notwithstanding the absence of a residence card.

18. Ms Harris maintained her position that the appellant had not re-entered the United Kingdom in breach of a deportation order because he had at that time been a family member of an EEA national and there had been no deportation order made pursuant to the Regulations.

19. Finally, Ms Harris acknowledged that she had not challenged the judge's specific findings of fact relating to the seriousness of the appellant's offending.

20. Ms Cunha accepted that the judge had materially erred in law by failing to undertake a full proportionality exercise. However, she submitted that there were no errors in respect of the other aspects of the appellant's challenge. In terms of the deportation order, she submitted that there was "homogenisation" of domestic and EU law. As I understood her argument, the deportation order made under section 3(5)(a) of the Immigration Act 1971 whilst the appellant was simply a third-country national had effect when he came back to the United Kingdom as the family member of an EEA national. That deportation order was "demonstrative" of the appellant being an individual to whom the public policy grounds applied. There was no error on the respondent's part in not making a new deportation order under the Regulations.

21. As regards the central aspect of the appellant's challenge on the effect of the decision to refuse a residence card, Ms Cunha confirmed that that decision did have a material impact, namely that it would prevent or at least restrict the appellant's access to work and therefore his ability to exercise his Treaty rights as a family member of an EEA national. It would effectively reduce his ability to be "economically viable". Regulation 24(1) was said to give the respondent a discretion to restrict the appellant's enjoyment of his undisputed right of residence in United Kingdom.

Decision on error of law

22. I conclude that the judge has erred in law in two respects. First, he failed to engage with the appellant's central submission as to the purported justification for the respondent's refusal to issue a residence card and failed to identify which, if any, fundamental interests of society put forward by the respondent were applicable in the particular circumstances of this case. Second, he failed to adequately address the question of proportionality.

23. I conclude that the judge did not err in respect of his conclusion on the deportation order issue. Having said that, for reasons which I will set out later, this issue has no real bearing on the outcome of the appeal.

24. It is important to set out a number of undisputed matters. The appellant became a direct family member of an EEA national when he married KS in Albania in 2016. He had this status when he re-entered the United Kingdom in 2017. There has never been any suggestion that his marriage was one of convenience, or that KS has not been exercising her Treaty rights in this country. It follows that the appellant has been at all material times a family member of an EEA national exercising Treaty rights in the United Kingdom. His right of residence in this capacity arises from the Directive and is not conditional upon the issuance of any documentation such as a residence card. The respondent's decision to refuse to issue a residence card did not require the appellant to leave United Kingdom, nor did it, in the words of the decision letter itself, "place any restrictions on [his] claimed right of residence." (In light of what I have already said, the reference to the right of residence being "claimed" is entirely misplaced).

25. The appellant's argument that these basic facts meant that the respondent was unable to justify the decision on public policy grounds was put to the judge (see [20]). Whilst acknowledging that argument, the judge failed to then engage with it. That constitutes an error.

26. The question really is whether the appellant's argument had any merit to it, such as to render the judge's omission material to the outcome of the appeal. I am in no doubt that it was not simply meritorious, but effectively determinative.

27. The judge's finding that the appellant represented a genuine, present, and sufficiently serious threat was not, in and of itself, enough. There needed to be a nexus between the threat and one or more of the fundamental interests of society, as set out in Schedule 1 to the Regulations.

28. The five facets of the fundamental interests of society relied on by the respondent in her decision letter (set out early in my decision) were not, I accept, expanded upon at the hearing. These interests fell to be considered in the context of the appellant having a right of residence, with all its accompanying entitlements, entirely independent of the issuance of a residence card. There was no question of him being removed from the United Kingdom. It could not sensibly be said that the public were being protected or the effects of persistent offending combated: the appellant remained in United Kingdom and could potentially have continued to commit crimes. It is extremely difficult to see how the refusal to issue a residence card, without accompanying deportation action pursuant to the Regulations, could be said to assist the maintenance of public confidence in the ability of the authorities to take action against relevant individuals. As to preventing unlawful immigration, this is not a case in which the appellant was refused admission to United Kingdom on public policy grounds.

29. In my view, the reality of the situation was crystalised by Ms Cunha in her submissions. It was felt by the respondent that the the refusal of a residence card would inhibit the appellant's ability to be "economically viable" and therefore to exercise his right of residence under EU law by denying him a document which would be of assistance to him when satisfying potential employers of his right to work here. In a sense, this could be described as a form of constructive denial (or at least significant impediment) of his rights under EU law. Not to put too fine a point on it, this effect (whether intended or not) comes very close indeed to being abusive. It certainly rendered the respondent's ability to rely on the fundamental interests of society set out in the decision letter so diminished as to be arguably incapable of constituting sufficient justification.

30. For the avoidance of any doubt, the purported public interest factor suggested by the judge himself at [20] could not provide a substitute for reasons put forward by the respondent, given that the burden rested with her to justify the decision. In any event, the judge's reason was certainly not sufficient to create justification where none otherwise existed.

31. I turn to Regulation 24(1), which provides, in so far as is relevant:

> "The Secretary of State may refuse to issue… a residence card… if the refusal… is justified on grounds of public policy, public security or public health…"

32. As mentioned earlier, I raised my concern at the hearing that this provision may be seen as devoid of utility if justification for the refusal of a residence card to someone such as the appellant is very difficult, if not impossible, to establish. However, I accept Ms Harris' submission that the discretionary power under Regulation 24(1) does have useful application. The example she gave of an extended family member applying for residence card is, in my view, illustrative of this.

33. Moving on to the issue of proportionality, Ms Cunha's concession was rightly made. The judge quite clearly did not undertake a full assessment of all relevant factors relating to the appellant's personal and familial circumstances. However, notwithstanding this particular error, I agree with Ms Harris' submission that the absence of any, or any appropriate, justification for the decision, together with the interference with the appellant's ability to actually obtain work (an interference that has been expressly acknowledged and indeed relied on by the respondent), at the very least arguably rendered the respondent's decision disproportionate on that basis alone. The judge did not engage with this aspect of the appellant's case. This is a further error.

34. Finally, I turn to the issue of the deportation order. If it is being suggested by the respondent that a deportation order made under section 3(5)(a) of the Immigration Act 1971 in respect of third country national without any EU law rights can in some way override or circumvent the subsequent acquisition of such rights by the subject of that order, then I would disagree. If an individual does acquire EU law rights such as, for example, a direct family member of an EEA national, they then become subject to a different legal regime, as contained in the Directive and, in so far as they are compatible with it, the Regulations. In the present case, there has never been a deportation order made under Regulation 32(3) of the Regulations. The appellant was never refused admission to the United Kingdom by virtue of being subject to such a deportation order. I conclude that whilst there was an extent deportation order against the appellant made when he had no EU law rights, this did not mean that he re-entered the United Kingdom in 2017 as an illegal entrant, as at that time he had acquired EU law rights and there was no deportation order pursuant to the Regulations.

35. As alluded to previously, I do not see that this issue ultimately has any real bearing on this case. Even if it could be said that the appellant re-entered the United Kingdom in 2017 in breach of the deportation order made in 2016 and should therefore have been considered as an illegal entrant, that of itself has no material impact on his right of residence under EU law. Indeed, the respondent has expressly acknowledged this in the decision letter.

36. In light of the above, I set the judge's decision aside.

Disposal

37. Given the nature of my conclusions on the error of law issue, I propose to remake the decision in this appeal on the basis of the materials currently before me, subject to any representations from the parties in compliance with the directions set out below.

38. The findings of the judge at [19] have not been specifically challenged and they will be preserved.

Anonymity

39. The First-tier Tribunal did not make an anonymity direction and I have not been asked to do so. I make no such direction.

Notice of Decision

40. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

41. I set aside the decision of the First-tier Tribunal.

42. This appeal will be retained in the Upper Tribunal for a re-making decision in due course.

Directions to the parties

1. **No later than 7 days** from when this decision is sent out, the appellant may file and serve in physical and electronic form any further submissions relating to the re-making of the decision in this appeal, having regard to the contents of this error of law decision;

2. No later than 14 days from when this decision is sent out, the respondent may file and serve in physical and electronic form any further submissions relating to the re-making up the decision in this appeal, having regard to the contents of this error of law decision;

3. No later than 21 days from when this decision is sent out, the appellant may, if appropriate, file and serve in physical and electronic form a reply;

4. With liberty to apply.

Signed: *H Norton-Taylor* Date: 23 September 2020

Upper Tribunal Judge Norton-Taylor