IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004823

First-tier Tribunal No:
HU/57875/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14th of November 2024

Before

UPPER TRIBUNAL JUDGE OWENS

Between

OREST QERIMAJ
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Khan, Solicitor Advocate
For the Respondent: Ms Rushforth, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 8 November 2024

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Albania who arrived unlawfully in the United Kingdom on 5 May 2019. On 9 July 2021 he applied to remain in the UK on the basis of his family life in the UK. His application was refused on 13 October 2022. His appeal against the decision was dismissed by First-tier Tribunal Judge Buckwell in a determination promulgated on 5 December 2023.
2. Permission to appeal was granted and I found that the First-tier Tribunal had erred in law, and set aside the decision with various

findings preserved for the reasons set out in the decision which is annexed to this one as Annex A.

3. The matter now comes back before me to remake the appeal.

4. At the start of the hearing, the parties identified the issues in the appeal and the matters that were agreed.

5. In the error of law decision, I preserved findings, inter alia, that the appellant could meet the relationship requirements and EX1 of Appendix FM.

6. The issues that remained to be determined in this hearing were agreed as being whether, at the date of hearing, the appellant could meet the suitability requirements of the Immigration Rules at S-LTR.2.2 because he had failed to declare a conviction in his application form; and if the Immigration Rules could not be met whether his removal constituted a disproportionate interference with his right to respect for private life as protected by Article 8 ECHR.

7. At the outset of the hearing, I confirmed with both representatives that we had the same documentation. Both parties had submitted skeleton arguments in support of their positions and the appellant produced a new statement explaining why he failed to declare his previous conviction in his application form accompanied by the appropriate rule 15(2A) notice. I indicated that in the interests of justice I would permit the further evidence to be produced and Ms Rushforth did not object to this course of action.

Evidence & Submissions – Remaking

8. The appellant's evidence from his written statement and oral evidence in relation to the failure to declare the previous conviction is as follows:

9. In 2012 he was convicted in Italy of resisting arrest and sentenced to four months imprisonment for resisting arrest.

10. There is no dispute about the factual context of this conviction. The findings by the First-tier Tribunal were not challenged. The appellant entered Italy as a child aged 15 without his family. He was granted leave to remain and studied for several years. He was enrolled in college and was training to be a pastry chef. He attended an application centre to extend his visa in 2009 when he was 19 years old. His application was rejected immediately and he was detained. He was shocked and upset as he was half way through his course and he tried to escape. He was detained by the police who hit him with truncheons and then immediately deported to Albania. Once in Albania he continued studying and obtained a Bachelor's Degree and in 2013 in physiotherapy. He then started working for the local council at a recycling centre.

11. In 2017, he was arrested and imprisoned in Albania. He was told that this was for being involved in the supply of drugs and resisting

arrest in Italy in 2009 and that he had been sentenced to a total of 9 years, 4 months and 20 days in his absence. He then instituted legal proceedings and eventually had the 9 year conviction nullified. It was accepted by First-tier Tribunal Judge Buckwell at [62] that the 9 years the conviction was nullified but it was not accepted by him that the four month and 20 day sentence for resisting arrest was nullified.

12. The appellant's evidence before me was that his understanding prior to his completing his application was that all of his convictions were nullified. He received a phone call from his lawyer whilst in the UK and understood that both convictions had been overturned.

13. When he made his application with the assistance of an Albanian national on 9 July 2021 he believed this to be the situation which is why he declared neither conviction in his application.

14. The application was refused by the respondent on 13 October 2022 on the grounds of suitability under S-LTR1.3 because of both the nine year and the four month conviction. At this point the appellant obtained the court documentation from the High Court in Trieste and had it translated. This material was received by his representatives on 13 February 2023.

15. It was at this point that the appellant states that he realised that it was only the nine-year sentence which had been overturned.

16. When he prepared his appeal statement, he accepted the conviction was outstanding and explained the circumstances of that conviction at paragraphs 6 to 9. At paragraph 12 he stated that he did not declare the conviction because "it was nullified".

17. The respondent's position on the relevant issues still to be determined in this appeal from the refusal decision and respondent review and oral submissions of Ms Rushforth are, in short summary, as follows.

18. The suitability criteria at SLTR.2.2(b) apply to the appellant and so he cannot succeed under the Immigration Rules. This is a discretionary requirement, and the respondent has exercised her discretion properly because the appellant failed to declare a conviction in the application form. She asked me to find that the appellant had deliberately omitted the reference to this conviction in his application form because his statement before the First-tier Tribunal was inconsistent. She submitted that the omission was "material" because it relates to suitability. An applicant is informed in no uncertain terms that he must fill out the form correctly and is asked to make various declarations that the form has been completed to the best of his knowledge and belief.

19. If the Immigration Rules are not met at the date of hearing Mr Rushforth argued that the appellant could not succeed on the basis of a wider proportionality assessment under Article 8 ECHR,

because weight should be given to the negative suitability finding in the overall assessment. She also submitted that the appellant could choose to return to Albania and reapply for entry clearance from there in accordance with Younis (section 117B(6)(b);Chikwamba; Zambrano)[2020]UKUT 129 (IAC) and Alam v SSHD [2023] EWCA Civ 30 or the appellant could assist his wife to integrate to Albania. There would not be unjustifiably harsh consequences for the appellant to return to Albania because the public interest weighed more heavily than his private and family life in the Article 8 ECHR balancing exercise.

20. Mr Khan relied on his skeleton argument. His submission was that it was clear from the chronology of the documentation that the appellant genuinely believed that all his convictions were overturned. He received the translated documents after he had submitted his application. The omission was innocent, and the appellant had no intent to deceive. He accepted that SLR-2.2(b) catches the appellant either way because the wording of the provision includes an innocent omission, but he submitted that this is relevant to the issue of exercising discretion. He reminded me that the provision is discretionary and pointed to all the factors that would persuade a decision maker to exercise discretion in favour of the appellant which I will deal with below.

21. He also submitted that the failure to declare the previous conviction was not “material” to the application because the conviction was for a minor offence which received a light penalty and took place 14 years before the application was made.

22. At the end of the hearing, I reserved my decision.

Conclusions – Remaking

23. I first consider whether the appellant can meet the requirements of the Immigration Rules at the time of the hearing. As set out at the beginning of the decision the element of the family life Immigration Rules it is said that he cannot meet by the respondent is that of suitability. It is argued that this is the case because he falls to be refused under the discretionary requirement at S-LTR. 2.2(b) of Appendix FM of the Immigration Rules due to his failure to declare his criminal conviction.

24. S-LTR.2.1 of the Immigration Rules states that an applicant will normally be refused on the grounds of suitability leave to remain if any of the paragraphs from S-LRT2.2 to 2.5 apply. SLR 2.2 states whether or not the applicant’s knowledge (b) there has been a failure to disclose material facts in relation to the application.

25. It is not in dispute that the appellant was convicted for the offence of resisting arrest and sentenced to four months and 9 days imprisonment. This is accepted by the appellant. It is also not in dispute that he did not declare this conviction in his application form.

26. I firstly consider whether this was an innocent mistake. In this respect, I note that the position of the respondent in the refusal letter and the facts as found and preserved by the First-tier Tribunal moved on significantly. In the application form the appellant stated that he had no previous convictions. His application was primarily refused on the grounds of suitability on the basis that his presence was not conductive the public good because he had been sentenced to 9 years imprisonment (in addition to the four month conviction) and secondly because he had failed to declare these convictions.

27. It was the refusal of his application which prompted the applicant to obtain documents from Albania and have them translated to demonstrate that in fact his conviction had been overturned. The judge was persuaded by these documents that the appellant's nine-year sentence had in fact been overturned and that the suitability requirements at S-LRT 1.3 did not apply. The judge also made findings on the circumstances which led to the lesser conviction and correctly found that they did not fall into the remit of the mandatory suitability provisions at S-LRT 1.3.

28. I set aside the previous decision because the judge failed to go on to consider S-LRT 2.2. As I commented in my error of law decision, it appears that the judge was not assisted because this issues was not raised explicitly in the review and neither representative dealt with it at the hearing. This issue appears to have been somewhat overlooked.

29. I agree with Mr Khan that the chronology of the application, the decision and the obtaining of the documents is all consistent with the appellant's evidence that he understood that all the convictions were overturned which is why he did not declare them on the application form. I find that in the context of the much more serious conviction being overturned, is plausible that the appellant believed that the lesser conviction was also overturned. I take into account that the events leading to the four month conviction took place in 2009, some 15 years ago and the conviction itself dated 8 March 2012 took place 12 years ago. I find that the Albanian court documents which contained the relevant information were received by his representatives on 13 February 2023 after his application was submitted and prior to the appeal hearing.

30. I do not find that there is any inconsistency between the appellant's previous appeal statement and his current statement. In his previous statement he confirms that he understood that he had a four month sentence and that he thought it was nullified. His current statement provides more detail. At worst, his earlier statement fails to deal with the issue of non-disclosure in detail which was presumably because his representative was focused on the far more serious suitability objection in relation to the nine year sentence on the grounds of good character.

31. I note that the appellant was found to be a credible witness by the judge at the First- tier Tribunal and Ms Rushforth's cross examination did not persuade me any differently.

32. I therefore accept the appellant's evidence. I find that the appellant's omission to declare the conviction on the statement was an innocent mistake on behalf of the appellant. I find that he genuinely believed that both convictions had been overturned and that he believed he was telling the truth when he completed the application form.

33. This does not prevent S-LTR 2.2(b)being applied to him but is a factor to be taken into account in addressing whether discretion should be exercised in his favour.

34. I swiftly deal with Mr Khan's submission that the failure to disclose the previous conviction was not "material" to the outcome of the application. It is important for the maintenance of immigration control and in the public interest that applicants are truthful in their applications and disclose relevant information which may affect the decision maker's view of them. The form clearly advises applicants of this and of the consequences of failing to declare facts. I therefore agree with Ms Rushforth that the failure to declare this information was "material" to the application.

35. I turn to the exercise of discretion. Manifestly the respondent would be entitled to take a very dim view of the failure to disclose a nine-year sentence which was the respondent's position at the date of the refusal, however, the failure to disclose has now only been found to be in respect of the four month sentence. When considering whether to exercise discretion I therefore take into account the following factors:

    a) A failure to declare will "normally" result in a refusal.
    b) The failure to declare was an innocent mistake and did not involve any dishonesty on behalf of the appellant.
    c) The offence was not serious which is reflected by the short sentence.
    d) The conviction was in respect of an incident which occurred in 2009 when the appellant was 19 years old and which took place 16 years ago.
    e) The sentence was imposed 12 years ago which is a considerable period.
    f) There has been no further offending and no other matters which weigh negatively on the appellant's character.
    g) The appellant has a strong family life with his wife in the UK.

36. In the light of all these factors I am satisfied that it is appropriate to exercise discretion in favour of the appellant. I therefore find that the appellant does not fall to be refused on suitability grounds under the discretionary ground at S-LTR2.2(b). of the Immigration Rules. On that basis I find that he is able to meet the requirements of the Immigration Rules in Appendix Family Life. As per OA and

Others (Nigeria) [2019] UKUT 65, which is in keeping with the guidance of the Court of Appeal in TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109 at paragraph 34, the fact that a family life Immigration Rule is met means that there is no public interest in maintaining immigration control or indeed any other public interest making his removal proportionate as he has met the requirements that parliament has set down for being permitted to remain in the UK. It is not therefore necessary to carry out a wider Article 8 ECHR balancing exercise. I therefore find that he is entitled to succeed in his Article 8 ECHR human rights appeal.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. The Tribunal set aside the decision with those findings set out at [30] of my decision preserved.
3. The appeal is remade allowing the appeal on Article 8 ECHR human rights grounds.

R J Owens
Upper Tribunal Judge Owens 11 November 2024

Appendix A

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004823

First-tier Tribunal Nos:
HU/57875/2022
IA/11025/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE OWENS

Between

Mr Orest Qerimaj
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Khan, Legal Representative, Fountain Solicitors
For the Respondent: Ms Rushforth, Senior Presenting Officer

Heard at Cardiff Civil Justice Centre on 13 June 2024

DECISION AND REASONS

1. The Secretary of State seeks to appeal against a decision of First-tier Tribunal Judge Buckwell, sent on the 5 December 2023, allowing Mr Querimaj's appeal against the decision dated 13 October 2022 by the respondent to refuse his human rights claim. Permission was granted by First-tier Tribunal Judge Mills on 8 November 2023.

The Background

2. Mr Qerimaj is an Albanian national who entered the United Kingdom illegally in 2019. Thereafter he entered into a relationship with a British

national, Ms Parrott, who he married on 14 April 2021. He asserts that he meets the requirements of the Immigration Rules in respect of family life at Appendix FM and alternatively that there would be unjustifiably harsh consequences for his wife were family life to take place in Albania.

3. The Secretary of State refused the application under the suitability criteria pursuant to S-LTR.1.3. It was asserted that Mr Qerimaj had previous convictions. He was sentenced to a period of four months, 20 days on the 8 March 2012 and for a period of nine years on the 9 January 2014. Both convictions took place in Italy. The Secretary of State was satisfied that he has been convicted of an offence for which he has been sentenced to imprisonment of at least four years. It was also said that paragraph S-LTR.2.2.(b) applies because Mr Qerimaj failed to declare the convictions in his application form and that these facts were material to the application because they relate to his suitability to be granted leave in the United Kingdom. The Secretary of State concluded that the exercise of discretion was not appropriate.

4. It was accepted by the Secretary of State that Mr Qerimaj meets the relationship requirements of the Immigration Rules. It was not accepted that he met the requirements of EX.1 because the Secretary of State had not seen evidence that there were any insurmountable obstacles in accordance with paragraph EX.2 of Appendix FM which meant that there were very significant difficulties which would be faced by him or his partner on continuing their family life together outside of the United Kingdom in Albania that would entail very serious hardship for either of them. Mr Qerimaj would be able to support his partner in Albania and could seek employment.

5. The view of the Secretary of State was that there were no unjustifiably harsh circumstances which would outweigh the public interest in maintaining immigration control. The duty under Article 8 ECHR does not impose a general obligation on the part of the contracting state to respect the choice by a married couple of the country of matrimonial residence. The relationship commenced in the knowledge that Mr Qerimaj did not have immigration status in the United Kingdom, and he had no legitimate expectation that he could remain here indefinitely.

The Decision

6. The judge considered the documentation before him in respect of the Italian convictions. The judge accepted that the conviction for nine years had been quashed and is now confirmed as a nullity, although the four month and twenty-day conviction for resisting detention for deportation to Albania may well subsist. The judge found that this was a sentence of less than twelve months and not of significance in terms of the suitability provisions. The judge heard evidence from Mr Qerimaj, his spouse, the spouse’s sister Cerys Parrott and the spouse’s father. The judge also had before him other written statements from family members. The evidence of the witnesses was that the Ms Parrott has mental health problems and would struggle to cope without the support of her family in Albania.

7. The judge found that the suitability criteria did not apply. It was accepted that couple met the financial requirements of the rules, as at the date of the

hearing. The judge accepted that all the witnesses were credible. He The judge then found that Mr Qerimaj's wife had serious mental health issues and that it would entail severe and significant hardship for her to live in Albania. The judge also found that if she relocated to Albania, she would lose her employment in the United Kingdom, which would destroy her financial position and would mean that she could no longer maintain her rented premises in Bristol. The judge found that Mr Qerimaj met the eligibility requirements of EX.1.

8. In the alternative, the judge then went on to find that there would be unjustifiably harsh consequences to remove him from the UK. The judge found that factors in favour of Mr Qerimaj outweighed the other factors in this particular appeal. The balance of proportionality fell in the favour of Mr Qerimaj.

Grounds of Appeal

9. The grounds of appeal are expressed as follows. "Failure to resolve a point in conflict/make findings/inadequate reasons".

(1) Ground 1. The judge has erred in respect of the suitability criteria. The judge allowed the appeal on the basis that Mr Qerimaj met the suitability requirements. Although the judge considered S-LTR.1.3 the judge fell to consider S-LTR.2.2.(b), that is Mr Qerimaj's failure to disclose his convictions in his application. The judge did not engage with or make findings on this separate ground for refusal. This is material because it informs whether Mr Qerimaj falls outside the remit of the application of EX.1 and is relevant to any proportionality assessment under Article 8.

(2) Ground 2. The judge also erred in respect of EX.1. The judge has failed to give adequate reasons why Mr Qerimaj's partner would face severe and significant hardship in Albania without medical evidence of her diagnosis or the prognosis or the circumstances in which she would be living, including the availability of medical support in Albania. The judge did not take into account that Mr Qerimaj, as an able adult, would be able to obtain employment on return to Albania, in order to support her. Finally, it is submitted that Mr Qerimaj's partner's loss of employment in the United Kingdom were she to relocate, cannot reasonably be considered as an insurmountable obstacle because the upheaval of relocation is envisaged within the test itself.

10. Permission to appeal was granted on the basis the suitability point is clearly arguable. The grant of permission was not limited.

11. I was provided with a detailed Rule 24 response dated December 2023 but which had not been uploaded onto the electronic portal. The Rule 24 response addresses in detail the suitability issue, which I will consider below. The response defended the judge's findings on EX.1(b) and EX.2 as well as the Article 8 assessment.

Submissions

12. Ms Rushforth relied on the grounds of appeal. She pointed to the fact that there were two separate grounds of refusal in relation to suitability. The first was the fact of the conviction itself. The Secretary of State accepts that the judge adequately engaged with this. The second provision related to the judge's failure to engage with Mr Qerimaj's failure to declare his previous conviction on his application. Her submission was that the judge did not engage with this at all. This is an error and therefore material to the outcome of the appeal. Had the judge found that the suitability criteria applied to Mr Qerimaj, then EX.1 would not come into play and suitability would be relevant to the wider proportionality exercise.

13. Ms Rushforth also submitted that the judge had erred in respect of assessing EX.1. The judge gave two reasons for finding that there were insurmountable obstacles to Mr Qerimaj and his wife relocating to Albania. The first was the appellant's wife's poor mental health and the second was that his wife would lose her employment in the United Kingdom. She submitted that the judge had not given adequate reasons why the appellant's wife's mental health would present an insurmountable obstacle in the absence of any prognosis, diagnosis or evidence that she would not be able to avail herself of treatment in Albania. Secondly, there was a lack of adequacy of reasons, in that the judge did not consider whether Mr Qerimaj could find employment in Albania himself to support his wife. She also submitted that the judge had misdirected himself in law by finding that these factors amounted to "insurmountable obstacles" because of the high threshold and stringency of the test. Were grounds 1 and 2 to be made out, this would have the implication that the broader Article 8 ECHR assessment was also flawed because it failed to take into account the suitability considerations and the errors under EX.1.

14. Mr Khan in turn relied on his Rule 24 response. He argued that the grounds amount essentially to a disagreement on the factual findings and that there is no error of law. The judge gave careful consideration to the decision and dealt with the points raised.

15. In respect of suitability, the judge was clearly aware that this was an issue in the appeal and that it would only be if Mr Qerimaj satisfied the suitability requirements that he could satisfy the Immigration Rules. The judge looked in detail at the assertion that Mr Qerimaj had been sentenced to a period of nine years' imprisonment. He accepted on the basis of the documents in the bundle at [52], [55] and [57] that this sentence had been quashed and that there was in fact no nine-year sentence. This was a factual finding, which has not been challenged by the Secretary of State. The consequence of this is that there was no obligation on Mr Qerimaj to declare this in his application form.

16. The judge was clearly aware that the second conviction, which resulted in a conviction of four months and twenty days' imprisonment for resisting deportation from Italy to Albania, existed. The judge took into account that because the sentence was for a period of less than twelve months, it did not fail the suitability provisions at S-LTR.1.3. The judge dealt with the shorter conviction at [62] where he stated:

> "I made clear during the hearing that with regard to the issue of suitability, I accepted the approach asserted by Mr Khan. Taking into

account all the documentary and other evidence given I am entirely satisfied that the previous nine-year prison sentence imposed on the appellant in Italy was quashed – it became 'a nullity' – as a consequence of the judgment of the High Court of Trieste. The appellant accepts that a sentence of four months and 20 days still applied to him but that is below the threshold which might otherwise apply in relation to suitability. Accordingly, there are no grounds for the application being refused with reference to suitability."

17. Mr Khan's submission is that it is implicit from the decision that the judge was aware that Mr Qerimaj had not declared the second conviction on his application form and that in any event, pursuant to S-LT.2.2, it was not material because of the age of the conviction. The conviction occurred in 2012 in relation to an incident when Mr Qerimaj resisted arrest in 2009. Mr Khan further submitted that the issue of non-disclosure was not raised in the respondent's review. It is manifest from the decision that Mr Qerimaj was not examined on this point. The cross-examination related primarily to the Italian documents. No challenge was put forward by Counsel on behalf of the Secretary of State and implicit in the judge's findings is the fact that he had taken the conviction into account when finding that there were no suitability grounds for refusal.

18. In respect of the eligibility requirement, Mr Khan's submission was that this was dealt with perfectly adequately at [64] to [67]. The judge was manifestly aware that there was no medical evidence. He considered the evidence in the round and from the evidence before him was entitled to find that it would cause Mr Qerimaj's wife significant and serious hardship to relocate to Albania, regardless of whether Mr Qerimaj could obtain employment there. EX.1 is worded in the alternative. The judge found that the difficulties that would be faced by Mr Qerimaj's wife do meet the high threshold. The Secretary of State may not agree, and one could accept that this was a generous finding, nevertheless there is nothing inherently wrong with it and there is no error of law.

19. It was further submitted that the judge had carried out a fair wider proportionality Article 8 ECHR balancing exercise. He submitted that even if there was an error in terms of suitability, the freestanding Article 8 ECHR exercise is sustainable. The judge dealt with all matters properly and correctly. He asked me to find that the decision stands.

20. In response, Ms Rushforth clarified that the suitability requirements were clearly relied upon in the refusal letter. In the respondent's review, at paragraph 2, it was stated that the refusal letter was relied upon "in its entirety" and included the assertion that the suitability requirements included Mr Qerimaj's omission to mention his previous convictions. She acknowledged that the SLR.1.4 is discretionary and submitted that this meant it was even more incumbent on the judge to address this suitability provision. Her submission was that this error infects the remainder of the findings.

Decision and Reasons

21. It is manifest from the refusal letter that the respondent decided that Mr Qerimaj's application fell for refusal on the grounds of suitability both under

S-LTR.1.3 and S-LTR.2.2.(b). In respect of the second paragraph, it is stated:

> "You do not meet S-LTR 2.2(b) because in your application, you failed to disclose the following facts, your convictions. I am satisfied that these facts were material to the application because they relate to your suitability to be granted leave to remain in the United Kingdom. I have considered whether you should nevertheless be granted leave to remain but have concluded that the exercise of discretion is not appropriate on this occasion. You therefore fail to meet the requirements for leave to remain because paragraph S-LTR.2.2.(b). of Appendix FM of the Immigration Rules applies."

22. The appellant's skeleton argument prepared by Mr Khan addressed the suitability requirements at paragraphs 9 to 12. The primary argument in this skeleton argument was that S-LTR.1.3 did not apply because Mr Qerimaj had not been convicted of an offence of over four years' imprisonment. There is no mention of S-LTR.2.2 (b).

23. It is not disputed that in his application, when asked the question, have you been convicted of any offence, Mr Qerimaj's response was, "No, I have never been convicted". In Mr Qerimaj's statement he addressed the shorter sentence for resisting arrest. He stated "I had entered Italy as a child of around 15 years old without my family. The Italian government granted me leave to remain in Italy and I studied for several years there. I was enrolled in a culinary college and trained to be a pastry chef". He sets out the circumstances in which he received this conviction. His statement does not address his failure to disclose the lesser conviction on his application form.

24. The respondent's review, as stated by Ms Rushforth, relied on the respondent's decision in its entirety. There was no concession made in respect of the failure to declare the second conviction. Although it is entirely appropriate for the judge to have considered that there was no requirement to disclose the conviction which had been quashed, I can see no explicit reference in the entire judgment as conceded by Mr Khan, that the judge has gone on to address the second limb of the suitability criteria at S-LR.2.2(b) and made clear findings as to why this suitability requirement does not apply. I am not in agreement that it is sufficient to read into the decision the judge's thinking that the age of the conviction and the circumstances in which it took place, meant that discretion should be applied to disregard it. It may well be that if the judge had applied his mind to this suitability provision, he may have come to that view, but I am satisfied that the Secretary of State's ground is made out and that the judge simply failed to have regard to whether the suitability provision under S-LTR.2.2.(b) applied or not. I am satisfied that this is an error which infects the remainder of the decision. This is because if the appellant could not meet the suitability requirements he would not be able to succeed under the Immigration Rules, which in itself, would be a factor to take into account in the proportionality exercise and further, there is no reference to any suitability criteria in the wider Article 8 ECHR proportionality exercise and this clearly would be a relevant factor that the judge would need to take into account when carrying out the balancing exercise. On this basis, I find that the judge's approach to suitability is flawed and I set aside the decision because this error is material to the outcome of the entire appeal.

25. I turn to the grounds in respect of insurmountable obstacles. My understanding of these grounds is not that they challenge the factual findings made in respect of Mr Qerimaj's wife's poor mental health, but they seek to argue that the judge failed to take into account whether the deterioration in Mr Qerimaj's wife's mental health could be assisted by accessing medical assistance in Albania or with the help and support of Mr Qerimaj and therefore would not amount to an insurmountable obstacle.

26. I am in agreement with Mr Khan that the judge's finding about the difficulties that the appellant would face without the support of her family and her poor mental health are sustainable. The judge has given adequate reasons at [66] why he accepted that the witnesses' evidence was credible despite the lack of medical evidence and confirms that he accepts their evidence that Mr Qerimaj's wife has had a difficult childhood. She has anxiety and depression and in 2019 was struggling as the sole carer of her grandfather. The witnesses gave consistent evidence that she was very dependent on the support both of her husband but of her wider family in Bristol and that she would not be able to cope in Albania without support from wider family. The judge also accepted that were she to relocate to Albania, she would lose her secure home and income in the United Kingdom. I am satisfied that this factor was not determinative of the judge's decision on EX.1. The judge manifestly placed most weight on her poor mental health and lack of knowledge of Albania. I am satisfied that the judge was considering this issue in respect of how this would affect Mr Qerimaj's wife were she to relocate to Albania, in terms of her mental health and that he accepted that she would be very isolated in Albania because of her inability to speak the language. Her sister gave evidence that she experienced early childhood trauma which makes her fearful of leaving her family and having to live in a country which he does not know.

27. Another sister confirmed that there were deaths in the family. When she had previously resided in Spain her mental health had suffered. The judge was manifestly entitled to find that the appellant's wife suffers from poor mental health and that it would deteriorate if she moved to Albania because the separation between her and her family and the isolation she would experience there. In my view, the judge has applied the correct test. He is aware of the high threshold, and he was entitled to form the view that EX.1. was made out on the basis of the appellant's wife's circumstances alone. As Mr Khan submitted, this may have been a generous finding which another judge would have not come to, but I am unable to find an error of law in this finding which is both adequately reasoned and sustainable.

28. Having found that the judge has erred in respect of suitability, I set aside the decision.

Disposal

29. There was a discussion about the disposal of this appeal. Mr Khan initially submitted that the appeal would need to go back to the First-tier Tribunal for a rehearing. However, given the number of positive findings that can be preserved and that the re-making primarily relates to a discretionary legal ground and the resultant Article 8 ECHR balancing exercise, it seems to me that the normal course of retaining the appeal in the Upper Tribunal is appropriate.

30. I preserve the following findings:

a) The suitability objections at S-LTR 1. 3 are not made out.
b) The nine-year criminal sentence in Italy was declared a nullity.
c) Mr Qerimaj did not declare the four month and 20-day conviction on his application form.
d) Mr Qerimaj and his wife are in a genuine and subsisting relationship.
e) As at the date of the hearing the financial requirements were satisfied. Ms Qerimaj's wife was working as a customer service advisor earning £23,00 pa.
f) EX1 is satisfied.
g) Ms Perrott had a difficult childhood and suffered an early childhood trauma
h) She has anxiety and depression. She requires the support of her wider family in Bristol including her father and sisters in addition to the support of her husband.
i) When she lived in Spain her mental health deteriorated. She struggled to cope in 2019 as the sole carer of her grandfather.
j) She does not speak Albanian and would be isolated in Albania. If she relocated to Albania, she would lose her job and secure home in the UK.
k) There would be no insurmountable obstacles to Mr Qerimaj relocating to Albania. He is familiar with the language and culture and his mother lives there.
l) Mr Qerimaj entered the UK illegally and his presence in the UK was unlawful when he commenced his relationship with his now wife.

Notice of Decision

31. The decision of the First-tier Tribunal allowing the appeal involved the making of an error of law.

32. The decision is set aside.

33. The decision is adjourned for remaking at the Upper Tribunal, to be heard face to face at Cardiff CJC before Upper Tribunal Judge Owens with a time estimate of 2 hours.

Directions

(1) Both parties are directed to file and serve written submissions no later than 72 hours prior to the day of the hearing on the issue of whether S-LRT.2.2 applies to the appellant.

(2) Any new evidence must be accompanied by the requisite rule 15(2A) notices and uploaded electronically to the Tribunal system.

R J Owens

Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 July 2024