**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2023-001283

First-tier Tribunal No: HU/53427/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

19th February 2024

**Before**

**UPPER TRIBUNAL JUDGE RIMINGTON**
**DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD**

**Between**

**URIM TROCI**
**(NO ANONYMITY ORDER MADE)**

Appellant

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms Bayati, counsel, instructed by Oak Solicitors
For the Respondents: Mr Tufan, Senior Home Office Presenting Officer

**Heard at Field House on 6 February 2024**

**DECISION AND REASONS**

**Background**

1. This matter concerns an appeal against the decision of First-tier Tribunal ('FtT') Judge Dineen ('the Judge') who dismissed the Appellant's appeal against the Respondent's decision letter of 7 February 2022 ("the Refusal Letter"), refusing the Appellant's application made on 11 March 2021.

2. The Appellant applied for leave to remain on the basis of his private life, relying mainly on the length of time he had been in the UK and the ties developed during this time.

3. The Refusal Letter refused the application on grounds of suitability under Section S-LTR of Appendix FM (S-LTR.4.2 and 4.3) of the immigration rules because the Appellant had previously used deception to gain leave in the UK,

claiming to be Kosovan when he was actually Albanian. It was also the Respondent's position that the Appellant had not shown he had completed 20 years of continuous residence in the UK and there were no very significant obstacles to his integration into Albania and there were no exceptional circumstances. The application was refused under paragraph 276ADE(1)(i), (iii), (iv), (v) and (vi).

4. The Appellant appealed the refusal decision. The Respondent undertook a review of the matter on 8 October 2022, at which point the Appellant had not provided a bundle or skeleton argument, and maintained the refusal position. The Appellant's later skeleton argument asserted that he fulfilled the requirements of immigration rule 276ADE(1)(iii) (long residence), having been resident in the UK since 2000.

5. His appeal was heard by the Judge at Hatton Cross on 26 January 2023. The Judge subsequently dismissed the appeal in his decision promulgated on 26 February 2023.

6. The Appellant applied for permission to appeal to this Tribunal on grounds which were not numbered, but may be enumerated and described as follows:

- Ground 1: the Judge erred in failing to take relevant evidence into consideration, including:
  - the Appellant's medical and other evidence showing his presence in the UK, as set out in detail in para 13 of the skeleton argument.
  - Home Office guidance on suitability, which said that questions of suitability are not relevant to applications on the grounds of private life.
  - the Appellant having voluntarily informed the Respondent of his true identity, as noted in the previous determination.

  In particular, the finding that the Appellant was not present between 2007 and 2010 disregarded wage slip and medical evidence from 2007, a letter from HMRC in 2008, and evidence from a witness who said the Appellant lived with him at the time. Due to having not properly considered the evidence, the Judge made erroneous findings of fact.

- Ground 2: the Judge erred in finding the Appellant's continuous residence was broken "on account of his absence" from the UK, failing to set out the applicable rule or that the Appellant can have absences totalling 18 months in the 20-year period.

- Ground 3: the errors identified under grounds 1 and 2 led to the Judge conducting a flawed proportionality exercise for the purposes of article 8.

7. The Appellant's application for permission to appeal was not admitted by FtT Judge Khurram on 5 April 2023, on the basis that it had been made out of time and an extension of time was refused.

8. The Appellant applied to the Upper Tribunal for permission to appeal on the same, renewed grounds.

9. Permission to appeal was granted by Upper Tribunal Judge C. Lane on 22 October 2023, stating:

> "1. The application to the First-tier Tribunal was out of time. having considered the explain in the renewed grounds, I find that it is in the interests of justice for the Upper Tribunal to admit the application.
>
> 2. The renewed grounds refer to particulars of items of evidence (including medical and tax records). It is arguable that the First-tier Tribunal failed adequately to consider this evidence in reaching its finding at [41] that the appellant had not been present in the United Kingdom between 2007-2010."

10. The Respondent did not file a response to the appeal.

## The Hearing

11. Mr Tufan did not have a copy of the Appellant's bundle that had been before the Judge. Ms Bayati had the bundle but had not had chance to review it. The appeal was put back in the list to allow both parties chance to obtain and review the relevant papers.

12. On return, Ms Bayati took us through the grounds of appeal, expanding on them as follows:

(a) the GP evidence for 2007-2008 refers to a number of tests which can only have been undertaken if the Appellant was in the UK; there are also wage slips from 2007.

(b) the HMRC letter was the only evidence for 2008 but this shows the Appellant receiving a payment and therefore his presence in that year.

(c) the Refusal Letter itself did not dispute presence across the whole period, but only referred to an absence of evidence for 2008 and 2010; the Judge's conclusion that there was no evidence for 2007 was therefore not open to him on the evidence.

(d) it was unclear what the judge was saying in [40] when he rejects the assertion of living in a shared house due to a lack of evidence of working.

(e) the Judge makes no findings concerning the oral evidence of the Appellant and his witness; we therefore do not know whether or not he accepted it and his reasons for this.

(f) the suitability provisions referred to in the Refusal Letter required the Respondent to exercise discretion on suitability. There was nothing in the Refusal Letter indicating the Respondent considered the question of discretion but simply said the Appellant had exercised deception and that meant he should be refused. The Judge should have taken this failure to exercise discretion into account when assessing proportionality under article 8.

13. In answer to questions from us, Ms Bayati was unable to confirm if a copy of the Home Office guidance referred to in the grounds of appeal was actually before the Judge but candidly admitted it did not take the matter much further given the suitability requirements were contained within the relevant immigration rules.

14. As regards what the evidence of the Appellant 'volunteering' his deception was, Ms Bayati said the Appellant's application leading to the previous appeal had been made on the basis that he was Albanian such that he was volunteering his true nationality at that point.

15. Mr Tufan replied to say:

(a) the Judge may have been wrong about 2007 if the GP entries were not just administrative however there is nothing to show the Appellant was here in 2008; the HMRC letter does not confirm this and it could be referring to the previous tax year.

(b) Concerning the Appellant's witness, at [40] the Judge says he is not satisfied as to the account 'given' which could be referring to the oral evidence; what he made of the evidence was a matter for him and it was open for him to find that he did not believe the Appellant.

(c) irrespective of whether evidence was found for 2007 -2010, the Appellant's deception is determinative of the appeal. A previous determination from 2018 made definitive findings on suitability at para 23 which is referred to in the Refusal Letter. The Respondent exercised its discretion by forming his own view on the basis of that determination. There is no reason why the Judge should have disturbed those findings on the basis of Devaseelan and it could have been an error to have done so.

(d) There are no material errors of law.

16. Ms Bayati replied to repeat her point about discretion and said that the Judge was not required to follow the previous determination because, asserting that he satisfied the 20-year rule, the Appellant's appeal was now different from that in the previous determination. The Judge therefore needed to factor in the lack of discretion when assessing proportionality.

17. At the end of the hearing, we reserved our decision.

## Discussion and Findings

18. We remind ourselves of the important guidance handed down by the Court of Appeal that an appellate court must not interfere in a decision of a judge below without good reason. The power of the Upper Tribunal to set aside a decision of the First-tier Tribunal and to proceed to remake the decision only arises in law if it is found that the tribunal below has made a genuine error of law that is material to the outcome of the decision under challenge.

19. The Judge's decision is brief, with his findings contained at [35]-[45]. As per the recent cases of TC (PS compliance - "issues-based" reasoning) Zimbabwe [2023] UKUT 00164 (IAC), and Lata (FtT: principal controversial issues) [2023] UKUT 00163 (IAC), brevity is to be lauded. Provided, that is, that sufficient reasons are provided in order for the parties to understand why they have either won or lost the appeal (see, for example, the headnote of MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC).

20. The Judge's findings may be summarised as follows:

(a) the Appellant has private, but not family, life in the UK by virtue of his residence since 2000 [35] such that removal would result in interference to his private life [36], however such interference would be lawful [37]

(b) on the Appellant's own evidence, his residence has been interrupted on a number of occasions [38]. The Appellant has not shown he was present in the UK between 2007 and 2010 [41], because:

(i) the Appellant's medical records have not been shown to be evidence of presence in the UK, as opposed to some administrative action being taken by his general practice [39]; and

(ii) the account given of presence in a shared house in 2010 is not accepted because the Appellant said he was working at that time, and has provided no evidence to establish such work when he could have done so [40]

(c) by virtue of his deception, the Appellant has failed the suitability test under 276ADE [42]

(d) there are no significant obstacles to the Appellant's integration in Albania because he lived there for 19 years; he has revisited the country on more than one occasion; his late parents lived there in the recent past; he has had the benefit of acquiring knowledge of life in the UK; and there is no reason to suppose he would have any more difficulty than any other Albanian citizen in supporting himself and generating a private life there [43]

(e) there are no exceptional circumstances which would make his removal disproportionate under article 8 ECHR [44] and his removal would not be disproportionate [45].

21. We agree with the grounds in saying that the Judge does not appear to have fully appreciated the Appellant's medical records in showing the Appellant received treatment in 2007 that would have required his presence in the UK. Examples are entries on 8 August 2007 recording that the Appellant had an endoscopy, and on 24 September 2007 showing he had a spinal x-ray. Whilst the entries are 'administrative' in the sense that the GP is simply recording something that was not an action taken within the surgery, they are nonetheless evidence of procedures elsewhere that would have required the Appellant's presence.

22. We also accept that the Judge is perhaps not entirely explicit in stating what he made of the oral evidence, particularly that of the Appellant's witness Mr P Ahmetaj. However, it can be inferred from the Judge's finding at [40] that he did not accept the evidence which encompassed the account of both the Appellant and the witness. We understand the reason the Judge did not accept it was because the Appellant was working at the time and had not produced evidence of such work when he could reasonably have done so. The Judge is essentially saying that there is no corroboration of either the Appellant's or Mr Ahmetaj's evidence, against the background of the Appellant having produced evidence of work in other years. The Judge is acknowledging this other evidence of work when he refers to the Appellant's "irregularly conducted" work. We find the Judge has provided sufficient reasoning for his finding that the account of living in a

shared house is not accepted, which finding was open to him. There was no documentary evidence of the Appellant and witness living together.

23. As regards the letter from HMRC in 2008, we accept that this is not expressly mentioned in the Judge's decision but it is trite that a Judge need not refer to each and every piece of evidence before him/her. Even if the Judge did not consider this letter (which we do not find proved), we do not see how it would have had any bearing on the Judge's reasoning concerning a lack of evidence for this particular year. The letter simply confirms that a payment was made to an agent acting on the Appellant's behalf. There is nothing in it which could be read as confirming the Appellant was physically present in the UK at the time and Ms Bayati confirmed that this was the only evidence of the Appellant's presence in 2008. Certainly nothing else is mentioned in the Appellant's skeleton argument that was before the Judge and which is mentioned at [16] of the decision.

24. In any event, we find the Judge was correct to conclude that that there was no evidence of residence in 2010. The Appellant's skeleton argument does not mention anything for 2010 in para 13 where it lists the evidence of presence over the 20-year period claimed and nor can we see anything in the papers going to this particular year.

25. Taking the above into account, whilst the Judge's finding at [41] that "I am therefore not satisfied that the appellant was present in the UK between 2007 and 2010" was technically incorrect given there was evidence of presence in 2007, he was correct to find there was no evidence of presence in 2010, and he was also entitled to find there was no evidence of presence in 2008. He was therefore correct to find in [38] that the Appellant's residence has been interrupted and it is clear the Judge did not accept the Appellant met the requirement of the immigration rules concerning long residence.

26. In terms of suitability, it was helpful of Ms Bayati to admit that the assertion in the grounds that the Judge did not take proper account of Home Office guidance did not take the matter any further. It is well established that policy cannot trump the rules (see for example Alvi [2012] UKSC 33) and this is particularly the case here as the applicable suitability requirements were set out in the relevant rules themselves, as referred to in the Refusal Letter.

27. We consider the submission that the Respondent did not properly consider whether to exercise, or did not exercise, discretion when applying the suitability requirements to be without foundation. The Respondent clearly did exercise discretion, explicitly deciding to refuse the Appellant's application on the basis that he failed to meet the suitability requirements because his "deception in gaining leave was previously considered by an Immigration Judge in your dismissed appeal in July 2018" and setting out the relevant finding from that dismissed appeal. Whether or not the present appeal raised additional arguments that had not been considered in the previous determination, the fact remained that the Appellant had been found to have exercised deception, and this finding remained in place.

28. The Judge's decision records at [22] that:

> "The appellant accepted that he had lied about his nationality until 03/10/16. It was submitted that suitability should not now weight against him, as he had declared the truthful position."

29. The Judge uses this as the basis for his finding in [42] that:

> "He has clearly been shown, by virtue of his deception, to have failed the suitability test are required under paragraph 276 ADE of the immigration rules".

30. No challenge has been brought against this finding. Rather, the Appellant says the Respondent's failure to properly exercise discretion should have been taken into account when the Judge considered proportionality under article 8.

31. As above, we have found the Respondent did exercise her discretion and this can be seen throughout the Respondent's decision, not least under the section marked 'exceptional circumstances' where there is consideration of the Appellant's assertion that he is a law-abiding citizen. There was therefore nothing for the Judge to take into account in this regard. We also cannot see that this point was explicitly argued before the Judge. The Appellant's skeleton argument asserts at para 24 that discretion should have exercised in the Appellant's favour, not that it was not exercised at all which is what Ms Bayani appeared to argue. The skeleton argument also raised the point *dependant* on long residence which the Appellant had not shown.

32. The question of the way in which the Respondent exercised discretion was not something that was within the Judge's jurisdiction to decide in any case. Since the Immigration Act 2014 came into force on 6 April 2015, a right of appeal has only arisen in relation to the refusal of human rights and protection claims, or decisions to revoke protection status. There is no longer an ability to bring an appeal on the basis that a decision is not in accordance with the law.

33. It was also not open to the Judge to have purported to himself exercise the discretion contained in the rules regarding the suitability requirements as this would have placed him in the position of primary decision maker.

34. At best, the Judge could only have taken into account the Appellant's "volunteering" of his deception when considering the balancing exercise for the purposes of article 8 and whether the weight to be accorded to public interest should be reduced as a result of this factor. We agree the Judge does not explicitly say whether he considered this factor in the balancing exercise. However, that is not to say he did not consider it. Even if he did not, we do not see that it could have a material impact on his overall decision in any case. The fact that the Appellant may have admitted his deception could not have been a positive factor in his behaviour. Nor can we see it could even have been neutral, because intentionally exercising deception can only reasonably be weighed as a negative absent some very good reason such as duress. We cannot see that the Appellant explained to the Judge how he "volunteered" his deception in order that the Judge could have made anything of this. Ms Bayani explained that the volunteering was by reason of the Appellant making an application using his true nationality, but she accepted that this in itself did not show the Appellant expressly stating that he had used deception in the past.

35. Overall, we find no error is disclosed. The Judge was correct to find in [42] that the Appellant failed to meet the suitability requirements of the rules due to his deception.

36. The Judge's findings concerning the Appellant's inability to meet the immigration rules were therefore correct and open to him.

37. It is well established that an inability to meet the rules is a weighty factor meaning something very compelling is required to outweigh the public interest (see Agyarko [2017] UKSC 11). The Judge clearly had this in mind when he states in [44] that:

> "I find there is no evidence of any circumstances of an exceptional nature, or which would make his removal disproportionate under article 8 ECHR, independently of the immigration rules".

38. On the basis of the evidence that was in front of him, it is difficult to see how the Judge could have concluded, particularly within the statutory framework of Section 117B of the Nationality and Asylum Act 2002, anything other than the appeal should be dismissed.

39. Overall, we consider the Judge's decision is sufficiently reasoned and discloses no material error of law.

40. To conclude, we find the decision is not infected by any material errors of law. The decision therefore stands.

**Notice of Decision**

41. The appeal to the Upper Tribunal is dismissed. The decision of First-tier Tribunal Judge Dineen of 26 February 2023 is maintained.

42. No anonymity order is made.

**L.Shepherd**
Deputy Judge of the Upper Tribunal

Immigration and Asylum Chamber
**15 February 2024**