Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/13719/2019**

THE IMMIGRATION ACTS

Heard at Manchester (via Skype)	**Decision & Reasons Promulgated**
On 18 February 2021	**On 03 March 2021**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MD NAZRUL ISLAM
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Ceallaigh instructed by Lexwin Solicitors.
For the Respondent: Mr Melvin Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Morris ('the Judge') promulgated on the 22 January 2020 in which she dismissed the appellant's appeal on human rights grounds.
2. Permission to appeal was granted on a renewed application by the Upper Tribunal on 30 June 2020, the operative part of the grant being in the following '

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2. It is accepted that the appellant's leave expired on 18 April 2018. He had, by then, been lawfully resident in the UK for 9 years and 3 months. It is also accepted that he made further applications for leave - out of time - on 1 May 2018 and 6 September 2018. The later varied the former. It appears that it was not decided before the appellant made a further application for leave on 30 January 2019. What is said by the respondent is that both 1 May 2018 and 6 September 2018 applications were "voided" on 31 December 2018. The appellant contends that was not the effect. There was no power to "void" either application. The second application varied the first application and that varied application remained outstanding until it was itself a varied by the application on 30 January 2019, the refusal of which gave rise to the appeal. It is accepted none of this can give the appellant further leave in order to meet the 10 year long residence rule in para 276B following R(Ahmed) v SSHD [2019] EWCA Civ 1070. But, it is said, it is relevant in assessing the appellant's art 8 claim and a 'near miss' argument.

3. Whilst the 'near miss' argument may ultimately not prevail, it is arguable that the immigration history of the appellant's applications may have been misunderstood and applied by the judge. The appellant's grounds are arguable.

Error of law

3. The Judge noted the appellants immigration history at [16 – 17] in the following terms:

16. It is agreed between the parties that the Appellant entered the United Kingdom as a student on 18 January 2009 with leave valid until 30 April 2012. It is accepted that the Appellant was granted further periods of leave to remain until 28 August 2015. On 23 June 2015, he made an application and was granted leave to remain until 14 July 2018. On 20 August 2017, his leave was curtailed. On 28 July 2017, he made an application which was refused on 4 March 2018. On 20 March 2018, he applied for an Admin Review and this was completed, with the decision maintained, on 16 April 2018. Mr Malik submits that, pursuant to Appendix SN, the effective date of service of that decision was 18 April 2018. I accept that submission.

17. On 1 May 2018, the Appellant made an application for leave to remain outside the Immigration Rules and Mr Malik calculates that from 18 April 2018 to 1 May 2018 is less than 14 days. That calculation is clearly correct. The application made on 1 May 2018 was voided on 31 December 2018 and a further application made on 6 September 2018 was also voided on 31 December 2018. Despite Mr Malik stating during the hearing that he did not challenge what is said in the decision letter, which included the voiding, in submissions he sought to argue in the absence of the actual notice, the application made on 6 September 2018 was still pending when the Appellant made his application on 30 January 2019. I reject that submission. The very clear oral evidence of the Appellant was that he knew of the voiding on 31 December 2018. That evidence may be contrary to the contents of his witness statement, but it was very clear oral evidence and I accept it. Further, the Appellant was not asked in re-examination how he became aware of the voiding and Appendix SN sets out various ways in which a notice may be given. I further reject the submission made by Mr Malik that the Respondent had been put on notice that the issue of service of the notice was to be raised at the hearing. It is not a ground of appeal and if such notice is alleged to have been provided to the Respondent by virtue of the Appellant's witness statement, I repeat here what is set out above, that statement only became the Appellant's signed witness statement at the hearing.

4. At [19 – 20] the Judge writes:

> 19. By reason of all the matters set out above, I find that the Respondent was correct to conclude that the Appellant's lawful leave ended when the Admin Review was completed on 16 April 2018, although I accept the submission made by Mr Malik that the data should be viewed as 18 April 2018 as I have set out above. By 18 April 2018 the Appellant had completed nine years three months continuous law residence. The next application made on 1 May 2018 does not assist the Appellant to show 10 years continuous lawful residence.
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> 20. By reason of the matters set out above, the applications made by the Appellants on 1 May 2018 and 6 September 2018 do not assist in establishing ten years continuous lawful residence but, if I am wrong as to the above, I find that the voiding such applications on 31 December 2018 also fails to establish 10 years continuous lawful residence.

5. The Judge considered the matter pursuant to article 8 ECHR on the basis of the appellant's private life in United Kingdom but concluded that the factors relied upon by the appellant did not outweigh the public interest in maintaining effective immigration control. These findings, set out between [22-24], are as follows:

> 22. The appellant has given no evidence of any family life beyond that which he has with his wife and child. Such family life would be maintained upon removal to Bangladesh. I am persuaded to accept that the Appellant has a private life by reason of the number of years he has been here, although there was no evidence led as to such private life. For the purposes of this decision, I am prepared to accept that the Respondents decision would interfere with any such private life and have consequences of such gravity as to potentially engage the operation of Article 8. I find that such interference would be in accordance with the law and would have a legitimate aim and, indeed, it was not argued to the contrary. That, therefore, leaves the question of proportionality.
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> 23. Pursuant to Section 117 B, little weight should be given to a private life that is established by a person at a time when the person is in the United Kingdom unlawfully or at any time when a person's immigration status is precarious. For the entire duration of the Appellant's presence in the United Kingdom, that presence has been precarious, if not unlawful, since he knew that his presence in the United Kingdom depended upon being given leave to do so. The Appellant does not meet the requirements of the Immigration Rules and it is accepted that there would be no significant obstacles to integration into Bangladesh. The Appellant's wife and child are not British citizens and the Appellant has family in Bangladesh. He also mentions in his witness statement, which he signed at the hearing, that he has skills and qualifications which he has been able to use in the United Kingdom. He has a Master's of Business Administration in Marketing Degree and a Graduate Diploma in Business Management, and a Diploma and Advanced Diploma in Business Studies. I bear in mind the length of time that the Appellant was lawfully in United Kingdom and the lengths of time that he has been present in the United Kingdom. However, the Appellant does not meet the requirements of the Immigration Rules.
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> 24. By reason of all the matters set out above and having taken account of the evidence as a whole, which I do, I find that the Respondent's decision is not disproportionate. I find this to be a case where all the factors do not outweigh

the public interest accordingly, the appeal is dismissed because the decision is not unlawful under Section 6 of the Human Rights Act 1998.

6. The appellant sought permission to appeal asserting the Judge erred in treating him as having made two applications which were voided on 31 December 2018, which amounts to legal error, and in failing to consider the appellant's argument that this was a 'near miss' case pursuant to article 8 ECHR.

7. The Secretary of State in her Rule 24 response in reply to the grant of permission and appellant's grounds writes:

Upper Tribunal Judge Grubb grants permission in this renewed application finding it arguable that whilst the appellant accepts that none of his various applications made on 1 May 2018, 6 September 2018 and 30 January 2019 can count towards his long residence application [276B] following R(Ahmed) v SSHD [2019 EWCA Civ 1070 it is argued that his immigration history should be taken into account when considering Article 8.

Judge Grubb notes that "Whilst the 'near miss' argument may ultimately not prevail it is arguable that the immigration history of the appellant's applications may have been mis understood and applied by the Judge."

The GoA argue that the FtT erred in law in that;
Ground 1 Argues that FtT erred I it's consideration of the voided applications
Ground 2 argues that the FtT erred when considering the main thrust of the arguments being that this was a near miss case.

It is respectfully submitted that an error in law needs to be material to the outcome of this appeal. Whether or not the decisions were able to be voided or not, as the appellant now accepts, is not material to the issue before the FtT which was whether he met the requirements of the Immigration Rules in order to succeed in his appeal or whether there were Exceptional circumstances that warranted a grant of leave outside of those Rules.

It is clear that neither of the voided applications had any prospect of success as Mr I would not have met the requirements for ILR or paragraph 276 B at the time of those applications.

The Grounds of appeal do not assert that the judge has erred because the appellant met the Rules (276B) or Appendix FM or 276 ADE or that there are exceptional circumstances present in this appeal which the judge has mistakenly omitted or mis-interpreted.

It is respectfully submitted that it is trite law that the "near miss" argument is not one that can be successful before the courts without more.

It is submitted that Grounds of appeal have no merit and are not material to the outcome of this appeal.

Error of law

8. In relation to the assertion the Judge erred by finding two of the appellants applications had been voided, and the submission of Mr O Ceallaigh that this was unlawful as they had ben varied, reference has been made to the respondent's guidance, 'Validation, variation and withdrawal of applications Version 3.0'. Although dated 1 December

2020 it was not suggested it did not represent the correct legal position in relation to the power to vary an application at the relevant date. From page 18 it reads:

Varying an application made in the UK.

An applicant can vary the purpose of an application at any time before a decision on the application is served. Any application submitted where a previous application has not yet been decided is a variation of that previous application. An applicant can only have one application outstanding at any one time. See Variation of an application for leave: example scenarios.

If the applicant wishes to vary the purpose of their application, they must complete the specified form and meet all the requirements of paragraph 34 of the Immigration Rules for the variation to be valid. If an applicant writes to request a variation of an application but does not submit an application form, you should write back to them confirming that they must complete a specified form and tell them which form to use. See: Requirement: a specified application form.

When the original and variation applications are made online, the applicant will have paid 2 fees. You must refund the fee for the first application. If both applications, or the second application, are on paper, the applicant must pay the difference between the original fee and the new higher fee and you should write to them to tell them what the difference is. See: missing fees.

Where an EU national or their family member varies a previous application made under the Immigration Rules with that of an application under the EU Settlement Scheme for either settled or pre-settled status, the fee for the first application should be refunded and only the second fee should be retained.

Where a dependant is included as part of an original application that is later varied, they can be included in the variation application if that application allows dependants to be included. If not, and the dependants have not submitted an application in their own right, then you must write to the dependants on the application confirming that the original application has been varied, that they are not included in the variation application and that their original application has fallen away. You should tell the dependant that they should now make a separate application. See: specified application forms.

If a dependant was not included in the original application, they can be added to the variation application; however, their date of application will be the date of the variation application and not the date of the original application.

A valid variation of purpose will look like a new application. You must check the caseworking system to see if an earlier application exists which has not yet been decided. This will tell you whether the new application is a variation of an existing application or a new application. If it is a new application you must consider whether it can be made. Guidance on applications made while a person is on section 3C leave can be found in the 3C guidance.

If an applicant submits an application to vary, but a decision has already been made on the original application, you must write to them and tell them that the application will be treated as a new application.

Date of application: original application

The date of application for paper applications sent by post by Royal Mail, including Parcel Force, is the date of posting that is indicated on the tracking information, or if not tracked, on the postmark on the envelope.

The date of application for postal applications delivered by courier is the date it is delivered to the Home Office.

If the envelope in which the application was posted is missing, or if the postmark is illegible, you must take the date of posting to be at least one working day before it is received. You must take the date of processing on the payment contractor's stream sheet as the date the application was received. If there is also accompanying correspondence with the application that matches the likely date of posting, and that date is earlier than postage date calculated using the above method, you must take this earlier date as the application date. If you are unsure, you must accept the probable date most favourable to the applicant.

The date of application for an online application is the date it is submitted using the online process.

If you withdraw a decision to treat an application as invalid and instead accept it as valid, the date of application is the date the application was originally made.

If an application, or variation, was previously rejected as invalid and the applicant then submits a valid application, the date of application, or variation, is the date the valid application is submitted.

Date of application: application to vary

Where an application is varied, the application date remains the date of the original application. This is relevant to whether an applicant has, or will have, section 3C leave. For further information see: Leave extended by section 3C (and leave extended by section 3D in transitional cases).

Where a variation application is made in accordance with paragraph 34E, the date the variation application is made is the date to be used for the purposes of assessment against the rules.

Variation of an application for leave: example scenarios

An applicant can only have one application outstanding at a time, except for one very specific exception as set out in example scenario 4 below, and where one application is a human rights or protection claim. See: Varying an application for leave to remain. When an applicant submits an application for leave followed by another application for leave, the second application will either be a variation of the first application, or a new application. The examples below explain how this works.

Example scenario 1

An applicant submits application A in time. They then submit application B before application A has been decided, but after the applicant's leave has expired when the applicant transitioned to 3C leave. As the applicant transitioned to 3C leave and a decision has not yet been made on application A, application B is automatically considered as a variation of application A. The date of application is the date application A was submitted.

Example scenario 2

An applicant submits application A in time. They then submit application B before application A has been decided, whilst they still have extant leave. An applicant cannot be granted more than one type of leave at a time. Where 2 applications have been submitted whilst the applicant has extant leave, the second application will be

considered as a variation of the first application. The date of application is the date application A was submitted.

Example scenario 3

An applicant submits application A out of time. They then submit application B before application A has been decided. An applicant cannot be granted more than one type of leave at a time. Where 2 applications have been submitted out of time, the second application will be considered as a variation of the first application. The date of application is the date application A was submitted.
Example scenario 4

An applicant submits application A in time. They transition to 3C leave and application A is refused, and the decision is served with a right of appeal. The applicant then submits application B, whilst still on 3C leave (for example, before the time limit to appeal has ended) In this scenario, if application B is a human rights claim or protection claim, application B must be decided. If application B is any other type of application, then it must be returned as void as there is no longer an application to vary. For further information on 3C leave, see: Leave extended by section 3C (and leave extended by section 3D in transitional cases).

Example scenario 5

An applicant submits application A (either in or out of time). Application A is refused and the decision is served, with a right to Administrative Review. The applicant then submits application B. The submission of application B brings the administrative review period and therefore any period of 3C leave, to an end. Application B cannot be a variation of application A, because the decision on application A has already been decided. Application B should be considered as a new application.

9. Reference is also made in the case to paragraph 34BB of the Immigration Rules which states:

Multiple Applications

34BB (1) An applicant may only have one outstanding application for leave to remain at a time.

(2) If an application for leave to remain is submitted in circumstances where a previous application for leave to remain has not been decided, it will be treated as a variation of the previous application.

(3) Where more than one application for leave to remain is submitted on the same day then subject to sub-paragraph (4), each application will be invalid and will not be considered.

(4) The Secretary of State may give the applicant a single opportunity to withdraw all but one of the applications within 10 working days of the date on which the notification was sent. If all but one of the applications are not withdrawn by the specified date each application will be invalid and will not be considered.

(5) Notice of invalidity will be given in writing and served in accordance with Appendix SN of these Rules.

10. In relation to the relevant applications said by the Judge to have been voided, one made on the 1 May 2018 and the other on the 6 September 2018, as no decision had been made on the first application when the second application was made, I find there is merit in Mr O Ceallaigh’ s submission that the second application

should have been treated as a variation of the first application. The third application made on the January 2019 will also have stood as a variation of the second application.

11. The grounds assert this error is material as the Judge concluded that after the appellant's leave expired, he made a series of failed applications before the application of January 2019, and therefore failed to consider the appellant's argument that his was a "near miss" case.

12. Even if the Judge was wrong to conclude the two varied applications had been "voided" that does not establish legal error in the Judge's findings at [19 – 20] set out above. It was not disputed before the Upper Tribunal that the appellant had only established nine years and three months continuous lawful residence rather than the requisite 10 years continuous lawful period required under the Rules.

13. The Judge did consider article 8 ECHR as noted above.

14. In relation to a 'near miss' argument, the appellant relies upon the decision in SS(Congo) and Others [2015] EWCA Civ 387 in which it was held that the fact that a case was a 'near miss' in relation to satisfying the requirements of the rules would not show that compelling reasons existed requiring the grant of the LTE outside the rules. If a claimant could show however that there were individual interests at stake covered by Article 8, which gave rise to a claim that compelling circumstances existed to justify the grant of leave outside the rules, the fact that the case was a 'near-miss' might be a relevant consideration, which tipped the balance in his or her favour. Where a claimant submitted that there was a reasonable prospect that he or she would soon be able to satisfy the requirements of the rules, the Secretary of State was not obliged to take that into account. It was fair that the claimant should wait until the circumstances had changed and then apply rather than attempting to jump the queue by asking for preferential treatment outside the rules in advance. Richards LJ noted that in certain of the appeals, the respondents said that improvements in the position of their sponsors were on the horizon, so that there appeared to be a reasonable prospect that within a period of weeks or months they would in fact be able to satisfy the requirements of the Rules. Richards LJ said that "Generally, it is fair that the applicant should wait until the circumstances have changed and the requirements in the Rules are satisfied and then apply, rather than attempting to jump the queue by asking for preferential treatment outside the Rules in advance".

15. This is not a case where it was made out the appellant could satisfy the requirements of the Rules within a short period of time or one in which the nine-month shortfall, when added to other matters taken into account by the Judge, was sufficient to warrant the appeal being allowed. As Mr Melvin submitted this was not a small shortfall but a considerable gap of some nine months.

16. The near miss argument was never determinative and could not be in law.

17. There was reference made before the Upper Tribunal to the fact the appellant's wife had given birth to a second child but that is a post hearing development and does not, of itself, support a finding of legal error.

18. The Judge clearly took into account the statutory provisions of section 117 B of the 2002 Act and it has not been shown the Judge erred in concluding there will be no disruption with the family life recognised by article 8 of this family unit. The issue was that of their private life. The Judge in concluding any interference with the private life was proportionate and justified took into account the number of years the appellant has been in the United Kingdom; although noted the appellant had not led any evidence as to the nature of his private life.

19. The finding by the Judge that there were no very significant obstacles to integration into Bangladesh is a finding within the range of those available to the Judge on the evidence. The Judge clearly considered the arguments in this case and only when having done, and having undertaken the balancing exercise, found this is a case in which all the factors relied upon by the appellant did not outweigh the public interest in the maintenance of effective immigration control.

20. The appellant has failed to establish this is a decision outside the range of those available to the Judge or a decision that is unreasonable or unsafe on the facts upon which proper weight could be placed. I find any error identified in the grounds, in relation to the finding application had been 'voided', is not material to the decision to dismiss this human rights appeal.

Decision

21. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

22. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed………………………………………………
Upper Tribunal Judge Hanson

Dated 22 February 2021