Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/06093/2020
UI-2021-001343

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28th June 2022	**On 25th August 2022**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

JARIN TASMIN ARIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: *Mr S Karim,* instructed by Shahid Rahman Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of her human rights claim.

Issues in Remaking

2. I began by agreeing with the representatives the issues that needed to be resolved in the remaking. The appeal was by reference to the appellant's right to respect for her family and private life in the UK, for the purposes of Article 8 ECHR. Whilst the appeal could only be by reference to the

appellant's human rights rather than the Immigration Rules themselves, it was appropriate that I should consider the Immigration Rules when considering those human rights, in particular Paragraph GEN.3.2 of Appendix FM, on which I say more below.

3. In considering the appellant's rights to respect for her private and family life, it is also necessary to consider sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002. In so doing, I note that the appellant's children are not "qualifying children," as they are not British citizens and both are under seven years' old (section 117D(1)), so that section 117B(6) does not apply. Nevertheless, I must consider their best interests for the purposes of Section 55 of the Borders, Citizenship and Immigration Act 2009.

4. The appellant's appeal focussed on two areas. The first was whether the appellant did have, or ought to be treated as though she had, continuing lawful residence under section 3C of the Immigration Act 1971. She argued that the second scenario potentially applied because of what is termed an "historical injustice" (see the authority of Patel (historic injustice; NIAA Part 5A) India [2020] UKUT 351 (IAC)), so that she had more than 10 years' continuous lawful residence. In summary, Mr Karim reiterated the appellant's claim, mentioned in the error of law decision, which is annexed to these reasons, that the respondent had erroneously treated the appellant as having made an application for leave to remain in her own right on 17th September 2015 on the basis of her family and private life, which the respondent had purported to refuse in her decision dated 7th August 2018. Mr Karim argued that the appellant had never made a 2015 application in her own right. Any application that had been made around that time was as her husband's dependant. As a consequence, the August 2018 decision was ineffective as it referred to an application that had never been made. Instead, the one application that the appellant had made in her own right, on 16th January 2018, remained extant (the respondent had treated the 2018 application as void, but this Tribunal confirmed that such voiding was ineffective). The appellant still had continuous lawful residence, which exceeded 10 years, for the purposes of paragraph 276B. As a consequence, TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109 was authority for the proposition that if I were to find that the appellant met the Immigration Rules, that would be dispositive of a human rights claim.

5. Even if I were not persuaded that by virtue of the historical injustice, 'section 3C leave' ought to be regarded as having continued, at the very least, it would be a weighty factor for the purposes of a proportionality analysis.

6. The second issue was whether the refusal of leave to remain would breach the appellant's Article 8 rights because such refusal would result in unjustifiably harsh consequences for her, her husband, and their children, whose Article 8 rights would be affected by a decision to refuse the application. This Tribunal had already preserved in the error of law

decision the FtT's findings that there would not be very significant obstacles to the appellant's integration in her country of origin, Bangladesh, but the issue of unjustifiably harsh consequences (paragraph GEN.3.2 of Appendix FM) remained. Once again, were the appellant to meet the requirements of GEN.3.2 of Appendix FM of the Immigration Rules, this would be dispositive of the appeal.

The hearing

7. The appellant provided a bundle, hereinafter "AB". I also considered Mr Melvin's skeleton argument. The appellant and her husband, Masudur Rahman Sharif, provided written witness statements on which they were cross-examined. I do not recite all of the evidence or the legal submissions, except where necessary to do so as I go along.

8. The witnesses' honesty and integrity were not challenged, and Mr Karim invited me to consider that their general honesty and credibility were therefore not in issue. This was particularly important as Mr Sharif has a separate, outstanding ILR application, which he made in 2016. There has been a substantial delay in deciding his application as a result of Operation Meeker, a police investigation into, and subsequent criminal convictions for, what was described as an organised fraud on an "industrial scale" to obtain improperly Tier 1 visas. Those convicted were individuals connected with Mr Sharif's former immigration representatives, Immigration4U (see the criminal case of Uddin & Ors v Regina [2021] EWCA Crim 14). I emphasise that there have not been and are currently no allegations against Mr Sharif personally at this stage, but it is necessary to refer to this because this explains the context of the respondent's delay in reaching her decision on Mr Sharif's case. Put simply, the respondent is still considering whether Mr Sharif was somehow implicated in that fraud or is merely an innocent former client. The delay in doing so has had an impact on the appellant and the couple's children.

Discussion and findings

9. Many of the facts are undisputed. The appellant, Mr Sharif and their children, whom it is unnecessary to name, (a daughter born in June 2018 and a son born in May 2021), are all Bangladeshi citizens. The children were born in the UK, a number of years after Mr Sharif's ILR application in 2016. Mr Sharif entered the UK lawfully on 18th October 2007. The appellant entered the UK lawfully on 18th June 2009 with entry clearance as a dependant to a Tier 1 (Highly Skilled) Migrant (Mr Sharif). The respondent's General Cases Information Database ('GCID') records, not all of which Mr Karim says were not before the FtT, indicate that the appellant's leave was then extended, following her application as her husband's dependent on 27th September 2012, with an expiry date of 14th February 2016.

10. The next part of the immigration history is disputed. This Tribunal had recorded previously, in the chronology of the annexed error of law

decision, at §9, that it was the appellant's case that on 17th September 2015, Mr Sharif had made an application for indefinite leave to remain and that she was included as a "PBS" (points-based system) dependent. The appellant maintained and continues to maintain that she did not make a human rights application in her own right in 2015 and only did so years later in January 2018. §9 of this Tribunal's error of law decision goes on to state:

> *"The respondent's records are that her spouse had made an application on 15th September 2015 and that the appellant was not a dependant, submitting her own application very shortly after: 'on 17th September 2015, [the appellant] submitted an in-time family and private life application'. The First-tier Tribunal noted '…the appellant … accepts that [she] made an application on 17th September 2015'. The First-tier Tribunal was not provided with a copy of the application. The First-tier Tribunal concluded, on the evidence available, that these were two separate applications."*

11. The appellant says that GCID records, which state that she made an application in her own right on 17th September 2015, are inaccurate. These records reflect what was recorded at §9 in the error of law decision. Indeed, the FtT referred to having had sight of at least part of the GCID records. At internal page [28] of the GCID records, they refer to the appellant having made an application, with an application date of 17th September 2015 and an application "type": "*Family/private life 10 yr - LTR(E)"* [leave to remain extension]" and that the "case outcome" was "*Refuse LTR: Out-Of-Country ROA*" [Right of Appeal]. The "outcome date" was 7th August 2018. Also, at internal page [71] of the GCID records, is an uploaded copy of a photograph of the appellant, dated 17th September 2015.

12. The appellant argued that the proof that this part of the GCID records are inaccurate is their inconsistency with another part of the GCID records, which the appellant had not previously provided to the FtT. I pause to observe that the FtT cannot be criticised for focussing on only part of the GCID records when the part said to be materially relevant was not provided to her. The relevant passage that the appellant now relied on was at internal page [31], which states:

> *"Minute/Case Notes:*
>
> *The applicant has submitted an FLR(FP) application as they are requesting to vary from Tier 1 dep. Case type amended to family and private life. … £993 input onto the payment screen. No refund to be made for the Tier 1 application as this has already been raised."*

13. The passage is undated. Mr Karim pointed out that the preceding entry was dated 30th November 2017 and the following entry was dated 21st May 2018, and so invited me to find, on the balance of probabilities, that this entry related to the appellant's application, which she accepts was in her own right, dated 16th January 2018. Mr Karim submitted that the note was consistent with her case (of a prior application only as Mr Sharif's Tier 1 dependent) and inconsistent with her having made a human rights application in her own right in 2015.

14. Whilst I accept the apparent logic of Mr Karim's submission, I do not accept that the appellant has shown that there is sufficiently reliable evidence of her case on the status of the applications, on the balance of probabilities. For the avoidance of doubt, I do not find that the appellant is intentionally dishonest in making this assertion. The passage which Mr Karim identifies shows a potential inconsistency in the GCID records, with the passage at internal page [31] being potentially inconsistent with internal page [28]. However, page [31] refers to "*they are requesting to vary from Tier 1 dep*." This is also consistent with the GCID record reflecting the appellant's belief as to the nature of her previous application. There is also no explanation, as I canvassed with Mr Karim, for why, when the respondent refused a 2015 application on 7th August 2018 (page [C47] AB), the appellant's legal representatives did not respond by asserting that there was no such application in her own right, either in the request for reconsideration dated 20th August 2018 (page [C43] AB onwards), to which the Respondent responded on 6th September 2018, or in follow-up correspondence dated 12th September 2018 (page [B3]). At best, the second letter referred to a confusion as to dates but did not suggest that the Respondent's August 2018 decision was invalid. While Mr Karim said that he was not instructed by the Appellant's then-solicitors, TKD Solicitors, and so could not comment on why the issue had not been taken at the time, in my view it is relevant as to the likely position of the 2015 application.

15. In summary, I am not persuaded that there is sufficiently reliable evidence that the respondent's record of a separate application, in the appellant's own right on 17th September 2015, is incorrect and I find that on the balance of probabilities, such an application was made on her behalf, even if she had not appreciated that that was the case.

16. Moreover, I return to this Tribunal's conclusion in the annexed error of law decision, at §5, that there was and could only be one live application, on the appellant's behalf, at any one time, and even though the respondent's attempt to treat the appellant's January 2018 as void was not effective, the respondent's August 2018 decision unquestionably refused the appellant further leave to remain, such that her leave ended after that decision, which was not the subject of any application for judicial review (the decision certified the appellant's human rights application, so there was no in-country statutory right of appeal).

17. In light of the appellant's continuous lawful residence ending in 2018, I do not accept that the respondent erred in treating the appellant as not having sufficient qualifying lawful residence for the purposes of the long residence provisions of the Immigration Rules. Her lawful residence lasted from her entry on 18th June 2009 until she was appeal rights exhausted shortly after the respondent's decision on 7th August 2018. She had therefore just over nine years' continuous lawful residence.

18. I also do not accept there was any "historical injustice" in the respondent's 2018 decision. That argument assumes that even if the 2018 decision had

the effect of ending the appellant's continuous lawful residence, the decision had responded to a 2015 application, which the appellant says did not exist, together with the respondent's failure to serve properly its separate decision to treat the January 2018 application as void. I have already given my reasons for which I find that the appellant had made a 2015 application in her own right in similar terms to the January 2018 application, to which the respondent's 2018 decision was responding.

19. I turn to consider the appellant's wider circumstances, including those of her husband and children, and whether the refusal of her leave to remain would result in unjustifiably harsh consequences for the appellant and her family.

20. Having lived in the UK since their respective entries to this country in 2009 and 2007, the appellant and Mr Sharif have given evidence of having moved at the end of 2021 from London to Rochdale, where they live. Their eldest child, a daughter, now aged four, has recently started at a nursery school in January 2022. Their son, born in May 2021, has some healthcare needs. The appellant and Mr Sharif were careful not to overstate his condition, which is said to be laryngomalacia, a condition which may obstruct breathing, for which the son is under the care of Great Ormond Street Hospital. The appellant and Mr Sharif do not suggest that their son is receiving regular medical treatment for his condition, but that he is seen either a quarterly or annual basis for check-ups in relation to the condition. Mr Melvin queried why the parents would continue to wish their son to be treated under the care of Great Ormond Street Hospital in the circumstances where there would be a hospital nearer to their home and in response, the couple indicated that they wished to have continuity of care. I regard that as credible and do not criticise the couple for their decision. While not gravely serious, the fact that the son is under the care of Great Ormond Street indicates that the condition is of some concern.

21. Mr Sharif works at JD Sports, full-time, as a warehouse operative. The appellant had previously worked in a Morrisons supermarket and does not suggest that she would be unable to work again, but currently does not work, instead acting as the primary caregiver for the couple's two children, one of whom is still a toddler. She described her own parents who live in Bangladesh as elderly, with her father, retired and in his 70s and her mother, a housewife. She described her parents as requiring support from her, rather than the other way round. She also described the high costs of living in Bangladesh compared to the UK and the practical impossibility of Mr Sharif providing her with meaningful financial support if she were to return to Bangladesh, particularly if she were to return with either or both of the children, thus limiting her ability to work.

22. Mr Sharif has an outstanding application for indefinite leave to remain, made on 16th January 2016, based on 10 years' continuous lawful residence. The respondent has yet to decide on that application because of ongoing enquiries in connection with Operation Meeker. It is also common ground that his is not the only case that has been delayed as a

result of the respondent's consideration, and that there are many cases. As part of the respondent's enquiries and decision making process, she has put in place a "minded to refuse" stage of the process, whereby, as the phrase suggests, if the respondent is minded to refuse an application because of an applicant's alleged complicity in the Immigration4U fraud, (and there is no suggestion that every client of Immigration4U was so complicit), the respondent will write to the individual first to identify her concerns. An applicant then has an opportunity to respond before the respondent reaches a final decision.

23. My reason for describing this process, as to which there are no precise timeframes, is that Mr Sharif has not even yet received a "minded to refuse" letter and as of this week, when Mr Melvin made enquiries of the relevant team within the respondent's organisation, there is no indication as to when any decision is likely to be reached about whether he will ever receive a letter. He is in a queue of an undescribed length, and there is no evidence on when such a decision is likely.

24. In this context, Mr Melvin referred to a judicial review decision of mine on a separate case (unreported) in relation to delay as a consequence of Operation Meeker. It is unnecessary to discuss the circumstances of the other case, other than to record that Mr Melvin accepts that the situation here is not truly analogous. The issue of delay in a public law context of judicial review, namely that a delay must be regarded as manifestly unreasonable or a person must have suffered a particular detriment as a result of the respondent's actions, which the respondent has failed to alleviate (see R (FH) v SSHD [2007] EWHC 1571 (Admin) and SSHD v Said [2018] EWCA Civ 627) is a different set of considerations from whether refusal of a human rights claim would result in unjustifiably harsh consequences. I accept Mr Karim's submission that a decision in respect of Mr Sharif could well be a long-drawn-out process, the duration of which it is at this stage impossible to determine. It may be that a decision is reached soon, that there is nothing untoward, as a consequence of which his application can then be determined on the basis of his long residence. Alternatively, there may be an extended process by which concerns are identified and then answered and possibly a right of appeal, if a decision adverse to him is reached.

25. The practical consequence of all of this is that were Mr Sharif to leave the UK during that process, he would lose his ability either to continue to pursue his ILR application or to challenge any "minded to refuse" process, by virtue of being out of the country. Through no fault of his own, there is a potentially lengthy process by which rights that he has potentially accrued but have yet to be decided upon, would otherwise be lost.

26. In reality, while I accept that Mr Sharif technically has a "choice" of whether to stay or leave, if Mr Sharif were to leave to the UK with his wife and children, the entire family would lose any status or hopes that they had of continuing their family and private life in the UK. The practical result of refusing the appellant leave to remain is that she would return to

Bangladesh, without her husband, and there is potentially no prospect, anytime soon, of her being able to re-apply and return to the UK swiftly, in circumstances where her husband's status remains uncertain. The same potentially is true of her two children, if they were to return with her, even if there were no practical difficulties for the appellant and her two children living in Bangladesh without her husband. In summary, unless the entire family forgoes any rights to remain in the UK, the consequence of refusal would be to separate two very young children from one of their parents, for an undetermined and potentially lengthy period, lasting years.

27. I am conscious that the two children do not have status in the UK and are not yet "qualifying children" for the purposes of section 117B(6) of the 2002 Act, which reflects a particular test (not applicable here) of whether it would not be reasonable to expect the children to leave the UK. Instead, the test of unjustifiably harsh consequences is a higher test. I also note the children's very young ages and that their daily focus at this stage of their lives is likely to be on their parents, rather than the wider community, although, as has already occurred, this focus will gradually change, as the children progress through school. As the appellant and her husband pragmatically accept, it is not suggested that their son's medical condition would mean that his health would be materially impacted as a result of returning with the appellant to Bangladesh. I find that if the children returned with the appellant, they would be most likely to so with the wider support of the appellant's parents, to the limited extent that they are able to help.

28. Moreover, I also bear in mind that the appellant could have been a dependent on her husband's application, as she maintains she remained, such that she and her children would still have leave. The respondent cannot be criticised for the appellant's choice to make an application in her own right. The appellant remained in the UK without leave. Her family life with Mr Sharif and their children which she has continued to develop was in the knowledge of her lack of status, and she knew that even if Mr Sharif were granted ILR, she no longer had an in-line application as his dependent. While she and her husband are financially independent and are able to speak English, which are relevant to my consideration of the unjustifiably harsh consequences and wider proportionality of the respondent's decision (see: sub-sections 117B(2) and (3) of the 2002 Act) these are neutral factors. I must place significant weight on the public interest in the maintenance of effective immigration control. The parents' private lives, in terms of their work and lengthy periods living in the UK, have been developed at a time when their immigration status has always been precarious and I must therefore attach limited (but not no) weight to their private lives, established in the UK. There are not very significant obstacles to the appellant's integration in Bangladesh. Were I focussing solely on their private lives, I would have concluded that the refusal of leave to remain would not come close to resulting in unjustifiably harsh consequences.

29. However, the broader picture changes when I consider, as a "balance-sheet" approach, the resulting consequences for the family's family life. I do not repeat the factors that I have listed above, which support the respondent's case that the consequences are not unjustifiably harsh, and that the family could return to Bangladesh as a family unit. It is clearly in the children's best interests that they remain as a family unit with their parents.

30. Weighed against those factors, in the scenario of the entire family's return, is the loss of Mr Sharif's potentially accrued right to ILR, based on an application made years before the children were born. While I accept that the appellant could have maintained her dependant application, and the children could have been added as dependants, the loss of that accrued right is at least in part as a direct consequence of the respondent's delay in reaching a decision in respect of Mr Sharif's 2016 application. I accept that the respondent cannot be criticised for delaying her decision, pending the outcome of a lengthy and complex prosecution process. However, that criminal process was concluded in 2019, so that even discounting the period between 2016 and 2019, there has been a further three-year delay in progressing Mr Sharif's application, against whom there are currently no allegations and who, as matters stand, remains entirely innocent. Had his application been resolved earlier and on the assumption that he was granted ILR, while matters are not as straightforward as if the appellant and their children had maintained applications as his dependants, there is every reason to suppose that the appellant's application would have been viewed in a very different light. She would alternatively have had the option to leave the UK and swiftly apply for re-entry. That option is not so easily open to her or their children. I conclude that the consequence of the delay in the respondent's decision on Mr Sharif's application is to reduce the public interest in the maintenance of immigration control. The consequential loss of Mr Sharif's potential right to ILR, which is the result of the entire family having to leave the UK would, I conclude, be unjustifiably harsh.

31. Either of the two other scenarios will have the effect of separating two very young children from one of their parents, which cannot be in their best interests. Were the children to remain in the UK, where they have begun to establish themselves, they would be without their primary caregiver, their mother, in circumstances where Mr Sharif would become a lone parent, on an open-ended basis. This would have consequences of his potentially needing to give up work or somehow access childcare. The chances of his sending any remittances to Bangladesh are unrealistic and the appellant would have to depend on her own resources and any shared resources of her parents, all the while separated from her two very young children. There is every possibility that any face-to-face contact between the children and their mother, given the cost of travelling with two young children, would be very limited, if at all. It may be countered that there are many lone parents in the UK who have to cope with similar situations, but I also bear in mind the damaging effect of separation on very young children, for a potentially lengthy period.

32. The alternative scenario of the children returning with the appellant to Bangladesh would be deprive them of their father, once again for an open-ended period and with limited opportunity to maintain face-face-to-face contact. It would disrupt their integration in the UK, which could well have a long-lasting impact on their subsequent integration, especially their education, particularly if it is for an extended period of time. Even assuming that the appellant would be able to live with her parents in Bangladesh in order to accommodate her two very small children or work to support them with remittances from her husband in the UK, that all ignores the open-ended nature of the separation of two very small children from their father and the damage that is likely to be caused to that parental relationship.

33. All of the above scenarios would result on consequences which are beyond mere hardship or inconvenience. The consequences would be either deprive very young children of one of their parents, or for Mr Sharif to lose a potentially accrued right to settlement because, at least in part, of the respondent's significant delay in deciding his ILR application.

34. In summary, and after assessing all of the circumstances cumulatively, the refusal of the appellant's leave to remain would, at least until the respondent reaches a final decision on Mr Sharif's application, result in unjustifiably harsh consequences, thus meeting the requirement of paragraph GEN.3.2 of Appendix FM. On the basis that the appellant meets that test, that is determinative of her human rights appeal for the purposes of Article 8 ECHR, noting TZ (Pakistan). There is nothing currently to prevent the respondent from reviewing the position once she has reached a decision on Mr Sharif's application.

Decision

35. The appellant's appeal on human rights grounds is upheld.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **8th July 2022**

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06093/2020

THE IMMIGRATION ACTS

Heard at Field House
On: 25 March 2022

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE THOMAS QC

Between

JARIN TASMIN ARIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Karim, of Counsel, instructed by Shahid Rahman Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of First-tier Tribunal Judge Abdar promulgated on 15th November 2021. Permission to appeal was granted by the First-tier Tribunal on 10th January 2022 and not limited in its scope.

Anonymity

2. No anonymity direction was made by the First-tier Tribunal. Considering the facts of this case and the circumstances of the Appellant, we could see no reason for making a direction.

The Appellant's lawful leave

3. The parties agree that the Appellant, a national of Bangladesh, born on 15th March 1991, entered the UK on 18th June 2009. She did so as the dependent spouse of Masudur Rahman Sharif who had entered the UK on 18th October 2007 as a Tier 1 (General) Migrant. Extensions of leave were granted to 29th September 2012 and to 14th February 2016. The parties also agree that she made an application to remain before the February 2016 deadline and has resided in the UK ever since and that the Appellant and her husband have two young children together, the eldest being three and the youngest less than a year. The Appellant has the requisite English language abilities and is financially independent of the state.

4. In brief summary, the competing positions on her lawful leave are as follows:

5. The Appellant contends that she made an in-time application for leave to remain in September 2015 and that application was varied on subsequent occasions, culminating in an application on 8th October 2019 under paragraph 276B of the Immigration Rules on long residence grounds. She asserts that application was in time, that she has held lawful leave throughout her now nearly 13 years in the UK, and the Respondent erred in refusing the application.

6. The Respondent's position is that the Appellant had continuous lawful leave until 7th August 2018 at which point the application then before the Respondent was refused and certified under section 94 of the Nationality, Immigration and Asylum Act 2002. This decision was not appealed and that is the point at which her lawful residency ceased. It follows that her application on 8th October 2019 was made out of time and that the Appellant did not have ten years continuous lawful residence.

7. The evidence before the First-tier Tribunal as to the exact nature of the various applications made by the Appellant was not satisfactory, and a more detailed exposition of the chronology is necessary before the grounds of appeal can be considered.

Chronology

8. On 14th February 2013, the Appellant was granted an extension of leave for a second time until 14th February 2016. That is the last point in the chronology at which there is clarity.

9. In the Appellant's chronology of events provided as part of the evidence before the First-tier Tribunal, it was asserted that on 17th September 2015, the Appellant's spouse made an application for indefinite leave to remain and "*The appellant was also included for ILR on that application as a PBS*

dependent. Crucially, this was not a private and family life application by any means". The Respondent's records are that her spouse had made an application on 15th September 2015 and that the Appellant was not a dependent, submitting her own application very shortly after: "*on 17th September 2015, [the Appellant] submitted an in-time family and private life application"*. The First-tier Tribunal noted "*...the Appellant ... accepts that [she] made an application on 17 September 2015*". The First-tier Tribunal was not provided with a copy of the application. The First-tier Tribunal concluded, on the evidence available, that these were two separate applications with the Appellant making a family and private life application.

10. On 16th January 2018, further applications were made. Her spouse varied his application to an application based on his 10 years' continuous lawful residence in the UK. The Respondent's position is "*[the Appellant] was not dependent on this application*". The Appellant's chronology asserted "*The appellant also varied her SET(O) application to a private and family life application. This was duly notified to the Respondent with a cover letter dated 15/01/18*". Again, those applications were not provided to the First-tier Tribunal, though a covering letter dated 15th January 2018 was provided signed by her spouse, but that is of little assistance. It was headed "*variation application form SET(O) to indefinite leave to remain on the basis of long residence and dependent applying for FLR(LR)"*. The letter explained "*we*" want to "*vary SET(O) application and process this SET(LR) application ... For kind information my spouse ([the Appellant]) is eligible to apply for SET(M) but due to English language certificate. She doesn't have any original identification for set for English language test*".

11. On 23rd January 2018, the Respondent invited the Appellant to enrol her biometrics, which she did on 29th January 2018.

12. More confusion follows. A document from the Respondent known as a 'GCID – Case Record Sheet' records that on 30th May 2018, the Appellant's (though not her spouse's) variation application of 16th January 2018 was voided as 'inappropriate'. The decision to void the application was not effectively served on the Appellant.

13. On 7th August 2018, the Respondent considered and refused the Appellant's application for leave to remain under paragraph 276ABE of the Immigration Rules. It was refused on the basis she would not face very significant obstacles in integrating to Bangladesh on her return and there were no unjustifiably harsh consequences for the Appellant or anyone else. The decision was certified under section 94 NIAA 2002. The Appellant asked for a reconsideration of the decision which was refused on 6th September 2018. The remedy to challenge the decision was an application for judicial review, which was not pursued.

14. On 8th October 2019, the Appellant submitted a further application for leave to remain on long residence grounds. The Respondent refused that application on 5th June 2020, and it is that refusal that was considered by the First-tier Tribunal and is further appealed by the Appellant before us.

15. The Respondent found:

(i) The Appellant did not have ten years of continuous lawful residence. The Appellant's leave had ceased with the refusal on 7th August 2018. In refusing to reconsider the decision, the Respondent noted (on 14th July 2020) "*The only outstanding application we have on record is Mr Sharif's application of 16th January 2018, and this remains under consideration at present. Unfortunately, I cannot provide a timescale as to when this will be concluded*".

(ii) There were no very significant obstacles to her integration into Bangladesh.

(iii) There were no unjustifiably harsh consequences for the Appellant, her partner, a relevant child, or another family member, if she were to return to Bangladesh.

16. The First-Tier Tribunal dismissed the appeal against that refusal, giving the following reasons:

(i) It was difficult to see there was any discernible difference between the application of 16th January 2018 and the application of 17th September 2015. Both were on private and family life (and not long residence) grounds. The decision to void the January 2018 was not effectively served on the Appellant but, regardless of whether the application was varied, the decision on 7th August 2018 to refuse the Appellant's (2015) application on private and family life grounds brought her continuous lawful leave to an end. The remedy would have been a challenge by way of judicial review which was not pursued. It could not now be argued the August 2018 refusal was in error and that the January 2018 application had somehow remained outstanding and been varied by the 8th October 2019 application to one of long residence. Insofar as the 8th October 2019 application was concerned "*the application was out-of-time and with the Appellant's continuous leave ending on 7 August 2018, the Appellant does not meet the requirements of paragraph 276B of the Rules for ILR on long residence grounds*".

(ii) There may be some difficulties, particularly if the Appellant returns with two young children, but she has close family in Bangladesh and could be supported from the UK by her spouse. Risk of harm could be negated with support from her family. There were no very significant obstacles preventing her integration.

(iii) Article 8(1) was engaged by her family life in the UK but having carried out a balancing exercise, the Appellant's rights did not outweigh the public interest. "*The Appellant's best interests will be best served and protected by being with the Appellant and Mr Sharif; no evidence has been adduced before me to indicate that Mr Sharif is unable to join the Appellant and the children in*

Bangladesh". The 'unjustifiably harsh consequences' test was not addressed.

Grounds of Appeal to the Upper Tribunal

17. The Appellant's first two grounds of appeal amount to a criticism of what is said to be the First-tier Tribunal's error in its approach to the 'private and family life' application of January 2018 and the Respondent's procedural and substantive errors in voiding or purporting to void that application. In summary, the Appellant's position is that given there was no basis to void the January 2018 application and in any event the decision to void was not effectively served, the January 2018 application remained extant and survived the refusal of the September 2015 'private and family' life application in August 2018. It follows the Applicant's lawful leave continued and the Applicant did have ten years continuous leave when making her October 2019 application and the First-tier Tribunal should have allowed the appeal on the grounds the long residence requirement was met.

18. The third and fourth grounds criticise the First-tier Tribunal's approach to whether there would be very significant obstacles to the Appellant's reintegration in Bangladesh (Rule 276ADE(vi)) and/or whether her return would have unjustifiably harsh consequences. Mr Karim argued that the First-tier Tribunal erred in assuming that the Appellant's spouse could return to Bangladesh with her. The First-tier Tribunal failed to consider the important evidence that her spouse has an outstanding application for indefinite leave to remain which, if granted, would mean he would have a right of residence in the UK and the two children would have a right to British citizenship. To return to Bangladesh with the Appellant, he would have to abandon that application. The First-tier Tribunal's proportionality assessment was therefore flawed and inadequate as it failed to weigh into balance the consequences of requiring her spouse to abandon an application that has been extant in various forms since 2015 and the Respondent is yet to determine, and the consequences of the Appellant returning to Bangladesh alone, or with her children, either decision requiring the separation of one of the parents from the children. Mr Karim argued the First-tier Tribunal had failed to consider the 'historical injustice' arising from the Respondent's handling of the applications.

19. The fifth ground, that a delay in promulgating the determination, led to a decision that was not safe or lawful, was not pursued in oral argument.

The Respondent's position

20. The Respondent relies on paragraph 34BB of the Immigration Rules insofar as it provides:

    (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) ...

21. The Respondent submits the First-tier Tribunal was entitled to conclude that -variation or no variation - there could be no outstanding applications after the refusal of August 2018 and that refusal stood given it had not been challenged.

22. The Respondent submits that the First-tier Tribunal was entitled to reach the conclusions it did on very significant obstacles / unjustifiably harsh consequences, and that an attempt to rely on historical injustice at this stage of the assessment was a further impermissible attempt to resurrect a challenge to the August 2018 refusal.

Discussion and reasons

Long Residence (Grounds 1 and 2)

23. The Appellant's substantive complaint under these grounds is that the First-tier Tribunal erred in concluding that she did not have 10 years continuous lawful residence as required by Rule 276B because leave came to an end with the Respondent's decision of August 2018.

24. Mr Karim's principal argument amounted was that the Appellant's continuous leave survived the Respondent's August 2018 decision. If that argument has validity, it follows that leave continued until she made the application (to be treated as a variation) on long residence grounds in October 2019 and she did meet the requirement under the Rules. Given it is accepted Article 8 ECHR is engaged, that meeting the requirements in the Rules positively determines the question of proportionality in her favour: *TZ (Pakistan) and PG (India) v. Secretary of State for the Home Department* [2018] EWCA Civ 1109.

25. He argued that given the First-tier Tribunal accepted the decision to void the January 2018 application had not been effectively served, the January 2018 remained extant at the time of the October 2019 application. Mr Karim was constrained to accept that paragraph 34BB of the Immigration Rules meant there could only ever be one application at a time. It follows that whatever application was extant in August 2018, it was refused by the Respondent. As the First-tier Tribunal noted, it is difficult to see how the private and family life application made by the Appellant in September 2015 - that was considered and refused by the Respondent - could have been materially different from the private and family life application of January 2018. Certainly, neither were on the grounds of long residence. But that is not determinative. What is determinative on this first argument is that leave to remain was refused in August 2018 and no other applications remains extant. If the Appellant had wanted to argue that decision was in error, including on the grounds that any evidence or arguments advanced in the January 2018 application had not been

considered, then the remedy was to challenge the Respondent's decision. That did not happen, and her leave came to an end.

26. The First-tier Tribunal did not err in rejecting the proposition that the Appellant had an additional, undecided application which preserved her continuous lawful residence.

27. In what amounted to a second, alternative argument, Mr Karim argued that the First-tier Tribunal was entitled to reach its own conclusion on the Appellant's continuous leave, despite the August 2018 refusal. He relied on *Basnet (validity of application – respondent) Nepal* [2012] UKUT 113 (IAC), *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009, and *Patel (historic injustice; NIAA Part 5A) India* [2020] UKUT 351 (IAC). It was no answer, he argued, that the Appellant should have pursued remedies available to her to challenge the August 2018 decision, because the appeal before the First-Tier Tribunal required consideration of broader human rights issues. He argued the First-tier Tribunal should have treated the August 2018 decision as a 'historical injustice' given the background of the improper voiding of the January 2018 variation and the failure to serve that decision to void. The effect of Mr Karim's argument was that the First-tier Tribunal should have treated the Appellant as if she had ten years' continuous leave and that finding should have been given very significant weight when determining the issue of proportionality.

28. *Basnet* and *Ahsan* do not assist the Appellant where the First-tier Tribunal recognised that the voiding decision had not been effectively served. It was agreed that continuous lawful residence continued until August 2018, so it was not as if the ineffective voiding decision was treated as having interrupted lawful residence. The 'historical injustice' for the purposes of this argument could relate only to a complaint about the August 2018 decision. That decision considered the Appellant's application on private and family life ground and, as the First-tier Tribunal noted, both the 2015 and 2018 applications were on family and private life grounds. We conclude that, on the evidence before it, the First-tier Tribunal did not materially err in law in finding at paragraphs 38 -39 that the August 2018 decision did not amount to a historical injustice and declining to treat the Appellant as if her leave continued beyond the August 2018 refusal.

29. There was no error of law in rejecting the appeal on long residence grounds.

Grounds 3 and 4: 'Very significant obstacles' / 'unjustifiably harsh'

30. There were overlaps in the way the Appellant pursued her argument on the remaining arguments under Article 8 ECHR, but we have reached separate conclusions.

31. The First-tier Tribunal's assessment as to whether there would be significant obstacles to the Appellant's re-integration into Bangladesh does not amount to an error of law. The First-tier Tribunal identified the correct test and provided reasons for the conclusions it reached that were not inconsistent with the approach identified in *Parveen v. Secretary of State*

for the Home Department [2018] EWCA Civ 932. There was no error of law in the approach to Rule 276ADE(vi).

32. Mr Karim was on stronger grounds in his criticism, as it developed in oral argument, of the First-tier Tribunal's approach to the 'unjustifiably harsh consequences' of removal. Appendix FM (GEN 3.2) provides:

> "…the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application."

33. The First-tier Tribunal did not explicitly address or make any findings on the 'unjustifiably harsh consequences' test. The argument was before the First-tier Tribunal, as Mr Karim's skeleton argument contained an assertion that "*removal would breach their Article 8 rights and would be unjustifiably harsh and contrary to s.6 HRA 1998*".

34. To the extent that reference was made to factual matters that were relevant to a consideration of the test, the First-tier Tribunal found:

> The Appellant's children's best interests will be best served and protected by being with the Appellant and [her spouse]; no evidence has been adduced before me to indicate that [her spouse] is unable to join the Appellant and the children in Bangladesh.

35. That finding is incorrect. The evidence before the First-tier Tribunal was that her spouse's application for indefinite leave to remain was unresolved and there was no indication as to when it would be resolved. For the family to remain together, her spouse would have to abandon an application he was entitled to make and an application that would have profound consequences for the immigration status of both children. That application remained unresolved due to the inaction of the Respondent since 2015.

36. Mr Karim developed in his oral argument a reliance on 'historical injustice' that had a different aspect: Cases that may be described as involving 'historical injustice' are where the individual has suffered as a result of the wrongful operation (or non-operation) by the Secretary of State of her immigration functions: *Patel (historic injustice*. Mr Karim emphasised that the Respondent has failed to decide on the spouse's application for what is now approaching seven years. There was no evidence before the First-tier Tribunal as to the reasons for that non-operation of the Respondent's immigration functions. The requirement for the family to be separated or for the claim to be abandoned arises from that non-operation of the Respondent's functions, and this is relevant both to the factual considerations and to the weight to be afforded to effective immigration control within the proportionally assessment.

37. The First-tier Tribunal erred in law in failing to consider the question of whether there would be unjustifiably harsh consequences for the Appellant, her spouse or her children from the decision to refuse her application for leave to remain. That error alone is material.

38. Insofar as relevant factual matters were considered within the First-tier Tribunal's Article 8 ECHR proportionality assessment, the First-tier Tribunal further erred in making the proportionality assessment on the flawed factual assumption there were no obstacles to the family together returning together to Bangladesh. This failure to consider the evidence overlaps with a further failure to take into account a relevant consideration, namely the impact of 'historical injustice' to the extent it relates to the Respondent's excessive delay in resolving her spouse's application.

Ground 5: Delay in promulgation of the determination

39. There is no evidence of a nexus between the delay (very shortly over three months) between the hearing and the writing and promulgation of the determination, and the errors of law we have identified above. It is, in any event, unnecessary for us to make any finding on this ground of appeal.

Disposal

40. With reference to paragraph 7.2 of the Senior President's Practice Statement, given the limited scope of the issues, it is appropriate that the Upper Tribunal remakes the First-tier Tribunal's decision, which has been set aside.

Directions

41. The following directions shall apply to the future conduct of this appeal:

(i) The Resumed Hearing will be listed before the Upper Tribunal sitting at Field House on the first open date after 27th June 2022, time estimate 3 hours, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.

(ii) The Appellant shall no later than 4pm on 6th June 2022 file with the Upper Tribunal and serve upon the Respondent's representative a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which she intends to rely. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only.

(iii) The Respondent shall have leave, if so advised, to file any further documentation she intends to rely upon and in response to the appellant's evidence; provided the same is filed no later than 4pm on 20th June 2022.

Decision

The decision of the First-tier Tribunal contains material errors of law and we set it aside. We preserve the findings made about the chronology of the various applications made by the Appellant insofar as they are contained within paragraphs 18-40 of the First-Tier Tribunal's decision.

No anonymity direction is made.

Signed: Richard Thomas **Date: 4 May 2022**