



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal number: HU/15468/2019 (P)**

**THE IMMIGRATION ACTS**

**Heard Remotely at Manchester CJC**

**Decision and Reasons Promulgated**

**On 22 September 2020**

**On 28 September 2020**

**Before**

**UPPER TRIBUNAL JUDGE PICKUP**

**Between**

**MIR FAZLE BARI**

**(ANONYMITY ORDER NOT MADE)**

**Appellant**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

For the appellant: Mr S Karim of counsel, instructed by Hamlet Solicitors LLP

For the Respondent: Mr A McVeety

**DECISION AND REASONS (P)**

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion of the hearing I indicated that I had found an error of law

in the decision and briefly outlined my reasons, reserving the full reasons to a written decision, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a citizen of Bangladesh with date of birth given as 5.2.85, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 18.12.19, dismissing on his appeal against the decision of the Secretary of State, dated 3.9.19, to refuse his application for Indefinite Leave to Remain in the UK on the basis of long residence.
2. The grounds of application for permission to appeal complain that the judge proceeded to hear the appeal despite being informed that counsel representing him had been taken unwell on the day of the hearing.
3. Application for permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal on 6.4.20. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Kamara granted permission on 6.7.20, considering it arguably unfair for the judge to justify the adjournment refusal owing to an absence of medical evidence, casting suspicion on the honesty of counsel, and which was, in any event, unrealistic given the timescale and nature of the illness, namely influenza. It was also noted that a statement of truth from counsel in question has been provided with the grounds. Judge Kamara also considered it arguably unlikely that the instructing solicitors would have been able to step into the breach, contrary to the conclusions of the judge, given that counsel had been instructed in the first place.
4. By letter dated 14.9.20, Ms Pettersen, acting for the respondent, informed the Tribunal that the application for permission to appeal was not opposed and inviting the Tribunal to remit the case to the First-tier Tribunal for a fresh hearing.
5. I am satisfied that the making of the decision of the First-tier Tribunal involved an error of law in refusing the adjournment application. I am satisfied that the application for an adjournment was made for good reason, even though there was no medical evidence. Given that the appellant's representative, instructed counsel had on the morning of the hearing succumbed to influenza, described as "strong flu" in the message given to the appellant by counsel's clerk from chambers, it is most unlikely that any medical evidence would have been obtainable or forthcoming. That counsel was indisposed as claimed has been confirmed by his recent statement.
6. It was not reasonable to expect the appellant's instructed solicitor, who was not in any event present at the hearing, to take over conduct of the appeal at the last minute. Whilst, given the hearing did not take place until 2:30pm, it might have been possible to find and instruct alternative counsel, it is not clear whether this option was practically available to the appellant in the short time available. The appellant was entitled to have legal representation in the appeal

and was not obliged to have someone come from the office to take the reins who may or may not have the ability to take over the case, even if that was person was available. I am satisfied that in all the circumstances the refusal of the adjournment request was unreasonable and, ultimately, procedurally unfair. The respondent frankly accepts as much.

7. In the circumstances and for the reasons set out above, as confirmed by Mr McVeety at the hearing and not opposed by the appellant's representative, I find a material error of law in the decision of the First-tier Tribunal such that it must be set aside and remade afresh.
8. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The error of the First-tier Tribunal Judge vitiates all findings of fact and the conclusions from those facts. The effect of the error has been to deprive the appellant of a fair hearing.
9. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2.

## Decision

The appeal of the appellant to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside.

The decision in the appeal is remitted to the First-tier Tribunal setting at Taylor House, to be made de novo with no findings preserved.

I make no order for costs.

I make no anonymity direction.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 22 September 2020