



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/35957/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham

Determination

On 12 September 2014

Promulgated

On 19 September 2014

Before

The President, The Hon. Mr Justice McCloskey

Between

GAYAN KAVINDA BANDARA HERATH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellants: Ms U Bhatt (of Counsel), instructed by VMD Solicitors
Respondent: Mr Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The framework of this error of law appeal can be gleaned from my ruling and directions dated 13th July 2014, appended hereto. The substantive hearing of this appeal has now been completed.
2. At the conclusion of the hearing, judgment was given *ex tempore*, allowing the appeal for the following reasons, in summary.

3. First, I consider that the decision making process of the FtT was unfair. This manifested itself in several respects. There was a failure to consider the materials transmitted by fax to the Tribunal late in the afternoon of the day preceding the hearing. There was a kindred failure to appreciate that the Appellant had a genuine, objectively verifiable reason for not attending the hearing on medical grounds. In consequence, the FtT did not consider its adjournment powers. Related to this, the Judge clearly considered that the Appellant's non-attendance was adverse to his case: this is explicitly stated in [10] of the determination. Furthermore, the Judge failed to recognise that the Appellant's solicitors had been active on his behalf throughout the preceding period, embracing the eve of the hearing, prompting another, factually incorrect, adverse assessment of the Appellant. Finally, there was a clear failure to engage with the case made on behalf of the Appellant in the materials lodged on his behalf, including the solicitors' skeleton argument. For this combination of reasons, the fairness of the hearing at first instance cannot be defended.
4. Second, there is a misdirection in law in the determination. In the impugned letter of decision, reference is made to paragraph 245AA of the Immigration Rules. Further, this specific provision of the Rules was addressed in the solicitor's skeleton argument. However, the FtT, incorrectly, adverted to what is described as "*the evidential flexibility policy*". There was a failure to recognise that the legal regime was contained in paragraph 245AA. This, in turn, precipitated a failure on the part of the FtT to review whether the Respondent's approach to paragraph 245AA was in accordance with the law. The question for this Tribunal is whether, if this issue had been correctly addressed, it might have been resolved in the Appellant's favour. The threshold is not an elevated one. I answer this question in the affirmative, having regard to the potential sustainability of the range of arguments formulated both in writing and in oral submissions by Ms Bhatt on behalf of the Appellant. Whether any of them is ultimately sustainable is not a matter for this Tribunal in an error of law appeal. Thus I consider this error to be material.

Decision and Directions

5. For the reasons elaborated above, I set aside the determination of the FtT.
6. The following directions will apply:
 - (a) I remit the case to a differently constituted FtT for fresh hearing and determination.
 - (b) The Appellant's solicitors will assemble a composite bundle containing all of the disparate materials, in coherent and logical sequence, with index and pagination. This will be lodged with the FtT and served on the Respondent within 21 days of the date hereof.

Finally, I note what was said on behalf of the Appellant about an appropriate and convenient location for the FtT rehearing and I endorse this.

Seamus McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE

UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 12 September 2014