

2. The hearing before me on 13th October 2020 took the form of a remote hearing using Skype for Business. Neither party objected. At the outset, I was informed by Mr Maqsood that the appellant is aware of the hearing, and that the appellant would not be joining the hearing. Mr Maqsood confirmed the appellant is happy for the hearing to proceed in his absence. I sat at the Birmingham Civil Justice Centre and the hearing room and building were open to the public. The hearing was publicly listed, and I was addressed by the representatives in exactly the same way as I would have been, if the parties had attended the hearing together. I was satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.
3. The appellant is a national of Bangladesh. His immigration history is set out in the respondent's decision and summarised at paragraph [2] of the decision of Judge Colvin. At paragraph [3] of her decision, Judge Colvin noted that the appeal was due to be heard on 11th February 2020, but, by email dated 10th February 2020 the appellant's representatives had requested that the appeal be determined on the papers. They also requested further time to submit documents in support of the appeal. She noted that on 11th February 2020, Judge Paul granted an adjournment and a further two weeks for any documents relied upon, to be submitted. She noted that no documents had been submitted by the appellant or his legal representatives by 2nd March 2020 when the appeal was allocated for

determination on the papers. At paragraph [4] of her decision, Judge Colvin said:

“In the circumstances and in the absence of bundles from both the appellant and the respondent I am determining this appeal on the limited documents of a copy of the appeal notice together with a copy of the respondent’s refusal letter dated 29 November 2019 ...”

4. Judge Colvin went on to consider the appeal based upon the limited information before her, and dismissed the appeal for reasons set out in her decision.
5. In the grounds of appeal filed, the appellant claims that contrary to what is said by Judge Colvin, the parties had served upon each other, and filed with the Tribunal, the documents that they each relied upon. The respondent’s bundle was received by the appellant’s representatives on 7th February 2020. The appellant’s representatives had by email on 6th February 2020 sent to the respondent and the Tribunal, a bundle comprising of 56 pages in two PDF attachments. For reasons that are not apparent, it appears that the parties bundles did not reach the Tribunal file, and were not before Judge Colvin when she went on to determine the appeal on the papers.
6. Permission to appeal was granted by FtT Judge O’Brien on 14th July 2020. The matter comes before me to consider whether the decision of the FtT involved the making of a material error of law.
7. I have carefully considered the Tribunal file and note that neither the respondent’s bundle nor the appellant’s bundle appears, even now, to have been reached the Tribunal file. The appellant’s representatives had emailed a copy of the bundle relied upon by the appellant to the Tribunal during the morning of the hearing before me. Mrs Aboni emailed a copy of the respondent’s bundle to me after the hearing and a copy has been placed in the Tribunal file.
8. At the hearing of the appeal before me, Mrs Aboni, rightly in my judgment, concedes that Judge Colvin erroneously proceeds upon the

basis that neither party had submitted their bundles and she accepts that in the circumstances, the decision of the FtT cannot stand. She accepts that the decision of Judge Colvin fails to have regard to the evidence relied upon by the appellant and she accepts that the decision of the FtT contains a material error of law and should be set aside. There can be no criticism of Judge Colvin because, as I have said, the bundles filed by the parties do not appear to have reached the Tribunal file.

9. I remind myself that in **MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)** the Upper Tribunal held that where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the First-Tier Tribunal (the “FtT”) to be set aside. The authorities referred to by the Upper Tribunal in **MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)** make it clear that upon an appeal such as this, the criterion to be applied is fairness and not reasonableness.
10. As to disposal, it is common ground between the parties that the appeal should be remitted to the FtT for determination afresh. As the Upper Tribunal did in **MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)**, I consider that where a first instance decision is set aside on the basis of an error of law involving the deprivation of the appellant’s right to a fair hearing, the appropriate course will be to remit the matter to a newly constituted FtT for a fresh hearing.
11. The appeal is allowed.

Notice of Decision

12. The appeal is allowed, and the decision of FtT Judge Colvin promulgated on 17th April 2020 is set aside.
13. The appeal is remitted to the First-tier Tribunal for a fresh hearing of the appeal with no findings preserved.

14. The appellant's representatives shall confirm within seven days whether the appellant still wishes for the appeal to be determined on the papers. In the event that the appellant's representatives request an oral hearing, the appeal will be listed for hearing before the First-tier Tribunal on the first available date. The parties will be notified of the date of any such hearing in due course.
15. No anonymity direction was made by the FtT. There has been no application for an anonymity direction before me.

Signed **V. Mandalia**

Date: 14th October 2020

Upper Tribunal Judge Mandalia