Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14175/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 October 2013	**On 22 October 2013**
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Before

MR JUSTICE MCCLOSKEY
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE COKER

Between

MRS MATY KANE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representation
For the Respondent: Mr G Saunders, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant Mrs Kane is a Sinhalese national now aged 35 years. Mrs Kane historically had permission to remain in the United Kingdom and was lawfully present here at all material times. That permission was based on her status as the spouse of a person settled here, namely her husband,

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who is a British citizen. The period in question was 10 April 2011 until 7 March 2013. At this stage representations and an application were made on Mrs Kane's behalf by her former solicitors. This constituted an application for permission to remain as the spouse of a settled person. This generated a decision on the part of the Secretary of State which refused that application and notified Mrs Kane of her right of appeal. That right of appeal was duly exercised and the hearing before the First-tier Tribunal proceeded in circumstances where neither Mrs Kane nor any representative on her behalf was in attendance. This gave rise to an application for permission to appeal to this Tribunal which was duly granted, hence the hearing which has taken place today.

2. There are two grounds of appeal to this Tribunal. The first concerns the decision made by the First-tier Tribunal to decline to adjourn the hearing which was scheduled for 23 July 2013. On 19 July an application was made to adjourn the hearing and was refused.

3. The first ground of appeal complains that this was perverse and/or there was a failure to apply the standard of proof. The essence of this ground is that the First-tier Tribunal Judge should have been satisfied by the information available, and in particular the medical information, that Mrs Kane could not attend the hearing, would not be represented and had a justifiable reason for all of this.

4. The first ground of appeal contains a material misstatement. It says: "*she passed her exam and this could have solved the matter*". That is incorrect. The First-tier Judge addressed the application for an adjournment, considered it on the basis of the information available and noted in particular that there had been wholesale default in the matter of processing and presenting the appeal. The First-tier Tribunal was obliged to make that decision on the basis of the information available to it. This included medical information which was rather sparse. The governing legal principle is that the appellant had a right to a fair hearing. The complaints that the First-tier Judge perversely failed to accede to the application for an adjournment must be viewed in the round. We can find no fault in the approach adopted and decision made by the First-tier Judge. The question is whether that decision is vitiated by a material error of law. The error of law advanced to this Tribunal is that of perversity and/or a failure to apply a standard of proof. The second limb of that is unintelligible and it does not begin to establish an error of law. The first erects a hurdle or threshold of elevated dimensions which has plainly not been overcome.

5. There is however one further ingredient of fundamental importance in the equation and that is the following. Even if the First-tier Tribunal Judge had acceded to the request for an adjournment this would have availed the appellant nothing because the crucial proof, namely the ESOL certificate was not available on that date which drives this Tribunal to conclude

inexorably that the outcome could not conceivably have been any different. Accordingly there is no substance in the first ground of appeal.

6. The second ground of appeal recites that there was inadequate reasoning and this is followed by the word "credibility". This places the focus not on the adjournment decision but on the text of the decision of the First-tier Tribunal Judge. Given the manifestly narrow issue which the judge had to consider we find no inadequacy of reasoning. There was no credibility issue to be addressed and in short no error of law was committed.

7. Now this brings us to a further issue and that is the question of Section 47 of the 2006 Act. This issue was identified by the Tribunal as one that would have to be addressed and it has given rise to a properly made concession by Mr Saunders on the part of the Secretary of State. He has conveyed to this Tribunal that on behalf of the Secretary of State the removal decision is withdrawn and unsurprisingly answered affirmatively when asked was that because the legality of that decision is unsustainable. That brings us to how we deal with that at this level on appeal. We shall treat the grounds of appeal as amended accordingly and - notional amendment is challenging one clear failure in the decision of the First-tier Tribunal, namely a failure to address and determine the Section 47 issue, namely the Secretary of State's failure to comply with the requirements of Section 47. This gives rise to a conclusion on the part of this Tribunal whereby we set aside the decision of the First-tier Tribunal because it is vitiated by error of law on this ground and we allow the appeal to this limited extent.

8. We take the opportunity to add the following.

9. We have been addressed this morning by Mrs Kane's husband and also by Mrs Kane through her interpreter. Mr & Mrs Kane have addressed this Tribunal on a number of factual issues. Those issues may have a bearing on further and future decision making processes involving the Secretary of State. We have found that all that was said to us this morning by Mrs Kane and her husband to be manifestly credible and persuasive. We also record that they found themselves in circumstances before and at the time of the First-tier Tribunal appeal hearing which were rather aggravated and complicated by two factors.

10. The first was the indelible fact that Mrs Kane did indeed have a medical ailment which had plainly been the matter of medical attention in a very short period of days before the Tribunal hearing and the second is that there were obvious difficulties involving legal representation and this plainly operate to the detriment of Mrs Kane in all matters appertaining to the hearing at first instance including the request for the adjournment, the question of legal representation at the hearing that there was none, and the issue which a legal representative would undoubtedly have raised on the hearing day, namely the imminence of the ESOL certificate and whether the Tribunal judge would have been prepared to grant a very short adjournment given that factor. We make that observation bearing in

mind the provisions of Section 85, sub-Section 4 of the Nationality, Immigration and Asylum Act 2002. The effect of our decision today is that the appeal under the Immigration Rules in unsuccessful thus we have concluded that the decision purportedly made by the Secretary of State to remove the appellant from the United Kingdom was an unlawful decision and that will now fall to be made again. Mrs Kane and her husband will find themselves making further representations and fresh applications to the Secretary of State and they should devote a suitable time and energy and investment in that exercise because there is potentially much to be said on behalf of Mrs Kane in a further and future decision making process. In making that observation we record that there was at no time any issue before either Tribunal concerning Article 8 of the Human Rights Convention.

Signed: Mr Justice McCloskey,
Sitting as a Judge of the Upper Tribunal

Dated: