Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/21349/2018 (P)**

THE IMMIGRATION ACTS

Decided under rule 34
On 5 June 2020

Decision & Reasons Promulgated
On 19th June 2020

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

NAHIDE KUSAT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S. Karim, Counsel
For the Respondent: Ms S. Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

1. In Directions sent by email on 28 April 2020 I informed the parties that it was my preliminary view that the appeal could and should be determined without a hearing. The parties were directed to make written submissions and, if they considered a hearing necessary, to submit reasons. I have received submissions from both parties. Neither party expressed any objection to the appeal being determined without a hearing. I have therefore decided this appeal without an oral hearing.

2. The appellant is a citizen of Turkey who was born on 1 March 1939. On 18 August 2017 she applied for leave to remain in the UK on human rights grounds. On 5 October 2018 the application was refused. The appellant appealed to the First-tier Tribunal where her appeal was heard on 30 August 2019 by Judge of the First-tier Tribunal Abebrese ("the judge"). In a decision promulgated on 2 October 2019 the appeal was dismissed. The appellant is now appealing against that decision.

3. For the reasons set out below, I have decided to set aside the decision of the First-tier Tribunal and remit the appeal to the First-tier Tribunal to be heard afresh on the basis that refusing to accede to the appellant's adjournment request was erroneous in law. It has therefore not been necessary to determine the grounds of appeal that do not relate to the adjournment issue.

4. Neither the appellant nor a representative on her behalf attended the hearing on 30 August 2019.

5. At paragraph 6 of the decision the judge stated that the appellant's solicitors sent an email to the Tribunal on 29 August 2019 requesting an adjournment on the basis that they had not received a notice of the hearing and had only become aware of the hearing scheduled for 30 August 2019 on that day (29 August 2019) because they had been contacted by the respondent.

6. The judge refused to adjourn the hearing. Several reasons are given in paragraphs 7 and 9 of the decision. These are:

   a. The matter was previously adjourned.

   b. Directions were provided to both parties in a notice of hearing dated 2 November 2019.

   c. The appellants had not complied with the directions and so were not ready for the hearing on 30 August 2019.

   d. The respondent opposed the adjournment application.

   e. The correspondence section at the hearing centre were able to confirm that both parties were sent the relevant notice of the hearing.

7. At paragraph 9 the judge stated:

   > "I concluded therefore that the claim that the appellant [sic] solicitors did not receive a copy of the hearing [notice] was not borne out by the facts."

8. The grounds of appeal argue that it was unfair to not adjourn the hearing as the appellant, and her representatives, had been unable to prepare for the hearing as they were not aware of it until the day before. The grounds note that the fact that a notice was sent does not mean it was received.

9. The respondent argues that the decision to not adjourn was open to the judge because the notice had been sent, it had received by the respondent, and the appellant's representatives were clearly aware of the hearing date.

10. At paragraph 9 of the decision the judge stated that it "was not borne out by the facts" that the appellant's solicitors did not receive notice of the hearing scheduled for 30 August 2019. This, however, is not correct. Whilst there was evidence before the judge that notice of the hearing was sent to the appellant's solicitors, there was no evidence that the notice was received by the solicitors. On the contrary, there was unambiguous evidence, in the form of an email from the appellant's solicitors, that the notice was not received by them. The email from the appellant's solicitors, sent on 29 August 2019, states:

> "… We were contacted today 10 minutes ago by the Presenting Officer from the Home Office and express surprise over the date. We have never been given a hearing date, never received any email, letter or fax. Had we known about the hearing day we would have instructed counsel…. We believe that in the circumstances it would not be in the interest of justice to proceed with the said hearing."

11. If the notice was, in fact, received by the appellant's solicitors then it follows that they were being dishonest in their email of 29 August 2019. This would be extremely serious professional misconduct. However, there was no evidence before the judge that could support a conclusion that the appellant's solicitors were not being truthful. In the light of the solicitor's email of 29 August 2019, and in the absence of any other evidence pertaining to the question of whether the notice was received by (as opposed to sent to) the appellant's solicitors, there was no reasonable basis to reach any conclusion other than that the appellant's solicitors only became aware of the hearing a day before it was scheduled to take place.

12. The issue to be determined is whether failure to accede to the adjournment request was unfair, in the sense that the appellant was deprived of a right to a fair hearing. As explained by the Upper Tribunal in Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC):

> "If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284."

13. With only one day's notice of the hearing, the appellant's solicitors would not have had sufficient time to adequately prepare the case or instruct Counsel. Nor would there have been enough time for the appellant, who is elderly and in poor health, to prepare herself or give instructions. In these circumstances, fairness required the granting of an adjournment as the consequence of refusing the adjournment request was to deprive the appellant of a right to a fair hearing.

14. As the appellant has not had an opportunity to put her case to the First-tier Tribunal, I have decided, having regard to paragraph 7.2 of the Senior President's Practice Statement, that the appeal will be remitted to the First-tier Tribunal to be considered afresh.

Decision

15. The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside. The appeal is remitted to the First-tier Tribunal to be heard afresh by a different judge.

Signed

Daniel Sheridan
Upper Tribunal Judge Sheridan
Dated: 5 June 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent’ is that appearing on the covering letter or covering email