



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

Appeal Number: HU/07561/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 23 September 2019**

**Decision & Reasons Promulgated  
On 20 February 2020**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BAGRAL**

**Between**

**DENIZ KAYIKEI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: None

For the Respondent: Mr P Singh, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant appeals against the decision of First-tier Tribunal Judge Ruth promulgated on 8 May 2019, in which the Appellant's appeal against the decision to refuse her human rights claim dated 11 May 2015 was dismissed.
2. The Appellant is a national of Turkey, born on 15 September 1965, who arrived in the United Kingdom on 4 May 2003, with entry clearance conferring leave to enter as a student until 1 January 2004. The Appellant

had continuous leave in that category until 31 January 2005. Following a further application in a different category and subsequently refused, the Appellant married a British citizen, Mr Ziya Balkan (hereafter “the Sponsor”), on 8 July 2011. This relationship and the Appellant’s diagnosis of paranoid schizophrenia primarily formed the basis of her application which was refused and was the subject of the appeal before Judge Ruth.

3. Prior to the appeal before Judge Ruth, a previous appeal hearing was adjourned by Judge Swaniker on 7 November 2018 because the Appellant had been hospitalised. The hearing was relisted for 8 April 2019. A further written request was made by the Sponsor for an adjournment of the hearing on the basis that the Appellant remained unwell and was unable to attend. It is not clear whether that written request was actioned by the First-tier Tribunal, and on the date of hearing neither the Appellant nor the Sponsor attended.
4. Before Judge Ruth the Respondent opposed the adjournment and relied on a file note taken by his representative at the hearing on 7 November 2018 before Judge Swaniker. Judge Ruth observed the file note recorded that Judge Swaniker had advised the Sponsor that there would be no further adjournments, and that he should be ready to proceed with the appeal on the next occasion. The contents of this file note caused Judge Ruth to make telephone enquiries through his clerk of the Sponsor’s whereabouts. That enquiry was met with a response from the Sponsor that he was on his way to work and could not attend and that the Appellant was ill.
5. In reliance on the advice given to the Sponsor at the previous hearing by Judge Swaniker and the delay in resolving the appeal, Judge Ruth proceeded to hear and then dismiss the appeal on all grounds.

### **The appeal**

6. The Appellant sought permission to appeal on two grounds, first that the First-tier Tribunal failed to adjourn the hearing when it was in the interests of justice to do so, involving a failure to apply the guidance and failing to have regard to material considerations. Secondly, that the judge erred in his proportionality assessment under Article 8 of the European Convention on Human Rights.
7. Permission to appeal was granted by Upper Tribunal Judge Martin on 24 July 2019 on the basis that it was arguable the judge erred in refusing to adjourn the appeal in the absence of a direction by Judge Swaniker that the hearing should proceed.
8. At the hearing before me, the Appellant was unrepresented and did not appear, but the Sponsor did appear. I explained to the Sponsor the purpose of the hearing and he provided correspondence sent to the First-tier Tribunal on 10 and 11 April 2019 relating to the Appellant’s mental health. Following a discussion of the events set out above, which were undisputed, Mr Singh accepted that Judge Ruth erred if Judge Swaniker had not made a direction and invited the Tribunal to confirm the same. Upon checking the Tribunal’s file, I could see no evidence of a direction

being made to this effect by Judge Swaniker and in view of this, Mr Singh accepted that Judge Ruth erred in refusing to adjourn the appeal and conceded the appeal on that basis.

9. This was explained to the Sponsor together with my decision that the First-tier Tribunal erred in law and that the appropriate course in the circumstances was to remit the appeal to the First-tier Tribunal for a rehearing.

### **Findings and reasons**

10. Judge Ruth's reasons for refusing the application for an adjournment were essentially for the reasons indicated earlier.

11. Although Judge Ruth took into account what was required in the interests of justice, he did not refer to the Upper Tribunal's decision in Nwaigwe (adjournment: fairness) [2014] UKUT 418 and it is far from clear from the reasons he gave refusing the adjournment that he applied the principles contained within it. In Nwaigwe, the Upper Tribunal found, in summary, as follows:

*"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."*

12. In the present appeal, Judge Ruth's reasons for refusing the application for an adjournment were primarily focused on the contents of the Respondent's file note and the delay in resolving the appeal. While these were legitimate observations Judge Ruth placed too great an emphasis on these factors rather than on whether a fair hearing could still be achieved in the absence of an adjournment. It is accepted that no direction was made by Judge Swaniker that the hearing must proceed on the next occasion, and even if there had been, Judge Ruth did not address the real question of whether the refusal in present circumstances would involve any deprivation of the Appellant's right to a fair hearing. For these reasons the refusal of an adjournment was unfair and there was a failure to apply the correct test for consideration of the application.
13. In all of the circumstances, the First-tier Tribunal made a material error of law in refusing the application for an adjournment and as such it is necessary to set aside the decision. The parties were in agreement that if an error of law was found, this case would most appropriately be remitted to the First-tier Tribunal for a de novo hearing.

14. The Sponsor indicated that he believed that the Appellant would not be in a position to give evidence and that he would be seeking medical advice and legal representation. While that is a matter for the Appellant and her Sponsor, the First-tier Tribunal may in the circumstances consider it appropriate to list the matter for a Case Management Review Hearing so that the Appellant's current position can be clarified before a further substantive hearing date is set.

### **Notice of Decision**

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal. The appeal will be reheard on all issues by a judge other than Judge Ruth and Judge Swaniker.

No anonymity direction is made.

Signed  
2020

Date: 8<sup>th</sup> February

Deputy Upper Tribunal Judge Bagral