



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/06424/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 22 August 2018

Decision & Reasons Promulgated  
On 5 September 2018

Before

LORD BECKETT SITTING AS AN UPPER TRIBUNAL JUDGE  
UPPER TRIBUNAL JUDGE KEKIC

Between

AO  
(ANONYMITY DIRECTION)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Nwaekwu, Solicitor, Moorehouse Solicitors

For the Respondent: Ms J. Isherwood, Senior Presenting Officer

**DECISION AND REASONS**

1. The respondent is the Secretary of State for the Home Department. The appellant is a national of Nigeria who entered the UK on a student visa in late 2006 and has a chequered immigration history thereafter.
2. On 4 August 2016 she was convicted of three crimes of fraud and an offence of possessing identity documents with intent. Concurrent sentences of imprisonment were imposed on each of the four charges and she was sentenced

to 18 months imprisonment. She is liable to automatic deportation as a foreign criminal under section 32 of the UK Borders Act 2007.

3. On 28 June 2017 the respondent decided to make a deportation order and refused a protection claim and a human rights claim, which decisions she appealed to the First-tier Tribunal.
4. Mr Nwaekwu attended on her behalf at a case management hearing on 9 January 2018 and an appeal hearing was fixed on the first available date, 8 March. The appellant was pregnant with a due date of 2 April.
5. On 25 February 2018, her solicitors wrote to the FTT seeking an adjournment as the appellant was suffering complications with her pregnancy. A letter was attached from a doctor at a Medical Centre in the South West of England explaining that the appellant would be 36 weeks pregnant on 8 March and had an antenatal scan booked for that date to assess foetal growth. She was also said to be suffering from depression associated with her pregnancy. A community midwife had written on 12 February 2018 to say that attending at court on 8 March would be very difficult for the appellant and supported an adjournment. This letter was also attached to the letter containing the adjournment request which was tracked and proved to have been received at the FTT on 27 February 2018.
6. On 7 March the solicitors were surprised not to have heard back from FTT and contacted the FTT by telephone. They emailed the FTT enclosing the same documents posted earlier and also a receipt to prove delivery. They got no reply. They were not in funds and were not available to attend the hearing, but assumed in the light of previous experience that had the request been refused they would have been told about it.
7. It is not known what happened to these documents, but they seem not to have found their way to the appropriate destination as the FTT was unaware of all this when the appeal hearing was called on 8 March 2018.
8. The Home Office Presenting Officer was in attendance. They had been told on 7 March that the appellant's representatives "were seeking an adjournment" because the appellant was pregnant. The FTT judge was told of this and directed the clerk to check for any communication from the representatives but none was found.
9. When by 12.15 pm there was no appearance by the appellant or representative, in the absence of any further specification of the situation explaining the appellant's absence, the FTT judge directed that the hearing should proceed in absence.
10. The judge rejected the credibility of the appellant's claim to have been trafficked to Italy in November 2005 in light of the established immigration history which appeared to contradict an account which had emerged at a relatively late stage

in the appellant's interactions with the respondent. The judge also found that none of the exceptions in section 117C of the Immigration, Nationality and Asylum Act 2002 were applicable.

11. In considering the asylum and human rights aspects of the claim, the judge noted that the burden of proof lay on the appellant before observing that the FTT had not had the benefit of hearing any evidence from the appellant in person or by way of a statement; para 22 of determination.
12. The judge considered that the appellant's account lacked credibility because of apparently conflicting information and the late stage at which it emerged. The judge was not prepared to accept that the appellant suffered from depression in the absence of any medical evidence. The judge concluded that the appellant did not fall within any of the exceptions to automatic deportation. The appeal was dismissed on all aspects.

### **The appeal**

13. The appellant sought permission to appeal against the decision to refuse her appeal in the circumstances narrated above, founding on the communications to the FTT in advance of the hearing. She contends that she did not get a fair hearing and founds in that regard on *Ngaigwe (adjournment: fairness)* [2014] UKUT 00418 (IAC).

### **Hearing**

#### *Appellant*

14. For the appellant Mr Nwaekwu reiterated the procedural history and set out the details of the communications his firm had made seeking an adjournment. He drew our attention to the relevant rules. His position was that, unknown to the judge, there was good reason for the absence of the appellant and her representative. At first glance, the latter proposition is more difficult to accept where no appearance was made at all. However, given that his firm had not been paid to appear, and had taken all reasonable steps to inform both the FTT and the respondent of the position, we should accept that there was good reason also for the representative's absence.
15. On the information before the judge, there was no good reason for the absences at the hearing. In reality, there was.
16. Whilst this was not known to the judge at the time, the solicitors had fulfilled the criteria in Rule 21.1 in seeking adjournment because they had notified all other parties; shown good reason why it was necessary; and provided evidence of the (medical) facts relied on.

17. More fundamentally, as the Upper Tribunal explained in *Ngaigwe*, the fundamental issue was the fairness of the hearing.

#### *Respondent*

18. Ms Isherwood could not and did not dispute any of what was said and she helpfully confirmed the terms of her colleague's note about the hearing which informs our finding at para 8 above. She questioned whether there was a good reason for the solicitors to fail to appear but, very properly, she recognised that the fundamental question for us was the fairness of the hearing as viewed now in light of information unknown to the judge. She left the resolution of that question to our assessment.

#### **Conclusion**

19. Given what is now known, the hearing should not have proceeded in absence. Unlike the situation in *Ngaigwe* where the unfairness was of no materiality because there could only be one outcome in a case which fell to be determined on paper, this was a case where the credibility of the appellant's account was crucial for aspects of her claim. A decision on credibility which led to the refusal of her claim was made in circumstances where, for reasons which were not her fault, the appellant had no opportunity to give evidence at the hearing of her appeal. That was unfair and the decision cannot stand.
20. We set aside the decision of the FTT to dismiss the appeal on 8 March 2018. Since there has not been a fair hearing, we remit the matter to the FTT to remake the decision.

#### **Decision**

21. The First-tier Tribunal made an error of law and its decision is set aside in its entirety. The decision shall be re-made following a hearing by a differently constituted Tribunal.

#### **Direction**

22. We direct that a hearing of two and a half hours will be fixed to take place in the Newport (South Wales) Immigration and Asylum Tribunal at which an interpreter will not be required.

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

23. Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

A handwritten signature in black ink, appearing to read 'R. Kekić' with a small dot at the end.

Upper Tribunal Judge Kekić

Date: 30 August 2018