



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2024-002548

First-tier Tribunal Nos: HU/50728/2023  
LH/01802/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On 16 September 2024**

**Before**

**UPPER TRIBUNAL JUDGE O'BRIEN**

**Between**

**THERESA YEWANDE ADENUGA  
(NO ANONYMITY ORDER MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms S Jegarajah, Counsel instructed by David Benson Solicitors Ltd

For the Respondent: Mr M Parvar, Senior Home Office Presenting Officer

**Heard at Field House on 5 August 2024**

**DECISION AND REASONS**

1. This appeal concerns a human rights claim made by the appellant on 29 December 2021 which was refused on 4 January 2023. The matter came before First-tier Tribunal Judge Maka (the judge) sitting at Hatton Cross on 29 February 2024, who proceeding in the absence of the appellant and her representatives and dismissed her appeal in a decision and reasons promulgated on 19 March 2024.
2. On 24 April 2024, First-tier Tribunal Judge Cox granted the appellant permission to appeal on the single ground that the appellant did not receive notice of the hearing.
3. In advance of this hearing, I granted a Rule 15(2A) application for the appellant to rely on further evidence, which included a statement from the appellant.. At the hearing, I was satisfied that it was appropriate in the interests of justice for

me to vary that grant for her to rely also on a statement from her solicitor, Shankhanie Samarakoon of David Benson Solicitors: a statement settled on 31 July 2024, provided to the Home Office the following day, and I which directed be uploaded to CE file immediately following the hearing.

4. The proceedings before the judge were a hearing on remittal, a previous dismissal of the appeal in the First-tier Tribunal having being overturned by the Upper Tribunal. It is apparent from the respective decisions that the appellant attended the earlier hearings in both the First-tier Tribunal and the Upper Tribunal and on both occasions had representation by her current solicitors, David Benson Solicitors Ltd.
5. Those solicitors remained on record at the time the matter came before the judge, and indeed they continue to represent now, albeit that they have instructed Ms Jegarajah of Counsel, recognising the potential professional embarrassment but considering that the appellant should have continuity of representation.
6. On the date in question, there was no attendance by the appellant and no attendance by her representatives. The judge had to consider whether it was appropriate in the circumstances to proceed in the absence of the appellant. What the judge says in respect of that can be found at paragraph 28 of the judgment:

“Having checked due service of the notice of hearing had been given to the appellant and having considered the procedure rules including Rules 2 and 28 as well as my own discretion, I determined reasonable steps had been taken to notify the appellant of the hearing and that it was in the interests of justice for me to proceed with the hearing in her absence. I determined having regard to the overriding objective the appellant and [sic] was aware of the hearing and I should continue in her absence. Applying Rule 2, I determined I could deal with the case fairly and justly in the appellant’s absence. I considered the proportionality of the appeal, the need to avoid delay, the costs already incurred in listing the appeal and the need to maintain flexibility. I also considered the resources of both parties including the Court and determined I should proceed on the evidence before me”.

7. Regrettably, the judge does not say what ‘reasonable steps’ had been taken to notify the appellant of the hearing beyond the sending of a notice of hearing. It would have been straightforward for the judge to record for instance that an attempt at telephone communication was made.
8. What the appellant’s statement admitted under rule 15 effectively tells me is that, having previously been aware of all significant correspondence between the Tribunal and her side, she was unaware of the hearing in question, and had not received herself notice of hearing. She makes no mention of any attempt to contact her by telephone, and I infer that she received none.
9. The witness statement of Shankhanie Samarakoon confirms that they are the solicitor with conduct of the appellant’s appeal, that the firm had received notice of hearing, but that the firm had not actioned it because of an ‘administrative oversight’ and therefore did not notify the appellant. Paragraph 4 of that statement continues:

“Given that the error was due to our oversight resulting in the client being unaware of the hearing and this was not our intention as I would have advised the client had I known with no fault on the part of the appellant I request the permission for appeal to be granted”.

From this I infer not only that the solicitor in question was unaware of the notice of hearing because of the administrative oversight but also that the firm received no contact from the Tribunal on the day to ask why they had not attended the hearing. Given the appellant and representatives’ previous consistent attendance, I am satisfied that they would otherwise have made every effort to attend the hearing or seek a an adjournment if unable. Therefore, I find as a fact that no such attempt was made.

10. The overriding objective of the First-tier Tribunal is to enable the Tribunal to deal with cases fairly and justly (rule 2(1) of the First-tier Tribunal’s Rules of Procedure). Per rule 2(2), dealing with cases fairly and justly includes: dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal, and avoiding delay, so far as compatible with proper consideration of the issues. However, it also includes ensuring, so far as practicable, that the parties are able to participate fully in the proceedings.
11. Rule 28 provides that, if a party fails to attend a hearing, the Tribunal may proceed with the hearing if the Tribunal:
  - (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
  - (b) considers that it is in the interests of justice to proceed with the hearing.
12. Rule 12(4) provides that if a document is provided to a person who has notified the Tribunal they are acting as the representative of a party it shall be deemed to have been provided to that party, and so I find as a matter of fact that the condition precedent in rule 28(a) is satisfied, as indeed Ms Jegarajah properly conceded.
13. The question is then whether it was open for the judge to find in all the circumstances that it was in the interests of justice to proceed with the hearing. Whilst described by the judge as an exercise of discretion, this in fact is a decision determined by an assessment of fairness in the interests of justice.
14. In this case, the appellant was manifestly interested in pursuing her case, having attended with representation to both substantive appeals before. Whilst it was suggested that there had been some pre-hearing non-compliance on the appellant’s part, I unable to determine if that was the case. I have unfortunately not been provided with the directions in question, and it is quite possible that they were sent at the same time as the notice of hearing.
15. Nevertheless, this was manifestly an appellant who was quite unlikely willingly not to attend and be unrepresented at her appeal hearing. Given that the long procedural history of attendance would have been obvious from the case file, it was, in my judgment, the very minimum that would be expected of a judge in those circumstances, to direct their clerk to make contact with the representatives (at least) to find out what had gone wrong. Through my lengthy

experience of First-tier proceedings, regrettably I am aware that these sort of 'administrative oversight' happens far too often.

16. Therefore, whilst I remind myself that an Appellate Court should be very slow to interfere with the exercise of a discretion, consideration of whether to proceed in a party's absence is not a true discretion, and certainly is not unfettered. Rather, its exercise is determined by the interests of justice. In my view, it lay outside the range of reasonable responses of a reasonable judge to proceed in absence without first checking with the appellant and, at the very least, the representatives, that the notice of hearing had been received and actioned. That was not done and gave rise to a material unfairness amounting to an error of law.

### **Notice of Decision**

1. The appeal is allowed.
2. The judge's decision involved the making of an error of law and is set aside with no findings of fact preserved.
3. The appeal is remitted to the First-tier Tribunal to be heard afresh by a different judge.

**Sean O'Brien**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**11 September 2024**