



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/24202/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 7 September 2018

Decision & Reasons Promulgated  
On 18 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE A MONSON

Between

MOORGESSEN PAJANIANDY  
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr A. Jafar (Counsel instructed by Liyon Legal Ltd)

For the Respondent: Mr T. Wilding (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

1. The Appellant appeals on procedural irregularity and/or unfairness grounds from the decision of the First-tier Tribunal (Judge Abebrese sitting at Taylor House on 28 February 2018) dismissing his appeal against the decision by the Secretary of State to refuse to grant him leave to remain on the grounds of continuous residence since 8 September 1995.
2. In his decision promulgated on 20 March 2018 the Judge records that the appellant and his representatives were not present at the hearing; that his representative had telephoned on the morning of the hearing and indicated that they would not be

attending; and that the appellant and his representative had not given him substantive reasons to delay the appeal being determined. On that basis, he declared himself satisfied that it was appropriate to proceed hear and determine the appeal in the appellant's absence.

3. Permission to appeal was granted as it was contended that the representative had faxed a letter to the Tribunal on the day of the hearing before 10 am requesting an adjournment to obtain a report from a psychiatrist, as it had come to light recently that he had mental health problems, including suicidal thoughts.
4. At the hearing before me to determine whether an error of law was made out, I examined the documents on file. I shared the information which I gleaned with the representatives, and Mr Wilding concurred that an error of law was made out on the basis outlined in the grant of permission, namely:

“It is an arguable error of law that had the Judge been aware of the circumstances of the non-attendance and had an adjournment been granted this may have made a material difference to the outcome or to the fairness of the proceedings.”

### **Discussion**

5. In **Nwaigwe (adjournment: fairness) [2014] UKUT 418 (IAC)** the UT held:

“In practice, in most cases the question will be whether the refusal (of an adjournment) 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?”
6. As fairness, rather than reasonableness, is the key consideration, it is appropriate to apply hindsight to the matter in issue. I am satisfied on the balance of probabilities that at about 9.40am on the morning of the hearing the representative faxed a letter to the Tribunal explaining his enforced non-attendance (his car was snowed in) and requesting an adjournment for that reason and for the additional reason that he wished to present expert evidence concerning the appellant's mental ill-health and suicidal ideation.
7. The documentary evidence provided with the application for permission indicates that the letter was received by the Tribunal before 10 am. But it also appears that the letter did not make its way to the Judge, and indeed it appears to have been mislaid.
8. On the information available to the Judge, there was no satisfactory explanation for the non-attendance of the appellant and his representative. So his decision to proceed with the hearing was reasonable.
9. However, although it was not the fault of the Judge, there was a procedural irregularity in that the Judge failed to take into account the letter that had been received by the Tribunal. The appellant was thereby inadvertently deprived of a fair hearing of the request for an adjournment; and the Judge's failure to consider the

adjournment request may have made a material difference to the outcome of the appeal.

**Notice of Decision**

10. The decision of the First-tier Tribunal is erroneous in law due to procedural irregularity and/or unfairness, and accordingly the decision must be set aside and remade.

**Directions**

11. The appeal is remitted to the First-tier Tribunal at Taylor House for a fresh hearing, with none of the findings of fact made by the previous Tribunal being preserved.

Signed  
Deputy Upper Tribunal Judge A J Monson

Date 13 September 2018