



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

Appeal Number: EA/03942/2017

THE IMMIGRATION ACTS

**Heard at Royal Courts of Justice, Decision & Reasons Promulgated
London**

On 25 September 2017

On 26 September 2017

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

[P U]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr McKenzie, Counsel

For the respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant is a national of Poland and therefore an EEA citizen. He entered the United Kingdom in 2010 and claims to have been exercising EU Treaty rights as a self-employed person until around 2015. At this time he is said to have stopped employment for reasons relating to his alcohol dependency, mental illness and homelessness.
2. In a decision contained in a IS151A (EEA) dated 23 March 2017 the

respondent decided that the appellant ceased to have a right to reside having been sentenced to imprisonment for one month and eleven days for shoplifting.

3. At a hearing on 14 July 2017 First-tier Tribunal Judge Abebrese refused the appellant's application for an adjournment and dismissed his appeal in a decision dated 31 July 2017.
4. In a decision dated 23 August 2017 the First-tier Tribunal granted the appellant permission to appeal observing that it was arguably:
 - (i) unfair not to adjourn in light of the appellant's acknowledged mental illness and lack of representation;
 - (ii) an error of law to fail to apply the guidance on vulnerable adults;
 - (iii) an error of law to fail to apply the relevant EEA Regulations to the evidence available.

Hearing

5. At the hearing before me Mr McKenzie relied upon his grounds of appeal and a very helpful skeleton argument. Mr Melvin relied upon a rule 23 notice and invited me to dismiss the appeal.
6. After hearing from both representatives I indicated that the First-tier Tribunal decision contains an error of law such that it must be set aside and remade. Both representatives agreed that it should be remitted to and remade by the First-tier Tribunal. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and I have decided that this is an appropriate case to remit to the First-tier Tribunal.

Error of law discussion

Adjournment

7. I am satisfied that the First-tier Tribunal acted unfairly in refusing to adjourn the hearing in light of the principles set out in Nwaigwe (adjournment: fairness) [2014] UKUT 00418. I acknowledge, as did Mr McKenzie, that the appellant probably had adequate time to arrange legal representation but there was sufficiently clear evidence of compelling circumstances explaining his failure to do so. These related to his detention, mental illness, alcohol dependency and learning difficulties. Fairness dictated an adjournment given the

factors set out below.

- (i) The appellant has an acknowledged mental illness or as described by the First-tier Tribunal at [10] "*is in need of medical attention*".
- (ii) He was unable to secure legal representation previously due to a combination of reasons but had recently secured very experienced solicitors in the field who made a cogent adjournment application on his behalf.
- (iii) The evidence available to the First-tier Tribunal was incomplete as acknowledged by the First-tier Tribunal at [11].
- (iv) The law underpinning the appeal is complex and difficult.

Guidance

8. In addition, the First-tier Tribunal failed to take into account and apply the Practice Direction 'First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses', dated 30 October 2008 or the joint Presidential Guidance Note No 2 of 2010. As set out in AM (Afghanistan) v SSHD [2017] EWCA Civ 1123 a failure to follow this guidance will most likely be a material error of law. I am satisfied that the appellant's circumstances raised a number of concerns that he may be vulnerable and as such special considerations applied including the express duty to consider an adjournment to secure representation.

EEA Regulations

9. The First-tier Tribunal wholly failed to consider the appeal by reference to the correct legal framework. No attempt was made to identify or apply the Immigration (EEA) Regulations 2016 (SI 2016/1052). As such the First-tier Tribunal has erred in law in failing to consider whether notwithstanding that the appellant ceased work in 2015,:
 - (i) he acquired permanent residence and qualified as a self-employed person who ceased activity for the purposes of regulation 5, or alternatively;
 - (ii) he was temporarily unable to work as a result of illness and is therefore a qualified person for the purposes of regulation 6.

Decision

10. The decision of the First-tier Tribunal involved the making of a material error of law. Its decision cannot stand and is set aside.
11. The appeal shall be remade by the First-tier Tribunal de novo.

Directions

- (1) The appeal shall be reheard de novo by the First-tier Tribunal sitting in Taylor House (TE: 2.5hrs) on the first date after four months (to enable the appellant's solicitors who have been acting pro bono to make an application for exceptional funding).
- (2) Polish interpreter necessary.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
25 September 2017