



**Upper Tribunal  
(Immigration and Asylum Chamber)  
EA/07390/2017**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 6 March 2018**

**Decision & Reasons  
Promulgated  
On 13 March 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN**

**Between**

**SEBASTIAN PASTORINI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr. S. Knight, Counsel, 1 Pump Court Chambers  
For the Respondent: Mr. P. Nath, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by Mr. Pastorini against the decision of First-tier Tribunal Judge Anthony, promulgated on 24 November 2017, in which she dismissed Mr. Pastorini's appeal against the Secretary of State's decision to remove him from the United Kingdom.
2. Permission to appeal was granted as follows:

"The grounds allege that the Judge failed to properly consider the appellant's grounds of appeal; the Judge applied the wrong burden and standard of proof and failed to consider proportionality. Further, the

refusal to allow or stay the case before a decision in the case of **Cielecki** amounted to procedural unfairness.

I have carefully considered the grounds of appeal and the Judge's decision, which was made on the papers, as requested by the appellant. The Judge dismissed the appeal in the absence of any evidence from the appellant but without identifying how the respondent had established a *prima facie* case (save for a reference to the circumstances of the respondent's encounter with the appellant) and without considering proportionality. I am satisfied that this amounts to an arguable error of law. I can see no application to adjourn, on the Tribunal's file, pending the decision in **Cielecki** and do not find the Judge was procedurally unfair in failing to adjourn or allow the appeal.

There is arguable error of law in the decision. Permission to appeal is granted."

3. I heard submissions from both representatives following which I reserved my decision.
4. One of the issues discussed related to the papers on the Tribunal file which the Judge had before her. There is no Respondent's bundle on file, and Mr. Nath did not have a copy before him. He did not give any reason for why he did not have the file before him, but requested that the hearing be adjourned for the Respondent's bundle to be obtained. However, given that this was an error of law hearing, and therefore the material that was before the Judge when she made her decision is what is relevant, I considered that it was in the interests of justice to proceed with the error of law hearing, particularly given the nature of the grounds of appeal.

### **Error of law**

5. I have carefully considered the grounds and the decision. I will commence with ground 4 which states simply that the Judge acted procedurally unfairly in considering the case. Contrary to what is stated in the grant of permission, there was a request to adjourn at the start of the grounds of appeal to the First-tier Tribunal. This states as follows:

"Adjourn the Appellant's appeal until the conclusion of the judicial review proceedings in the case of *R (oao Mariusz Cielecki) v Secretary of State for the Home Department*, due to be heard 21-23 November 2017, which has been granted permission to apply for judicial review."

6. At [22] of the grounds to the First-tier Tribunal it refers to the fact that the policy under which the decision was made is under challenge in the Administrative Court.
7. There is no reference in the decision to any adjournment request. The Judge gave no consideration to this request which, as stated above, appears right at the start of the grounds of appeal. It was submitted by Mr. Knight that this had denied the Appellant an opportunity to make

further submissions as he was unaware that his application for an adjournment had been refused, and that the appeal would proceed to be determined.

8. The appeal was listed for paper determination. As stated above, there is no Respondent's bundle on the Tribunal file, and therefore there was no Respondent's bundle before the Judge. The Judge proceeded to determine the appeal based on the information provided by the Appellant when he lodged his appeal. As emerged at the hearing before me, the IS.151A was not in the bundle before the Judge, although the relevant part had been copied verbatim in the grounds of appeal at [4].
9. I find that the failure to consider the request to adjourn made by the Appellant on the grounds that the policy under which the decision was made was under review, is compounded by the fact that the Judge did not have the Respondent's bundle before her. It was submitted by Mr. Knight that, in the many cases like this that he has seen, the Respondent has not produced anything more than the type of documents produced by the Appellant here, i.e. the IS.151A, IS.151B, IS.151D and the IS.96. What occurs in other cases is of some, albeit limited relevance, but in relation to the Appellant's own case, as there is no Respondent's bundle on file, I cannot make any comment. It was submitted that the Respondent had not provided any evidence to show that grounds existed for taking away EU rights, but it is difficult for me to find that no evidence was provided when the Judge made the decision without having a Respondent's bundle on file, and when she made no reference to the lack of Respondent's bundle before her.
10. The fact that the Judge proceeded to determine the appeal in the absence of any Respondent's bundle, given that a request had been made in any event to adjourn, and given that the grounds of appeal made clear that the burden of proof lay on the Respondent, has arguably led the judge to make further errors in her decision. In particular, at [12] she states "It is plain that the circumstances of the respondent's encounter with the appellant led the respondent to believe that the appellant was not someone who was engaged in pursuit of effective and genuine economic activities." However, there was no evidence before her from the Respondent regarding the circumstances of the encounter with the Appellant. There was no evidence before the Judge of the basis on which the Respondent made her decision.
11. Further, as pointed out by Mr. Knight, in the IS.151A, which although was not before the Judge was set out in the grounds of appeal, it is unclear whether the Respondent herself knew why she had made the decision, and therefore the lack of her bundle is arguably still more significant. It states "you are unable to provide evidence of your arrival date in the United Kingdom/ have been present in the United Kingdom for longer than three months".
12. I find that the failure to consider the request to adjourn the hearing, and the failure thereby to give the opportunity to the Appellant to provide

further evidence or submissions prior to the determination of the appeal, especially given that the Judge did not have a Respondent's bundle before her, is a material error of law.

13. Given that I have found that the Judge made a material error of law in failing to adjourn the hearing, and thereby the decision is procedurally unfair, I do not need to proceed to consider grounds 1 to 3 in any more detail. The decision in the case of Gureckis [2017] EWHC 3298 has now been promulgated quashing the Respondent's guidance insofar as it relates to decisions made under regulation 23(6)(c) of the 2016 Regulations. The decision in the Appellant's case was made under regulation 23(6)(a). However decisions under regulations 23(6)(a) and 23(6)(c) were both covered by the policy guidance, and the case of Gureckis is therefore of relevance to this appeal insofar as it relates to discrimination and "systematic verification". This can be fully examined on a rehearing of the case, when the Respondent has considered her position. Should the Respondent decide to withdraw her decision in the light of Gureckis, it is open for her to do so. However, given that I have found that the failure to adjourn means that the Appellant has not had a fair hearing before the First-tier Tribunal, having regard to the overriding objective, I therefore remit this case to the First-tier Tribunal to be reheard.

### **Decision**

14. The decision of the First-tier Tribunal involves the making of a material error of law and I set the decision aside.
15. The appeal is remitted to the First-tier Tribunal to be reheard.
16. On the request of Mr. Knight who is acting pro bono, it is to be remitted to Taylor House for oral hearing.
17. Any further evidence which the Respondent has relating to the Appellant can be provided by her for the remitted hearing.

Signed

Date 9 March 2018

**Deputy Upper Tribunal Judge Chamberlain**