



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/22385/2018

**THE IMMIGRATION ACTS**

Heard remotely via video (Skype for Business)  
On 4 February 2021

Decision & Reasons Promulgated  
On 23 February 2021

Before

UPPER TRIBUNAL JUDGE BLUM

Between

MUHAMMAD SULEMAN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the appellant: Ms S Anzani, Counsel, instructed by Lawfare Solicitors

For the respondent: Ms R Pettersen, Senior Home Office Presenting Officer

This decision follows a remote hearing in respect of which there has not objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

**DECISION AND REASONS**

## Background

1. This is an appeal against the decision of Judge of the First-tier Tribunal N M Paul (“the judge”) promulgated on 18 October 2019 in which he dismissed the appellant’s appeal against a decision of the respondent dated 16 October 2018 refusing his human rights claim based on his long residence in the UK.
2. The appellant is a national of Pakistan who was born on 12 August 1982. He first entered the UK on 2 December 2007 with entry clearance as a student. He was granted further periods of Leave To Remain (LTR), the last period valid to 7 March 2013. By this time, he had resided in the UK for a continuous lawful period of approximately 5 years and 3 months.
3. On 7 March 2013 the appellant applied for an EEA residence card as confirmation of his right to reside in the UK as the spouse of Elizabeth Anne Yarsuvat, a Swedish national exercising Treaty rights in the UK as a qualified person. He had married Ms Yarsuvat on 6 March 2013. The residence card was issued on 19 June 2013, valid until 19 June 2018. It is important at this stage to appreciate that the appellant’s right of residence was not bestowed by the issuance of the residence card but derived from his relationship with his EEA national spouse who was working in the UK. The residence card simply evidenced that right. It is also important to appreciate that the appellant’s right to reside in this country was no longer governed by the immigration rules because, as the family member of a qualified person, he was not subject to immigration control (this is reflected in paragraph 5 of the immigration rules).
4. According to the Reasons for Refusal Letter dated 16 October 2018 the registration certificate issued to Ms Yarsuvat on 19 June 2013 as a qualified person was revoked on 13 May 2014 as she failed to establish that she was exercising Treaty rights at that time.
5. On 15 June 2018 the appellant made a human rights claim (an application for Indefinite Leave to Remain (ILR)) on the basis that he had lawfully resided in the UK for a continuous period of 10 years, with reference to paragraphs 276A and 276B of the immigration rules. The covering letter accompanying the application indicated that the appellant and his spouse had separated “in the last few months” but that they were not divorced. The covering letter indicated that the appellant was unable to provide “her documents” as “all efforts to convince her to assist have proved futile” (“her” being Ms Yarsuvat).
6. In refusing the application the respondent referred to her published guidance on long residence which noted that individuals who had resided in the UK by virtue of rights under EU law (detailed in the Immigration (European Economic Area) Regulations 2016) were not required to have leave to enter or remain and could not therefore meet the requirements of paragraph 276B. The guidance however indicated that the decision-maker had to apply discretion and count

time spent in the UK as lawful residence for a family member of an EEA national who was exercising their Treaty rights. The respondent noted that the appellant had separated from his spouse but that they were not divorced. The respondent additionally noted the appellant's claim that, because of the separation, he was unable to provide documentation to support his application other than some of Ms Yarsuvat's bank statements dating from 2013. The respondent then stated that the appellant had been unable to provide any evidence to support his claim that he had been in a subsisting relationship with Ms Yarsuvat for the period claim, and that he had failed to establish that she had been exercising Treaty rights for the period claimed (given that the appellant had already achieved 5 years and 3 months lawful residence by 7 March 2013, it is tolerably clear that the 'period claimed' related to the period continuing from that date making up a total of 10 years, which would be approximately December 2017/January 2018). The respondent was not, as a consequence, satisfied that the appellant could rely on the period of time that he sought to rely in his human rights claim as the spouse of an EEA national. The application was therefore refused under paragraph 276B(i)(a) and (v) of the immigration rules. The respondent then considered whether the appellant met the requirements of paragraph 276ADE(1)(vi) of the immigration rules, relating to his private life in the UK, but found, based on his particular circumstances, that there were no very significant obstacles to his integration in Pakistan. Nor was the respondent satisfied that the refusal of the appellant's human rights claim would breach rights protected by Article 8 ECHR.

7. It is apparent from the Reasons for Refusal Letter, which was received by the applicant on 20 October 2018, that the respondent was not satisfied that Ms Yarsuvat had been exercising Treaty rights following the issuance to her of a Registration Certificate up to and including the date of the application. The appellant would therefore have been aware that this concern was a principle issue that needed to be addressed at any appeal hearing, and that central to his appeal was the question whether his spouse had been exercising Treaty rights following the issuance of appellant's residence card. The appellant appealed the respondent's decision to the First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

### **The Decision of the First-tier Tribunal**

8. At the First-tier Tribunal hearing on 3 October 2019 the respondent produced three letters; one addressed to Ms Yarsuvat, the other two addressed to a Mr B Shahid and a Mr M Shahzad respectively. The letters were all dated 13 May 2014 and were all sent to the same address. The letter for Ms Yarsuvat explained that, in light of a recent application made to UK Visas and Immigration in which she was identified as the sponsor, several unsuccessful phone calls were made to verify her employment. It was therefore decided to revoke her Registration Certificate as the respondent was not satisfied that she was still exercising her Treaty rights. The two other letters were in very similar

terms. An application had been made by Mr B Shahid and Mr M Shahzad as family members of Ms Yarsuvat but the nature of the relationship was not clear. The Home Office was not satisfied that either gentleman was a family member of Ms Yarsuvat, or that she had, in any event, been exercising Treaty rights as a qualified person. The judge stated, at the end of [7]:

“Thus, the reason for the revocation of the EEA national’s registration certificate is made explicit. It appears that she was being claimed as an EEA national wife by 3 different people.”

9. The appellant’s barrister, Mr Plowright, took issue with the late provision of these letters and requested that they be excluded, alternatively, that the appellant be granted an adjournment to enable the appellant to consider the letters and to give him an opportunity to provide rebuttal evidence.

10. The judge refused to exclude the letters and refused to grant an adjournment. At [9] the judge noted that the appellant could not be said to have been taken by surprise as the Reasons for Refusal Letter referred to the revocation of Ms Yarsuvat’s registration certificate on 13 May 2014 on the basis that she had failed to establish that she was exercising Treaty rights at that time. The judge noted that the appellant had made no application for any relevant material to be disclosed by the respondent. The judge concluded that the Tribunal Procedure (First-tier Tribunal) (Immigration & Asylum Chamber) Rules 2014 were sufficiently flexible to allow for the late admission of evidence if it was in the interests of justice to do so.

11. At [10] the judge stated:

“I also rejected the application for an adjournment because I could not see that there was any sensible basis on which any evidence could be obtained that could alter this situation. The Home Office documents spoke for themselves, and so far as the EEA national was concerned, it was part of the appellant’s case that after their separation she had refused to cooperate or communicate with him. there was thus no reasonable prospect of any evidence to be obtained by an adjournment.”

12. At [11] the judge stated:

“The appellant’s case, as set out in his witness statement and attached representations, is that he has been in the UK for a number of years, and has had an extremely good employment history; successfully passed a Life in the UK test; and has the relevant English language requirement on the basis of his Masters degree. He was also in possession of a valid residence certificate that was never revoked. On that basis, it was submitted that either in relation to the 267B long residence Rules, or in relation to his Article 8 claim, that he should be allowed to remain.”

13. In the section headed “Conclusions & Reasons” the judge stated, at [13]:

“The starting point is whether or not he can meet the requirements of the Rules. In simply [*sic*] terms he cannot. It is quite plain that, from the point at which the EEA national’s certificate of registration was revoked, that meant that the appellant’s situation in this country which was contingent upon his wife’s [*sic*] ceased to be lawful. It therefore follows that, on a simply [*sic*] construction of the principles of lawful residents, he cannot succeed.”

14. At [14] and [15] the judge proceeded to consider the appeal from the point of view of the appellant’s Article 8 private life rights. The judge found that there were no insurmountable obstacles to the appellant’s return to Pakistan, by reference to paragraph 276ADE(1)(vi) of the immigration rules. The judge noted in this regard that the appellant had “excellent qualifications”, that he had maintained ties with Pakistan by reason of having returned to visit, and that there was nothing that could point to the appellant experiencing “... All sorts of difficulties that would crush the threshold of showing that life would be intolerably difficult.” The judge then considered whether there were any factors in the case before him could point to any consideration of the appellant’s Article 8 rights that were not properly contemplated within the immigration rules. The judge found there were no such factors. The judge stated:

“This is a straightforward case of a man who has come to the UK and completed his education over a number of years, and has benefited from being able to work here with all the experience that he has acquired, and that has meant that although he may have established a private life to that extent, it is not so strong or compelling as to mean that it should trump the basic requirement to maintain proper immigration control. In my view, there was nothing in the human rights claim that takes it outside a proper application of Article 8 under the Rules.”

15. The judge dismissed the appeal on human rights grounds.

### **The challenge to the judge’s decision**

16. The grounds of appeal as originally drafted (not by either Mr Plowright or by Ms Anzani) challenged the judge’s decision on a range of issues. The grounds are lengthy and, in relation to some of the issues under challenge, betray a lack of understanding on the part of the author of the nature of rights derived under EU law and the consequences of a grant of a residence permit. The grounds contend that the judge erred in law in refusing to exclude the letters produced by the respondent on the day of the hearing (including a failure to ask the respondent to explain what the documents had not been served earlier and an assertion that the respondent was using “unfair tactics”), and that the judge erred in law in failing to grant the adjournment to enable the appellant to assess and “verify the factual accuracy” of the letters and in concluding that there was no reasonable prospect of any evidence capable of being obtained by an adjournment. The grounds further contend that the judge failed to record a full account of the evidence given by the appellant, although no details are

provided as to what material evidence was left out of account. The judge was said to have failed to take into account a letter from the appellant's previous legal representatives indicating that they had never received any correspondence from the Home Office relating to the revocation of Ms Yarsuvat's registration certificate, and the judge failed to take into account that the applicant and his spouse had never received any such letter as they had moved address by that time. The grounds contend that the judge failed to consider that the appellant had never been stopped whilst entering the UK following the revocation of his spouse's registration certificate and that the judge failed to consider a letter in support provided by his former employer indicating that he was, *inter alia*, a role model employee. The grounds contend that the judge failed to consider that a person is entitled to a grant of Indefinite Leave to Remain under paragraph 276B and that the appellant remained lawfully in the UK since acquiring his EEA residence card, although the author of the grounds failed to appreciate that the residence card did not bestow lawful residents. The grounds contend that the respondent (not the judge) failed to properly exercise her discretion given that the appellant was "an exceptionally talented person" who would always sought to make his applications within the legal framework and who had resided continuously without breaching the immigration rules. The grounds finally contend that the judge erred in his approach to Article 8 as he should have considered the legality of removal in accordance with Strasbourg jurisprudence and that he failed to consider Article 8 outside the immigration rules, and that the judge failed to consider the length of time the appellant resided in the UK.

17. In granting permission to appeal to the Upper Tribunal judge of the First-tier Tribunal Chohan stated:

"I note the reasons given by the judge for refusing the adjournment request and the reasons for allowing the evidence. However, in the interests of fairness and bearing in mind the impact of the new documentary evidence on the appellant's case, if not to exclude the evidence, perhaps the judge should have given the appellant an adjournment to consider the new documentary evidence and prepare accordingly.

This is an issue that must be looked into further but the appellant must note that it must be established that the refusal to exclude the documentary evidence and the refusal to grant an adjournment had a material impact on the overall decision made by the judge."

18. In the course of issuing directions for determining the appeal in light of the Covid-19 pandemic Upper Tribunal Judge Jackson stated, in paragraph 4 of directions issued on 7 July 2020:

"On a preliminary view of the papers, it is difficult to see what if any difference the further documents produced by the Respondent had on the outcome of the appeal as with or without them, it appears that the Appellant has failed to establish that he was residing in accordance with the Immigration (European Economic Area) Regulation 2006 (under which the Residence Card was issued in

2013) as the family member of an EEA national exercising treaty rights. A Residence Card does not confer any leave to remain and a person is still required to establish that they were residing in accordance with the regulations for the purposes of lawful residence in the United Kingdom. In the absence of this, the Appellant did not establish 10 years continuous lawful residence in the United Kingdom, and he could not meet the requirements of paragraph 276ADE of the Immigration Rules.”

19. On 14 July 2020 the appellant provided a supplementary bundle that contained, amongst other things, a post-decision statement from the appellant and some P60 End of Year Certificates relating to his spouse for the years ending April 2017, 2016, 2015 and 2014. The supplementary bundle did not contain any documentation dealing with the letters produced by the respondent on the day of the First-tier Tribunal hearing. In further directions issued on 29 September 2020 Upper Tribunal Judge Sheridan acknowledged the supplementary bundle but indicated that it did “not contain any submissions on the point.”
20. At the remotely conducted ‘error of law’ hearing Ms Anzani sensibly narrowed the focus of her submissions to the strongest of the grounds, that concerning the issue of fairness. She argued that the judge was wrong to have refused to adjourn the hearing to enable the appellant to deal with evidence that had only been provided on the day of the hearing. The judge’s conclusion at the end of [7] that Ms Yarsuvat’s registration certificate had been revoked because she was being claimed as an EEA national wife by three different people was not borne out by the actual letter revoking her registration certificate which indicated that attempts by the respondent to contact her employer had failed and there was therefore no evidence that she was exercising Treaty rights. The letters and the judge’s comments raised issue concerning the appellant’s relationship with Ms Yarsuvat and the nature of their marriage. It was unreasonable and unfair for the judge to have suggested that the appellant was aware of any concerns that two other people had made applications with Ms Yarsuvat as their sponsor. There was inherent unfairness in the decision to refuse the adjournment.

## Discussion

21. The ‘Modernised Guidance, Home Office Long Residence’, extant at the material time, states:

Time spent in the UK with a right to reside under EEA regulations

This page tells you how to consider a long residence application when a person has spent time in the UK with a right to reside under the European Economic Area (EEA) regulations.

Time spent in the UK does not count as lawful residence under paragraph 276A of the Immigration Rules for third country nationals who have spent time in the UK as:

- the spouse, civil partner or other family member of a European Union (EU) national
- an EEA national exercising their treaty rights to live in the UK but have not qualified for permanent residence
- former family members who have retained a right of residence

During the time spent in the UK under the provisions of the EEA regulations, the individuals are not subject to immigration control, and would not be required to have leave to enter or leave to remain. See EEA Nationals guidance for further information.

However, you must apply discretion and count time spent in the UK as lawful residence for an EU or EEA national or their family members exercising their treaty rights to reside in the UK.

Sufficient evidence must be provided to demonstrate that the applicant has been exercising treaty rights throughout any period that they are seeking to rely on for the purposes of meeting the long residence rules.

This does not affect the rights of family members of EEA nationals to permanent residence in the UK, where they qualify for it after a period of 5 years residence in the UK - Regulation 15 of the Immigration (European Economic Area) Regulations 2006. More information can be found on the GOV.UK website - apply for a UK residence card.

If an applicant was in the UK with a right to reside under European Economic Area (EEA) regulations, continuous residence is not broken if they leave the UK and are then re-admitted under the EEA regulations.

When granting a Long Residence application in which a person has relied on a period of leave in the UK exercising treaty rights as an EEA national or their family member, any grant of leave must be made outside the Immigration Rules.

22. It is readily apparent from the Modernised Guidance that the respondent will exercise her discretion and grant leave outside the immigration rules provided that an applicant can show that he or she was the spouse of a qualified person who was exercising treaty rights for the necessary period of time.
23. Regardless of why the spouse's registration certificate had been revoked, and indeed regardless of whether it had been revoked at all, the appellant needed to show that Ms Yarsuvat had been exercising Treaty rights as a qualified person after their marriage for a period of time sufficient to amount to the equivalent of 10 years continuous lawful residence so as to enable the respondent's discretion to be exercised in accordance with her guidance. It should have been apparent to the appellant, and certainly to his legal representatives, that the central issue at the First-tier Tribunal appeal was whether, despite the issuance of documents evidencing or revoking rights derived under EU law, Ms Yarsuvat had been exercising Treaty rights for a period of 4 years and 9 months since their marriage (the period of time required to established the equivalent of 10 years



continuous lawful residence given that the appellant had already been lawfully resident through grants of leave to enter and leave to remain for 5 years and 3 months). This central issue, in actuality, had little if anything to do with the letters produced by the respondent on the day of the hearing.

24. Even if it was unreasonable for the judge to have presumed that the appellant would be aware of concerns that two other people had made applications with Ms Yarsuvat as their sponsor, the respondent never asserted that the marriage was one of convenience and the judge made no such finding. The judge's decision was not based on any dishonesty or abuse of Treaty rights, but on the simple fact that there was insufficient evidence that Ms Yarsuvat had been exercising Treaty rights as a qualified person for a period of 4 years and 9 months. This was the pivotal issue that needed to be determined at the hearing and which was clear from the Reasons for Refusal Letter.
25. Under section 12 of the Tribunals, Courts and Enforcement Act 2007 the Upper Tribunal may, if it finds that the making of the First-tier Tribunal's decision involved the making of an error on a point of law, but need not, set the decision aside. An error of law must therefore be material to the decision. **Nwaigwe (adjournment: fairness)** [2014] UKUT 00418 (IAC), a decision of the former President of the Upper Tribunal (IAC), dealt with procedural fairness in the context of adjournments. The test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? The issue of materiality was nevertheless relevant when determining whether to set the decision aside and therefore whether to allow or dismiss the appeal. In **Nwaigwe** itself the Tribunal found that the error of law in refusing to grant the adjournment was not material and that the refusal to grant the adjournment would not have made any difference to the outcome of the appeal (at [11] & [12]).
26. Despite the indication of the appellant's barrister at the First-tier Tribunal hearing that the adjournment was being requested solely in order to obtain rebuttal evidence to deal with the letters provided by the respondent on the day of the hearing, and despite the grant of permission to appeal indicating that the appellant had to establish that the refusal to grant the adjournment had a material impact on the overall decision, and despite Upper Tribunal Judge Jackson's preliminary view that it was difficult to see what if any difference the further letters would have had on the outcome of the appeal, and despite the observation of Upper Tribunal Judge Sheridan that the supplementary bundle provided on 14 July 2020 did not contain any submissions on the relevant point, the appellant has failed to provide any evidence engaging with or in rebuttal to the letters of 13 May 2014. Moreover, even if such evidence had been provided, it is extremely difficult to see how it would have been relevant to, or how it could have affected, the pivotal issue in the appeal, which was the absence of any evidence that Ms Yarsuvat had been exercising Treaty rights. It follows inexorably that the refusal to adjourn the hearing was not unfair, since the

appellant could not on any showing have succeeded even if an adjournment had been granted.

27. Although the appellant has now produced a supplementary bundle that contains documents that appear to be P60s issued to the appellant's spouse for the tax years ending April 2014 to 2017, these documents were not before the judge when he made his decision and, as pointed out by Judge Sheridan, they do not constitute rebuttal evidence in response to the letters produced by the respondent on the day of the First-tier Tribunal hearing. Ms Anzani did not seek to argue that the P60s should be admitted in order to determine whether the judge erred in law, and she was right not to do so. At the time of both the First-tier Tribunal hearing and decision the appellant maintained that he was unable to obtain any evidence that Ms Yarsuvat was exercising Treaty rights due to their breakup. No application appears to have been made by the appellant for an 'Amos Direction' pursuant to **Amos v SSHD** [2011] EWCA Civ 552 to obtain HMRC records relating to Ms Yarsuvat's employment, either prior to or at the First-tier Tribunal hearing. The appellant could not, on any rational view, meet the requirements for demonstrating that the judge made a mistake of fact amounting to an error of law, as considered in **E & R v SSHD** [2004] EWCA Civ 49. Whilst the documents in the supplementary bundle may form the basis for a further application by the applicant, they are not relevant in determining whether the judge's decision contains errors of law based on the evidence that was available to him.
28. Ms Anzani did not advance any of the other grounds in her oral submissions and I need only deal with them briefly. Given that the letters produced by the respondent on the day of the hearing did not make any material difference to the judge's assessment of the pivotal issue in the appeal, there is no error of law in the decision not to exclude them. Nor is there any error of law based on the judge's failure to mention the letter from the appellant's previous representatives relating to the non-receipt of the letter revoking her registration certificate; whether or not the letter was received, there was simply no evidence that Ms Yarsuvat had been exercising Treaty rights. To the extent that the grounds contend that the judge failed to take account of relevant considerations such as the appellant's length of residence or his good employment record, this is not made out. The judge was demonstrably aware of the appellant's length of residence in the UK (see [1], [5], and [11]) and his good work history (see [11] and [12]). Nor was there any material error of law in the judge's Article 8 assessment. Whilst the immigration rules are not a complete code as to how article 8 should be applied, but a starting point, the judge's findings at [15], that the particular circumstances of the appellant (including his length of residence, his education and his employment history) were not sufficient to overcome the public interest in the maintenance of effective immigration control, was one rationally open to him. Indeed it is difficult to see how any judge would have been entitled to allow the appeal given the absence of any evidence that the

appellant actually had a right to reside in the UK (a valid residence permit does not bestow a right of residence) since being issued with his residence permit.

29. For these reasons I find that the grounds of appeal are not made out and I dismiss the appeal.

**Notice of Decision**

**The making of the First-tier Tribunal's decision did not involve the making of errors on points of law requiring it to be set aside.**

**The appeal is dismissed.**

*D. Blum*

9 February 2021

Signed  
Upper Tribunal Judge Blum

Date