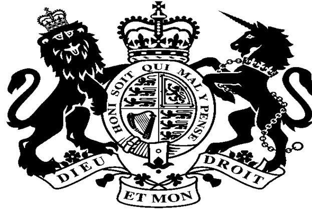

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00291/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 July 2019	**On 16 August 2019**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department Appellant

And

Mr Masum Rajeshkumar Kothari Respondent
(ANONYMITY ORDER NOT MADE)

Representation:
For the Appellant: Mr D Clarke, Senior Presenting Officer.
For the Respondent: In person.

DECISION AND REASONS

1. This is the re-making of the decision on the appeal of Mr Kothari (hereafter the "claimant"), a national of India born on 29 October 1986, against the Secretary of State's decision of 6 December 2017 to refuse to issue him with a residence card[1] as the former spouse of Ms [EC] (hereafter the "sponsor"), a Polish national exercising EEA Treaty rights in the United Kingdom.

2. By a decision promulgated on 29 January 2019 (the "EOL decision"), I set aside the decision of Judge of the First-tier Tribunal Sweet who allowed the appeal of the

[1] The "Error of law" decision promulgated on 29 January 2019 incorrectly states that the appeal was against a decision to refuse to issue the claimant with a residence card as confirmation that he had a *retained* right of residence.

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claimant. My reasons for setting aside the judge's decision are set out in the EOL decision which is annexed to this decision as Annex A

3. In order to succeed in the re-making of the decision on his appeal, the claimant needs to establish:

   (i) the date on which his divorce proceedings were initiated; and

   (ii) that the sponsor was exercising Treaty rights as at that date.

4. In the EOL decision, I issued directions to the Secretary of State to make such enquiries as he could reasonably make in order to establish whether the sponsor was exercising Treaty rights for what was stated in the EOL decision to be the Relevant Period.

5. The case was subsequently listed for case management review on 9 April 2019. It was then listed for full hearing on 30 July 2019.

6. By 30 July 2019, the claimant had produced evidence that his divorce proceedings commenced on 24 February 2016. He also submitted a substantial number of documents on the basis of which Mr Clarke accepted, albeit that this issue was not relevant because this was not an appeal against a refusal of a permanent residence card, that the claimant has been working from and after 24 February 2019 such that, if he were an EEA national, he would be regarded as exercising Treaty rights continuously from 24 February 2016 to the date of the hearing on 30 July 2019.

7. However, the difficulty for the claimant concerns the lack of evidence that the sponsor was exercising Treaty rights as at 24 February 2016. As stated at para 3 of the Directions dated 9 April 2019, the evidence that the Secretary of State has obtained from HMRC and filed is as follows:

	Tax year	Results of enquiries with HMRC
a)	2012-2013	The sponsor did not declare any earnings or benefits.
b)	2013-2015	The sponsor received job-seeker's allowance, the exact dates of which are not shown in HMRC's system.
c)	2015-2016	The sponsor did not declare any earnings or benefits.
d)	2016-2017	(i) There was one employment with SM Global Consultancy for which the sponsor declared earnings of £1,261.80; and (ii) There was one employment with Trueland Limited, from March to April 2017, for which the sponsor claimed £55.80; and (iii) the sponsor declared receiving jobseekers' allowance between 9 May 2016 and 7 August 2016.
e)	2017-2018	The sponsor did not declare any earnings or benefits.

8. As can be seen from c) above, the sponsor did not declare any earnings or benefits in the tax year 2015-2016. This is the tax year that spans 24 February 2016.

Accordingly, the Secretary of State's efforts in making reasonable enquiries have not produced relevant evidence that assists the claimant.

9. At the hearing on 30 July 2019, the claimant said that he has done his best to obtain evidence but has not been able to do so. He was anxious to explain to me that he has opportunities for other work available to him and that his life has been on hold.

10. The judge found, on the basis of unsupported evidence before her, that the claimant's divorce proceedings were initiated in 2017. This has now been proved to be incorrect because the claimant has submitted documentary evidence from the Family Court which shows that his divorce proceedings were initiated on 24 February 2016. At para 19 ii) a) of the EOL decision, I referred to the evidence that the claimant gave the judge, i.e. that he had been told by the sponsor's mother that the sponsor had been working continuously from 22 September 2012 until December 2016. This hearsay evidence, when combined with the evidence from HMRC for the tax year from 2015-2016, is simply insufficient to discharge the burden of proof that is on the claimant to the standard of the balance of probabilities to show that the sponsor was exercising Treaty rights as at 24 February 2016.

11. The claimant therefore does not satisfy the requirements for the grant of a residence card.

12. Accordingly, whilst I have every sympathy for the claimant, I am bound to dismiss his appeal.

Decision

The decision of Judge of the First-tier Tribunal Sweet involved the making of errors of law sufficient to require it to be set aside.

Accordingly, her decision was set aside.

The Upper Tribunal re-makes the decision on the claimant's appeal against the Secretary of State's decision by dismissing his appeal.

Signed
Upper Tribunal Judge Gill

Date: 12 August 2019

Upper Tribunal
(Immigration and Asylum Chamber) Appeal number: EA/00291/2018

THE IMMIGRATION ACTS

Heard at: Field House
On 16 January 2019

Decision promulgated
29 January 2019

Before

Upper Tribunal Judge Gill

Between

The Secretary of State for the Home Department Appellant

And

Mr Masum Rajeshkumar Kothari Respondent
(ANONYMITY DIRECTION NOT MADE)

Representation:
For the appellant: (In person)
For the respondent: Mr D Clarke, Senior Presenting Officer

Decision and Directions

1. The Secretary of State has been granted permission to appeal against a decision of Judge of the First-tier Tribunal Sweet who, in a decision promulgated on 24 September 2018 following a hearing on 11 September 2018, allowed the appeal of Mr Masum Rajeshkumar Kothari, a national of India born on 29 October 1986 (hereafter the "claimant") against a decision of the respondent of 6 December 2017 to refuse to issue him with a residence card as confirmation that he had a retained right of residence in the United Kingdom as the former spouse of Ms [EC], a Polish national exercising EEA Treaty rights in the United Kingdom.

2. The claimant, who appeared unrepresented at the hearing before me, did not request an adjournment. I could see no reason to adjourn the hearing. I explained that I

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would consider whether the judge's decision should be set aside and, in simple terms, the basic principles I would need to apply.

3. The refusal decision was made under the Immigration (European Economic Area) Regulations 2016 (hereafter the "2016 Regulations"). The respondent refused the claimant's application of 18 September 2017 for a residence card for the following reasons:

   i) He had failed to provide a divorce certificate and therefore there was no evidence that the marriage had been terminated so that the claimant could benefit from regulation 10(5).

   ii) He had failed to provide a valid identity card or passport in Ms [C]'s name, as required by regulation 21(5).

4. The respondent therefore did not consider whether the claimant satisfied the remaining requirements for a retained right of residence.

5. The sole issue before me is whether the judge materially erred in law in reaching his conclusion that the claimant had established, to the standard of the balance of probabilities, that Ms [C] had exercised Treaty rights for the relevant period in order to derive a retained right of residence.

6. The claimant entered into his marriage with Ms [C] on 13 April 2012. The evidence before the judge was that the decree absolute, dissolving the marriage, was issued on 9 January 2018. The divorce proceedings were commenced some time between January 2017 (according to the claimant's evidence, para 20 of the judge's decision) and September 2017, as shown on a court document dated 22 September 2017 (para 20 of the judge's decision).

7. Accordingly, Mr Clarke submitted that, on the evidence before the judge, the period for which the claimant needed to establish that Ms [C] had been exercising Treaty rights in the United Kingdom was the period from 22 September 2012 to 22 September 2017 (hereafter the "Relevant Period"). I agree with Mr Clarke's analysis of the start and end dates of this period.

Regulations 6 and 10 of the 2016 Regulations

8. In Gauswami (retained right of residence: jobseekers) India [2018] UKUT 00275 (IAC), a decision by the President and Upper Tribunal Judge Rimington, the Tribunal held that, for the purposes of determining retained rights of residence, in regulation 10(6)(a) of the 2016 Regulations (as well as its predecessor), the reference to a worker includes a jobseeker.

9. In the instant appeal, it is relevant to set out regulation 6 insofar as it sets out the requirements for a person to be regarded as a jobseeker as well as regulation 10(5) which sets out the requirements to be met for a person to have a retained right of residence. These provide (insofar as relevant) as follows:

   6. "Qualified person"

   (1) In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as—

   (a) a jobseeker;

(b) a worker;
(c) a self-employed person;
(d) a self-sufficient person; or
(e) a student.

(2) Subject to regulations 7A(4) and 7B(4), a person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if—
(a) he is temporarily unable to work as the result of an illness or accident;
(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom for at least one year, provided that he –
(i) has registered as a jobseeker with the relevant employment office; and
(ii) satisfies conditions A and B;
(ba) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom for less than one year, provided that he –
(i) has registered as a jobseeker with the relevant employment office; and
(ii) satisfied conditions A and B.
(c) he is involuntarily unemployed and has embarked on vocational training; or
(d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.

(2A) A person to whom paragraph (2)(ba) applies may only retain worker status for a maximum of six months.

(3) …

(4) For the purpose of paragraph (1)(a), “jobseeker” means a person who satisfies conditions A, B and, where relevant, C.

(5) Condition A is that the person –
(a) entered the United Kingdom in order to seek employment; or
(b) is present in the United Kingdom seeking employment, immediately after enjoying a right to reside pursuant to paragraph (1)(b) to (e) (disregarding any period during which worker status was retained pursuant to paragraph (2)(b) or (ba).

(6) Condition B is that the person can provide evidence that he is seeking employment and has a genuine chance of being engaged.

(7) A person may not retain the status of a worker pursuant to paragraph (2)(b), or jobseeker pursuant to paragraph (1)(a), for longer than the relevant period unless she can provide compelling evidence that he is continuing to seek employment and has a genuine chance of being engaged.

(8) In paragraph (7), “the relevant period” means –
(a) in the case of a person retaining worker status pursuant to paragraph (2)(b), a continuous period of six months;
(b) in the case of a jobseeker, 91 days, minus the cumulative total of any days during which the person concerned previously enjoyed a right to reside as a jobseeker, not including any days prior to a continuous absence from the United Kingdom of at least 12 months.

(9) Condition C applies where the person concerned has previously, enjoyed a right to reside under this regulation as a result of satisfying conditions A and B –
(a) in the case of a person to whom paragraph (2)(b) or (ba) applied, for at least six months; or
(b) in the case of a jobseeker, for at least 91 days in total,

unless the person concerned has, since enjoying the above right to reside, been continuously absent from the United Kingdom for at least 12 months.

(10) Condition C is that the person has had a period of absence from the United Kingdom.

(11) Where condition C applies –

(a) paragraph (7) does not apply; and

(b) condition B has effect as if "compelling" were inserted before "evidence".

"Family member who has retained the right of residence"

10.—(1) In these Regulations, "family member who has retained the right of residence" means, subject to paragraphs (8) and (9), a person who satisfies a condition in paragraph (2), (3), (4) or (5).

(2) …

(3) …

(4) …

(5) The condition in this paragraph is that the person ("A")—

(a) ceased to be a family member of a qualified person or an EEA national with a right of permanent residence on the termination of the marriage or civil partnership of A;

(b) was residing in the United Kingdom in accordance with these Regulations at the date of the termination;

(c) satisfies the condition in paragraph (6); and

(d) either—

(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership, the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

(ii) …;

(iii) …; or

(iv) ….

(6) The condition in this paragraph is that the person—

(a) is not an EEA national but would, if the person were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or

(b) is the family member of a person who falls within paragraph (a).

<u>The judge's decision</u>

10. The judge heard oral evidence from the claimant. At paras 11-15 of his decision, the judge summarised the oral evidence. Paras 12-14 relate to the evidence that the claimant gave concerning Ms [C]'s exercise of Treaty rights. Para 10 is also relevant. These paragraphs read:

> "10. … The question was whether the sponsor was exercising Treaty Rights at the start of the divorce proceedings in January 2017. She was looking for work in that month….
>
> 12. His ex-wife left their home at the end of 2015. She was working as a cleaner with her mother. They got work through contacts and the mother was already working for other people. There was no other paid work.
>
> 13. In respect of his second statement, he stated that his ex-spouse was working as a cleaner until December 2016 - as he was told by friends and

her mother. She did not take on other paid work. She had worked with her mother since 2012 and had carried out no other paid work. He dealt with her finances He does not know if she declared her income to HMRC. He was trying to get her back. She ignored him. He has no other details regarding her looking for work.

14. He showed a screenshot on Facebook which showed that she started working at Hanwell care home on 15 July 2018. He is not friends with her on Facebook. Her profile is public and not private as he can see her pictures. He has no correspondence showing their joint address."

11. The judge's consideration of this evidence is at paras 22-23 of his decision which read:

"22. … He has had difficulties in obtaining the relevant documents from his ex-spouse because of the breakdown in relations from 2015 onwards. However, there is now clear evidence that his ex-spouse had been exercising Treaty Rights at the time, being employed as a cleaner in a business with her mother from 2012 up to December 2016. It appears that she was then job seeking and from 15 July 2018 was working at Hanwell Care Home, though it is not known when she commenced that employment.

23. Based on my assessment of the credibility of the appellant's evidence, I am satisfied that his ex-spouse was indeed exercising Treaty Rights, whether as an employee or self-employed person or as a job-seeker, over the relevant 5-year period from 2012. They had been married for more than three years and had lived together for more than one year. He has provided evidence of the start of divorce proceedings in 2017 (and the decree absolute of January 2018) and his ex-spouse's ID card."

12. The judge's findings may be summarised as follows:

i) The claimant had produced evidence of the start of the divorce proceedings in 2017 and the decree absolute dissolving the marriage on 9 January 2018 (para 23 of the judge's decision).

ii) The claimant had produced Ms [C]'s identity card (para 23 of the judge's decision).

iii) The claimant and Ms [C] had been married for more than three years and had lived together for more than one year.

iv) Based on his assessment of the credibility of the claimant's evidence, the judge was satisfied that Ms [C] "*was indeed exercising Treaty rights, whether as an employee or self-employed persons or as a job-seeker, over the [Relevant Period].*

The grounds

13. The judge's findings as set out at para 12 i), ii) and iii) above were not challenged in the Secretary of State's grounds.

14. The grounds only challenge the judge's finding that Ms [C] had exercised Treaty rights for the duration of the Relevant Period. The grounds contend that the judge erred in reaching this finding because he relied solely upon the claimant's oral evidence. There was no documentary evidence at all to show at Ms [C] had exercised Treaty rights at any point of the marriage. The judge therefore erred in

stating, at para 22 of his decision, that there was now "*clear evidence*" that Ms [C] had been exercising Treaty rights at the relevant time.

Submissions

15. Mr Clarke referred me to the evidence that was before the judge concerning the exercise by Ms [C] of Treaty rights, which was as follows:

    i) In relation to the period from 2012 to 2016, it was clear from para 13 of the judge's decision that the evidence was oral evidence from the claimant that he had been told by friends and Ms [C]'s mother that Ms [C] was working as a cleaner until December 2016. Mr Clarke asked me to note the judge's reliance not only on oral evidence but hearsay evidence.

    ii) In relation to 2017, the only evidence was that mentioned in para 10, that Ms [C] was looking for work in January 2017. This evidence was based on the claimant's handwritten witness statement. Mr Clarke asked me to note that the judge again relied only on the appellant's own evidence. There was no supporting documentary evidence. In addition, there was no evidence that she was registered as a jobseeker or that she had a genuine chance of being employed. Furthermore, the claimant's evidence only concerned the month of January 2017.

    iii) In relation to the period from the date that the marriage was terminated (9 January 2018) to the date of the hearing (11 September 2018), the only evidence was the screenshot from Ms [C]'s Facebook page which showed that she started working at Hanwell Care Home on 15 July 2018.

16. Mr Clarke submitted that, given the evidence that was before him, the judge was simply not entitled to conclude that the evidence before him enabled the claimant to discharge the burden of proof on the standard of the balance of probabilities that Ms [C] had been exercising Treaty rights for the duration of the Relevant Period. He was not entitled to find that there was *"clear evidence"* of Ms [C] exercising Treaty rights.

17. The claimant said that he had tried hard to resume his relationship with Ms [C] to no avail. He then asked her to help him with the documents he needed to establish his case but she rejected him. He therefore looked at her Facebook page and saw photographs of her working at Hanwell Care Home which he showed to the judge and the Presenting Officer at the hearing before the judge.

18. I reserved my decision.

Assessment

19. I am satisfied that the judge erred in law in reaching his finding that the claimant had established that Ms [C] was exercising Treaty rights for the duration of the Relevant Period, for the following reasons:

    i) In the first place, it is plain that the judge relied upon the claimant's own subjective evidence, hearsay evidence (i.e. what the claimant was told by Ms [C]'s mother) and a screenshot from Ms [C]'s Facebook page. Such evidence, even taken cumulatively, is simply incapable of discharging the burden of proof to the applicable standard of the balance of probabilities, on any legitimate view.

In concluding that it was sufficient, the judge in effect applied too low a standard of proof.

ii) Further, and in any event, it is plain that there were material periods within the Relevant Period in respect of which there was simply no evidence whatsoever, not even any oral evidence or hearsay evidence or evidence from Ms [C]'s Facebook page. Specifically:

a) In relation to the period from 2012 to 2016, there is nothing to show that the claimant was told by Ms [C]'s mother that Ms [C] had been working continuously *from 22 September 2012* until December 2016. She merely told the claimant that Ms [C] was working as a cleaner "*until December 2016*", not that she was working continuously from September 2012 to December 2016.

b) In relation to the year 2017, the only evidence that the judge had was the evidence in the claimant's written statement, that Ms [C] was looking for work in January 2017. This was insufficient to show that she was a "jobseeker" within the meaning of regulation 6. There was no evidence to show that regulation 6(2), which included a requirement that Ms [C] be registered as a jobseeker with the relevant employment office, was satisfied. Furthermore, there was no evidence at all whether Ms [C] was looking for work or working for the remainder of the year 2017.

c) In relation to the period from the date of divorce (9 January 2018) until the date of the hearing before the judge (11 September 2018), the only evidence was the screenshot from Ms [C]'s Facebook page which, even if such evidence was sufficient to discharge the burden of proof on the balance of probabilities (which is not the case), only related to July 2018. There was simply no evidence that she was working from January 2018 until June 2018 or from August 2018 to September 2018.

20. Accordingly, not only is it the case that the judge's finding, that there was "*clear evidence*", was based on the claimant's own subjective written and oral evidence, hearsay evidence and evidence from Ms [C]'s Facebook page which, even taken cumulatively, was insufficient to discharge the burden of proof on the standard of the balance of probabilities, it was speculative, in that, there was simply no evidence at all in respect of certain parts of the Relevant Period, as explained above.

21. I am therefore satisfied that the judge erred in law in reaching his finding that the claimant had established that Ms [C] was exercising Treaty rights for the duration of the Relevant Period. As he could not otherwise have allowed this appeal, his error was material.

22. I therefore set aside the judge's decision to allow the claimant's appeal.

23. In re-making the decision, Mr Clarke accepted that the judge had found the claimant credible and that the Secretary of State has not challenged the judge's findings that: (i) the claimant had produced Ms [C]'s identity card (para 23 of the judge's decision); (ii) he had produced evidence of the start of the divorce proceedings in 2017 and the decree absolute dissolving the marriage on 9 January 2018 (para 23 of the judge's decision); and (iii) the claimant and Ms [C] had been married for more than three years and had lived together for more than one year.

24. On this basis, Mr Clarke accepted that the claimant satisfied the requirements of regulation 10(5)(d)(i) and that he only now needs to establish:

    i) that Ms [C] was exercising Treaty rights for the Relevant Period; and

    ii) if he were an EEA national, he would be regarded as exercising Treaty rights from 9 January 2018, the date that the marriage was terminated.

25. In relation to the requirement that Ms [C] was exercising Treaty rights for the Relevant Period, Mr Clarke accepted that, given that the judge found the claimant credible and that the claimant gave evidence that he had asked Ms [C], unsuccessfully, to help him by providing documents to support his application, it would be difficult for him to argue against the Upper Tribunal directing the Secretary of State to undertake enquiries in order to establish whether Ms [C] had exercised Treaty rights for the Relevant Period, in accordance with the Secretary of State's policy[2].

26. I am therefore issuing such a direction to the Secretary of State.

27. The claimant also needs to show that he satisfies regulation 10(6)(a). In this regard, I explained very carefully to the claimant at the hearing that, if the judge's decision were to be set aside, he would need to submit documents to show that he had been working or, if he were an EEA national, would be regarded as exercising Treaty rights for any relevant period. I told him to submit documents showing that he has been working from September 2017 until the date of the hearing before me together with a letter from Tesco Stores plc to confirm (as he had said at the hearing before me) that payslips are only available online from November 2018. I made it clear to him that it was for him to ensure that he sent me documents to cover the entire period and that I would not be requesting documents for any missing period.

28. Notwithstanding my clear instructions that the Upper Tribunal has no responsibility for requesting any missing documents and that it was his responsibility to ensure that he submitted all necessary documents, I received a bundle of documents from the claimant by email on 22 January 2019 with payslips and other documents which do not cover the entire period from September 2017 until 16 January 2019, the date of the hearing before me. In his cover email, he said that he has requested copies of his October – December 2017 payslips *"which I can forward to you in 5 days should it be needed".*

29. In addition, it appears that the claimant did not send to the Secretary of State a copy of the documents he sent to the Upper Tribunal on 22 January 2019.

30. The claimant is reminded, as he was told at the hearing, that it is *his responsibility* to decide what evidence he needs to submit in order to establish that, if he were an EEA national, he would be regarded as exercising Treaty rights in the United Kingdom. Put simply, if the Upper Tribunal is not in possession of necessary documents, he will lose his appeal. The Upper Tribunal will not request missing documents.

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[2] page 20 of the document entitled: *"Free movement rights: retained rights of residence*", version 3.0, dated 7 February 2017

31. This appeal will be listed for a case management review hearing in three months and a resumed hearing on the first available date after 4 months. It is part-heard. Both hearings will therefore be listed before me.

DECISION

The decision of Judge of the First-tier Tribunal Sweet involved the making of errors on points of law such that the decision to allow the appeal is set aside.

The Upper Tribunal will re-make the decision on the claimant's appeal at a resumed hearing.

DIRECTIONS:

1. I direct the Secretary of State to undertake such enquiries as he can reasonably undertake in order to establish whether Ms [C] was exercising Treaty rights for the duration of the Relevant Period, i.e. for the period from 22 September 2012 to 22 September 2017.
2. I direct the claimant to serve on the Secretary of State, within five calendar days of the date that this decision is sent to the parties, a copy of his email dated 22 January 2019 to the Upper Tribunal timed at 01:04 and the attachments to that email.
3. It is for the claimant to decide what evidence is necessary for him to establish that he satisfies regulation 10(6)(a). If he wishes to rely upon any further evidence in this regard, he must serve any such evidence on the Upper Tribunal and the Secretary of State within ten calendar days of the date that this decision is sent to the parties.
4. The respondent to inform the Upper Tribunal at the case management review hearing:
   (i) the outcome of his enquiries concerning whether Ms [C] was exercising Treaty rights for the duration of the Relevant Period; and
   (ii) whether the respondent accepts that the claimant satisfies the requirements of regulation 10(6)(a).

Both parties are to attend the case management review hearing. No exceptions.

Signed
Upper Tribunal Judge Gill

Date: 26 January 2019