Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/23925/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th December 2017	**On 22nd December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR TUDONU ABIDEMI GANDONU
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs S Hall of Counsel
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nigeria born on 20th of May 1975. He appeals against a decision of Judge of the First-tier Tribunal Thew sitting at Taylor House on 22nd of March 2017 who dismissed the Appellant's appeal against a decision of the Respondent dated 11th of June 2015. That decision was to refuse to issue the Appellant with a permanent right of residence card pursuant to Regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). This Regulation provides that a family member of an EEA national who is not himself an EEA national but who has resided in the The United Kingdom with the EEA national in accordance with the 2006 Regulations for a continuous period of 5 years shall acquire the right to reside in the The United Kingdom permanently. The burden of proof of establishing this requirement rests upon the Appellant and the standard of

proof is the usual civil standard of balance of probabilities. Facts and matters are established as at the date of hearing.

2. The Appellant met his wife Mrs Eila Maria Gandonu, a Finnish citizen ("the Sponsor"), in Finland in 2000. They married in 2002 and a child, M, was born on 7th of May 2007. The Appellant entered the The United Kingdom to join the Sponsor on a visa valid from 15th of November 2004 to 15th of November 2005 and again on a visa to join the Sponsor valid from 31st of October 2006 to 30th of April 2007. The Appellant, Sponsor and their child moved to the United Kingdom in August 2008. The Appellant applied for a residence card on the basis of his marriage to the Sponsor which was issued by the Respondent on 20th of January 2010 to expire on 20th of January 2015. On 3rd of February 2015 the Appellant applied for permanent residence as a confirmation of his right to reside in the United Kingdom and it was the refusal of this application by the Respondent on 11th of June 2015 that gave rise to the basis of these proceedings.

The Appellant's Case

3. The Appellant argued that he and the Sponsor were still in a genuine and subsisting marriage albeit that he was living in the United Kingdom and she was now in Finland having returned there to look after her parents. The Sponsor had exercised her treaty rights as a worker from her arrival in the United Kingdom in August 2008. In 2009, she had started her own business as a self-employed cleaner. The Appellant was issued with a residence card from 5th of July 2010 and the Respondent must have been satisfied at that time that the Sponsor was genuinely self-employed.

4. The Sponsor had travelled back to Finland on 14th of January 2015 to care for her mother who had been diagnosed with cancer and subsequently passed away in October 2016. The Sponsor continued to reside in Finland thereafter to care for her father whose health had been affected following the death of his wife. Although the Appellant and Sponsor lived apart the Appellant's case was that the marriage was subsisting. The Sponsor had visited the Appellant in the United Kingdom. The Appellant could not visit the Sponsor in Finland to see his wife and child because the Respondent had retained his passport from the time of his application in early 2015.

Explanation for Refusal

5. The Respondent refused the application on the grounds that the Appellant had not supplied sufficient evidence to show that the Sponsor had been self-employed for a continuous period of five years. There was no proof of registration with HM Revenue and Customs, no evidence of national insurance contributions being paid or invoices for work done or a copy of the Sponsor's business accounts. The only documents provided were three self-assessment letters and an HMRC national insurance contributions letter. The HMRC letters did not indicate that the Sponsor had been actively trading as a self-employed person and did not cover a 5-year period. The national insurance contributions letter did not confirm that any payment had been

made to the Sponsor. The Respondent concluded that the Sponsor had not been exercising her treaty rights as a qualified person and the application was refused.

6. The Appellant appealed against that decision arguing that the Sponsor was self-employed between 2011 and 2014 before she left the United Kingdom. The Appellant blamed a previous solicitor who had not submitted all the relevant documents that the Respondent required to establish the Sponsor's self-employed status. The grounds of appeal produced further documents from HMRC, tax returns and payslips for the Sponsor and bank statements for the Appellant.

The Decision at First Instance

7. The Judge was satisfied that there was adequate evidence by way of payslips and an employer's letter dated 7th of December 2009 together with a tax return to establish that the Sponsor was employed at that stage but there was less evidence relating to the Sponsor's claimed period of self-employment thereafter. The Judge attached some weight to the fact that there was no evidence from any customers of the Sponsor, no receipts and no way of identifying the income claimed except by way of the tax return. A letter from the accountants to identify evidence submitted to them in order to prepare the tax return would, the Judge held, have been of considerable assistance.

8. At paragraph 16 the Judge stated that the evidence to show that the Appellant, Sponsor and their son had lived together in the United Kingdom between 2008 and January 2015 was limited. The latest date on the documents addressed to the Sponsor and Appellant was a joint council tax bill dated 2010/2011. The tenancy agreement for the Appellant's address in Southampton was dated 1st of April 2014 but was in the Appellant's sole name. There was no explanation why there should be a tenancy in his name only when the evidence was that she did not leave the United Kingdom until January 2015.

9. There was a mistake in a date given in the Sponsor's statement as to when she left Finland to take a holiday in the United Kingdom to see the Appellant. Her statement said it was from August 2016 to August 2015 which was clearly wrong. The Appellant's evidence was that the holiday was from the 3rd until 10th of August 2015. A letter from the Appellant's sister referred to a holiday in August 2016 and that was the date the Appellant gave as the last time the Sponsor was in this country. However, there was no reference to any further visits in August 2016 in either the Sponsor's statement, which was dated 2017 and thus after any such holiday or in the Appellant statement which was dated 7th of September 2016 and would therefore been signed within a month after the claimed visit in August 2016. The Judge was concerned that the Appellant had made a statement which referred to a holiday in 2015 but not a more recent one in 2016. The only holiday the Judge decided was for one week in 2015.

10. Evidence had been given to the Judge of communications between the Appellant and the Sponsor in What's App which lacked any terms of endearment and did not indicate that this was a subsisting marriage. The basis of the refusal by the

Respondent was inadequate evidence to establish that the Sponsor had been exercising treaty rights as required over a 5-year period. On the evidence before the Judge the Appellant had not discharged the burden which was upon him to establish on a balance of probabilities that the Sponsor had been exercising treaty rights over a 5-year period and the appeal was dismissed.

The Onward Appeal

11. The Appellant appealed against this decision in lengthy grounds for permission arguing that the Judge had considered irrelevant matters in arriving at her decision such as the content of the What's App communications. The Respondent's refusal of the application was solely on the grounds of insufficient evidence provided for the period 2010 to 2015. This was an appeal by a family member of an EEA national and the case fell to be treated differently to unmarried partners who had to demonstrate they were in a durable relationship.

12. At paragraph 13 of the determination there was a list of the documents provided within the Appellant's bundle which related to the Sponsor's self-employment. The Tribunal had been provided with tax returns for the Sponsor from 2010 to 2015 prepared by an accountant. The grounds quoted the Judge that "there is no evidence of any gap in the self-employment declared in these returns". I pause to note here that that was not an acceptance by the Judge that the Appellant had provided sufficient evidence. At that point in the determination the Judge was quoting a submission made to her by counsel for the Appellant. The grounds claimed that the Judge had imposed a higher standard of proof on the Appellant than the balance of probabilities.

13. It was further argued that there was no specific list of documents a self-employed EEA Sponsor had to provide to demonstrate their working status in contrast to the specified documents found in Appendix FM for non-EEA Sponsors. The Appellant had provided reasonable evidence of the Sponsor's self-employment. Hers was a modest business of a domestic cleaning nature which was advertised through word of mouth. The Respondent must have been satisfied at the time of issuing a residence card in July 2010 that the Sponsor was genuinely self-employed at that stage. There was no reason to doubt this continued over the 5-year period which gave rise to the entitlement to a permanent residence card.

14. The application for permission to appeal came on the papers before First-tier Tribunal Judge Holmes on 18th of October 2017. In granting permission to appeal he wrote that it was arguable that the Judge's focus was not upon whether the Appellant had acquired a permanent right of residence by January 2015 or subsequently and that as such immaterial issues and irrelevant evidence were considered by the Judge. The Respondent had accepted that the Appellant lawfully entered the United Kingdom as the spouse of an EEA citizen exercising treaty rights and issued the Appellant with a residence card as a result. HMRC had accepted that the Appellant was a self-employed person and no issue was raised over the accounts of his business. Arguably the Appellant had provided in evidence all that could reasonably be

expected of him given the nature of his business and arguably the Judge failed to ask himself how the Appellant supported himself if he was not self-employed as claimed. It is arguable that the Judge misdirected himself either as to the burden and standard of proof or that [she] focused upon irrelevant material.

15. I pause to note here that Judge Holmes in granting permission to appeal referred to the Appellant's business and evidence provided of his self-employment. I assume that they are typographical errors and that he meant to refer to the Sponsor not the Appellant. In any event on 8th of November 2017 the Respondent replied to the grant of permission under rule 24 stating that the First-tier Tribunal Judge had found the Appellant had not established that the Sponsor was exercising treaty rights for a 5 year period which was a finding open to her on the evidence.

The Hearing Before Me

16. At the hearing before me counsel relied on the grounds of appeal which I have summarised above. The Judge had placed undue weight on the documents before her. The only concern the Respondent had was whether the Sponsor was exercising treaty rights. The Sponsor was still in Finland as she was nursing her father. She was there with her son M. The Judge had focused on irrelevant matters such as the What's App communications. The best evidence of the Sponsor's employment was the HMRC evidence. The Appellant had had indefinite leave to remain status in Finland. There was now a letter from the accountants Tahira and co dated 6th of December 2017 confirming that they had acted as accountants for the Sponsor giving the Appellant's current address for her. She had worked as a self-employed sole trader trading as a freelance cleaning service. They had prepared her business profit and loss accounts for the tax years from 2009 to 2015 from the documents and information provided by her.

17. Counsel argued that the issue raised by the Judge over the holiday of the Sponsor had no relevance to the case. The Appellant and Sponsor enjoyed a relationship until January 2015 when the Sponsor had to leave to nurse her sick mother. The Sponsor had not come to the hearing because it was not necessary as the refusal concerned whether the Sponsor was exercising treaty rights. She had made a statement and there was evidence in that statement. She had come back to see the Appellant for a short visit in 2015.

18. In reply, the Presenting Officer stated that he relied on the refusal letter and his rule 24 response. The grounds of onward appeal were a mere disagreement with the Judge's determination. The Judge's point was that she had not seen evidence that discharged the burden for the relevant period. In conclusion counsel reiterated that the family had arrived in the United Kingdom in 2009 when the Sponsor started work which the Respondent was aware of and which continued until January 2015.

Findings

19. The issue in this case was whether the Appellant could establish that the Sponsor had been exercising treaty rights for a continuous period of 5 years while he was living with her. The issue was not whether the marriage itself was genuine and subsisting. As there was no evidence of a divorce, following jurisprudence from the Court of Justice of the European Union such as **Diatta v Land Berlin**, the marriage would continue to be subsisting even if the parties had separated and were living in different countries as was the case here. What the Appellant had to show was the continuous self-employment of the Sponsor over a 5-year period.

20. I would respectfully disagree with the grant of permission in this case that the Judge had not focused upon whether the Appellant had acquired a permanent right of residence by January 2015. At the beginning of paragraph 16 the Judge made it clear that she was concerned that the evidence for the Appellant and Sponsor living together in the United Kingdom between 2008 and the middle of January 2015 was limited. What the Judge was concerned about was whether the Sponsor really was working as a self-employed cleaner as claimed.

21. The Appellant had to prove two things. Firstly, that he and the Sponsor had lived together for a continuous period of 5 years and secondly that during that time the Sponsor had been continuously exercising treaty rights. The Judge found against the Appellant on both points. She was satisfied that there was evidence of continuing contact between the Appellant and Sponsor and noted that the Sponsor had sent in a statement for the hearing. However, there were some errors in that statement whose resolution was not assisted by the absence of the Sponsor from the hearing.

22. I do not accept the argument that was made to me that there was no need for the Sponsor to attend the hearing based on the nature of the Respondent's refusal. The Respondent's refusal went directly to what the Sponsor had or had not done and she was best placed to answer questions about that. This was an important hearing for the Appellant and the Sponsor's absence was a significant one. Whilst I appreciate that the Sponsor may have wished to be in Finland to look after her sick father, it would not have been difficult for her as an EEA citizen to come to the United Kingdom for a short period in order to be present at the appeal hearing.

23. There were a number of matters of concern which the Judge had which the Sponsor should have dealt with by way of oral evidence since the Sponsor had not dealt with them in her statement. These included the lack of documentation to show that she and the Appellant were living together for the whole of the relevant period. The tenancy agreement in the Appellant's sole name was dated 1st of April 2014 eight months before the Sponsor was said to have gone back to Finland to look after her parents. Even if she had had concerns about her parents at that early stage it is difficult to see why she would still not have been put on a tenancy agreement for the matrimonial home particularly as on the Appellant's case the Sponsor was based in the United Kingdom as she was continuing to run her self-employed business for the rest of the year. The Judge quoted the Appellant's description of the marriage at

paragraph 17 of her determination that it was not "as it had been" by the time of the hearing. The state of the marriage by that stage was irrelevant. The Judge found at paragraph 18 there was inadequate evidence to establish that the Sponsor had been living with the Appellant or exercising treaty rights as required over the 5-year period.

24. The Appellant now seeks to put in as evidence (if the determination is set aside) a letter from the Sponsor's accountants dated 6th of December 2017 which is in answer to the point made by the Judge at paragraph 14 that a letter from the accountants would have been of considerable assistance to her. That letter has come into existence after the determination and therefore the failure to consider it cannot be an error of law. In submissions, I was referred to it but it is apparent on the face of the letter that it raises as many questions as it purports to answer.

25. The accountants state they prepared business profit and loss accounts for the period 2009 to 2015 from documents including income receipts and expenses invoices and information provided by the Sponsor. No such documents were produced to the Respondent or the Judge at first instance to establish the existence of the Sponsor's business. It might have been of assistance to the Judge to be told what documents had been provided to the accountants by the Sponsor. In considering whether the Judge made a material error of law in her determination, the existence of this letter from the accountants is of no importance since it was produced after the hearing. Were the matter to proceed to a rehearing of the appeal on the basis that the decision at first instance was set aside, I would want clarification of the contradiction between what the accountants say they were given and what the Appellant was able to produce at first instance. I do not find that the letter of itself, indicates that the Judge may have made a material error of law.

26. The submission to me that there was a material error of law by the Judge centred on one particular issue namely what was said to be the inadequate consideration by the Judge of the HMRC documentation. There were tax returns in respect of the Sponsor dated April 2010 dealing with employment and for each of the years from 2010/2011 until 2014/2015 inclusive in respect of self-employment. As I have indicated, see [12] above, it was counsel for the Appellant who submitted that there was no evidence of any gap in the self-employment declared in those returns. The Judge's concern was that there was no evidence supporting the claimed income stated in the tax returns, see paragraph 14 of the determination.

27. The weight to be placed on these tax returns was a matter for the Judge. One might ask the question why would someone prepare a tax return if they were not working? The difficulty for the Appellant with that argument is that the Sponsor's claimed earnings were modest which would mean that no tax liability would arise from the tax returns and thus they could be submitted, assuming that was what happened, without any repercussions since they were below the £10,000 tax threshold. There were some oddities in the tax returns such as that the tax return for April 2013 to April 2014 had been submitted to HMRC in October 2015 some months after the Sponsor had left the United Kingdom to return to Finland. The tax return for April

2014 to April 2015 the period during which it is said the Sponsor returned to Finland was not submitted until 26th of January 2016 raising the question of how the accountants were given the information to prepare a tax return for the Sponsor in Finland. The accountants had been employed by the Appellant in relation to his company Precedents Care Ltd. They had produced a letter dated 20th of April 2016 confirming that they were acting for the company. If they had been preparing accounts for the Sponsor for the period between 2010 and 2015 it is difficult without further explanation to see why those tax returns were not submitted to the Respondent when the Appellant made his application for permanent residence, an application made a few weeks after the Appellant and Sponsor had separated when the Sponsor had returned to Finland.

28. These points are somewhat speculative (and were not raised by the Judge at first instance) because I am concerned at this stage only with whether the Judge made a material error of law. What is important is that the Judge did not consider that the tax returns by themselves proved the Appellant's case that the Sponsor had been exercising treaty rights for a continuous period of 5 years. If such questions as I have set out at [27] above had been raised it would not have been possible to have investigated them given the absence of the Sponsor from the hearing at first instance.

29. I do not consider that the Judge can be criticised for placing greater weight on the absence of supporting documentation which the tax returns are said to be based on rather than the tax returns themselves. It was for the Appellant to prove his case but the Judge was not satisfied that the Appellant had done this. There were unexplained gaps in the documentation for the period during which the Appellant and Sponsor were said to have lived together which I have referred to above. Importantly there was a lack of evidence to show the existence of the Sponsor's self-employment when such evidence could reasonably have been expected to be obtained. If the accountants letter of 6th of December 2017 is to be relied on, that evidence did exist because it is said it formed the basis of the tax returns making it even more inexplicable that the supporting evidence had not been presented at first instance to the Judge.

30. I do not find that there was a material error of law in the determination. The Judge could only decide the case on the basis of the evidence before her and there were problems with that evidence. I do not accept the criticism made in the grant of permission to appeal and repeated in submissions to me that the Judge considered irrelevant matters. Nor do I accept the criticism that the Judge decided the case on a basis higher than the balance of probabilities. The Judge specifically directed herself on that standard of proof at paragraph 18 and there is nothing in the determination to indicate she decided the case on any different basis. Nor do I consider it relevant that the Respondent had granted a residence card to the Appellant apparently on the basis that she was satisfied the Sponsor was exercising treaty rights in 2010. The test was not whether that card had been correctly issued but whether the Sponsor could show five years continuous self-employment from 2010 until 2015 which required an examination of what had happened since the residence card was issued. The Judge considered the evidence of that such as it was and gave cogent reasons why the

Appellant's claim failed on that basis. I find there was no material error of law and I dismiss the Appellant's onward appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 15th of December 2017

…….
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee was payable and I have dismissed the appeal and therefore there can be no fee award.

Signed this 15th of December 2017

…….
Judge Woodcraft
Deputy Upper Tribunal Judge