Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33261/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 October 2017	**On 23 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

MR AKINSEYE AKINSEHINWA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Nicholson, Counsel
For the Respondent: Ms Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria who appealed against the respondent's decision to refuse him a residence card as confirmation of a right of residence under the EEA Regulations. His appeal against that refusal was dismissed by Judge of the First-tier Tribunal Turquet ("the FTTJ") in a decision promulgated on 22 December 2016.

2. No anonymity direction was made in the First-tier Tribunal; nor has such a direction been requested before me. None is required.

3. Permission to appeal was granted by First-tier Tribunal Judge I D Boyes on 25 July 2017 on the basis that the grounds of appeal were arguable. No reasons were given for this conclusion.

Submissions

4. Mr Nicholson, for the appellant, relied on detailed written grounds and, in addition, made lengthy oral submissions. I summarise these as follows:

   (i) The FTTJ had misapplied the burden of proof in that where the respondent alleged abuse of rights or fraud, the burden of proving that rested on the respondent (Rosa v SSHD [2016] EWCA Civ 14). The respondent provided no evidence to rebut that of the appellant.

   (ii) The FTTJ found a discrepancy in the alternative descriptions of the appellant as "Admin Assistant" and "Virtual Admin Assistant". This finding was not sustainable on the evidence. Furthermore, the FTTJ had drawn on "personal experiential understanding" in making this finding. This was not open to her.

   (iii) It was not open to the FTTJ to make adverse findings as a result of parallel lines of evidence. This had occurred with regard to the way in which the appellant had found her job; the nature of her role, her hours of work, her holiday entitlement.

   (iv) There was a reasonable explanation for the different spellings of the appellant's name. This was of no value in the assessment of the evidence; this was not an appeal relating to a sham marriage.

   (v) The perceived discrepancies identified by the FTTJ did not exist.

5. For the respondent, Ms Pal submitted that the findings were open to the FTTJ on the evidence. Even if the FTTJ had erroneously taken into account her own assessment of the role of an administrative assistant, and this amounted to an error of law, this was immaterial given the other valid adverse findings on the evidence. The respondent had relied on the HMRC disclosure of the appellant's records of employment which did not refer to the claimed employment. There were no P60s and no reasonable explanation for the lack of HMRC records. It was accepted the burden was on the respondent to show the documents were not genuine, but the FTTJ had seen and heard the evidence of the appellant's witnesses and was entitled to find the appellant's evidence was not reliable. The appellant merely disagreed with the findings.

6. Mr Nicholson replied that it was difficult to separate paragraph 29 of the decision from the earlier findings. If that were right, the FTTJ had based her findings on discrepancies which did not exist. Paragraphs 29-31 could not stand on their own because the witnesses would have been found consistent. The explanation for the lack of HMRC records was the appellant's low income. The FTTJ's view that Mr Odupitan was not a satisfactory witness was as a result of her earlier findings. If those findings were not based on the evidence, her assessment of the witness could not stand. The respondent had not discharged the burden of proving fraud. He submitted that the decision was perverse: the FTTJ had relied on discrepancies which did not exist.

Discussion

7. The burden of proving a document is false rests with the accuser. I agree that Rosa is relevant here. In this case the respondent had been provided by the appellant with various payslips and a letter issued by Pytrops Ltd to demonstrate his former wife's employment. The respondent had obtained and disclosed a letter from HMRC setting out the appellant's former wife's

employment history from 7 December 2009 to 30 August 2015. The content of this letter was not disputed by the appellant before the FTTJ. It was submitted by Mr Nicholson that the FTTJ should have taken into account that the appellant's wife had earned less than the income tax threshold and this explained the absence of any record of the employment with HMRC. However, I note that, according to the HMRC, most of the appellant's income in the period shown was below the income tax threshold; only in the tax year 2010/11 was tax deducted from her income. The FTTJ cannot therefore be criticised for having failed to take this potential explanation into account, particularly as the evidence of Mr Odupitan, the appellant's wife's purported employer, was that he could not provide an explanation for the absence of any record of this employment with HMRC [13].

8. In her decision [19] the FTTJ notes the respondent initially had doubts about the authenticity of the employment because the EEA sponsor was paid cash and payments could not be verified by reference to her bank statement. The respondent noted the employer had "very little internet presence and an address more than a 50 minute drive away from where the Appellant claimed to have resided with his EEA Sponsor. This raised concerns as to whether it would be reasonable to travel such a way for earnings of £435 per month." The FTTJ noted the HMRC evidence and that, in the light of this, the respondent did not consider the documents in relation to the company to be genuine.

9. At [30] the FTTJ states the "Appellant has failed to address the issues raised by the Respondent. The Appellant has not demonstrated that his EEA sponsor was employed by Pytrops as claimed. He has not provided credible evidence that Ms Cayol was a qualified person at the date of divorce 16.9.14. The Appellant has not satisfied me on the balance of probabilities that his wife was employed or self-employed as claimed until the date of termination of the marriage. I do not find that it satisfies me on the balance of probabilities that she was exercising Treaty Rights on 5.11.2013" [31]. She goes on to find she is "not satisfied on the balance of probabilities that the Appellant can satisfy the requirements of Regulation 10(5)(b)." [32].

10. In Rosa it was held that the legal burden was on the SSHD to prove that an otherwise valid marriage was a marriage of convenience so as to justify the refusal of a residence card under the EEA Regulations. Paragraphs 25 and 26 were cited in the application for permission to appeal to this tribunal, but paragraph 27 is particularly relevant:

> "….When translated into the position before the tribunal, that is tantamount to saying that the legal burden of proof in relation to marriage of convenience lies on the Secretary of State but that if the Secretary of State adduces evidence capable of pointing to the conclusion that the marriage is one of convenience, the evidential burden shifts to the applicant".

This was reiterated at the end of paragraph 29 where the Court of Appeal interpreted the guidance in Papajorgji (EEA spouse – marriage of convenience) Greece [2012] UKUT 00038 (IAC):

> "The result that I think the tribunal must have intended is achieved if the legal burden of proof lies on the Secretary of State throughout but the evidential burden can shift, as explained in *Papajorgji*. In my judgment, that is the correct analysis."

11. In the present case, the respondent relied on unchallenged evidence to the effect hat the HMRC had no record of the appellant's working during the period in question. Whilst the FTTJ did not cite the guidance in Rosa, she accepted the evidence from HMRC. Given the

absence of challenge to that evidence, this was appropriate. Whilst the FTTJ did not state in so many words that the evidential burden had passed to the appellant, in practice she proceeded on that basis. For this reason, I find that the FTTJ's error of law in failing to identify the burden was on the respondent was immaterial, given the lack of challenge to the HMRC material and the failure of the witnesses to provide a reasonable explanation for the absence of any HMRC record of the sponsor's employment during the relevant period. The respondent had satisfied the legal burden of proof. The evidential burden thus passed to the appellant.

12. The FTTJ considered the evidence of the appellant carefully and thoroughly. She identified various discrepancies in that evidence and whilst some were minor, others were more serious. She identified inter alia the lack of correlation between cash income received and bank statement entries, the failure of the EEA sponsor's employer to provide evidence the EEA sponsor had been on the company's payroll [29], that Mr Odupitan did not know the EEA sponsor's holiday entitlement, Mr Odupitan's inability to explain the absence of any HMRC record of the EEA national's employment at Pytrops [29], the inconsistency in the evidence of the appellant and his brother as to the nature of the EEA sponsor's work at the date of marriage [30] and the misspelling of the EEA sponsor's name [30]. The FTTJ also identified a discrepancy in the appellant's evidence as regards the formal description of the EEA sponsor's role: Virtual Admin Assistant as against Admin Assistant. The FTTJ noted there was no explanation for the change in job title. That finding is not challenged; the appellant merely contends that there is little difference between them and not enough to justify an adverse credibility finding. The degree of weight given to these inconsistencies and discrepancies is a matter for the FTTJ. She took them into account in the round and it was appropriate for her to do so.

13. I agree with the appellant that it was inappropriate for the FTTJ to give her own meaning to the job title of "Admin Assistant" and to decide, effectively, that the description in the evidence of that role did not justify such a title. To do so was to prefer her own opinion of the role of an administrative assistant as against the description in the evidence. However, this is one issue amongst many valid matters of concern for the FTTJ as regards the evidence before her. Even if this were discounted, the remaining discrepancies, taken in the round, were sufficient to undermine the reliability of the evidence as to the EEA national's employment.

14. It was not incorrect for the FTTJ to note the evidence of Mr Odupitan that the EEA sponsor's job had been advertised on Gumtree and that the appellant's evidence had been that she found the job through a church member. Whilst it may be that these amount to parallel lines of evidence, as submitted by Mr Nicholson, in the absence of evidence that these two lines were linked the FTTJ was entitled to find them discordant.

15. Mr Nicholson summarised by submitting that this appeal was pursued on the basis that the FTTJ's findings were perverse, including being based on no evidence at all. A challenge on the grounds of perversity involves a high bar (R & Ors v SSHD [20905] EWCA Civ 982). The findings of the FTTJ were reasonably open to her on the evidence before her, notwithstanding the errors I have identified above. Those errors were not material to the outcome. The FTTJ's findings are sustainable on the evidence notwithstanding her failure to place the legal burden of proof on the respondent initially and her ascribing her own interpretation of the EEA national's job title. The FTTJ was entitled to find that the appellant's documentary and witness evidence was not sufficiently reliable for a finding that the EEA national had been employed by Pytrops, as claimed.

16. For these reasons, there is no material error of law in the FTTJ's decision and reasons.

Decision

17. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

18. I do not set aside the decision.

Signed *A M Black* Date 20 October 2017

Deputy Upper Tribunal Judge A M Black