



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/25052/2012

THE IMMIGRATION ACTS

Heard at Field House  
On 18<sup>th</sup> September 2013

Determination Promulgated  
On 4<sup>th</sup> October 2013  
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Before

UPPER TRIBUNAL JUDGE D E TAYLOR  
UPPER TRIBUNAL JUDGE REEDS

Between

DONALD ONOSEDEBA OKPEKPE

and

Appellant

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Spio-Aidoo, of E Spio Solicitors  
For the Respondent: Ms A. Everett, Senior Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal brought by the Appellant from a decision of First-tier Tribunal Judge Napthine who dismissed an appeal by the Appellant against a decision to

refuse to issue him with a permanent residence card in accordance with the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") as a family member.

## Background

2. The Appellant is a citizen of Nigeria who was born on 1<sup>st</sup> January 1968. On 11<sup>th</sup> August 2003 the Appellant married Margaret Pamela Okpekpe in Vienna. It is asserted on behalf of the Appellant that he moved to London along with his wife on 23<sup>rd</sup> August 2003 and that they lived at an address there from August 2003 until June 2004. On 24<sup>th</sup> August 2004 he presented himself to UKBA as the spouse of Margaret Pamela Okpekpe, an EEA national who exercising her treaty rights in the UK and accordingly on 5<sup>th</sup> October 2004 was issued with an EEA residence card on this basis. It is said that the marriage between the parties was annulled by Margaret Okpekpe on 4<sup>th</sup> May 2004 in Vienna, however the Appellant claims to have been unaware of that fact until a date in 2008 and it is claimed that she carried out those proceedings without his knowledge. It is asserted on behalf of the Appellant that despite that, the parties lived together between 2003 until their separation in 2008.
3. On 1<sup>st</sup> October 2009 the Appellant made a human rights application for leave to remain in the UK on the basis that his mother was residing in the United Kingdom and that he had previously been married to an EEA national. That application was refused.
4. On 7<sup>th</sup> January 2012 the Appellant applied for permanent residence stating that in 2008, whilst the relationship was ongoing between the Appellant and Margaret Okpekpe, he discovered that she had had the marriage annulled and it was upon discovering of the annulment that that brought around the end of the relationship, on the basis that he was a family member of an EEA national and that he had resided in the UK with an EEA national in accordance with the EEA Regulations for a continuous period of five years.
5. In a notice of immigration decision dated 30<sup>th</sup> October 2012 that application was refused because the Respondent was not satisfied that the Appellant had five years' lawful residence as an "unmarried partner". Full reasons for the decision were set out in a Notice of Refusal of the same date.
6. The Appellant exercised his right to appeal that decision and the appeal came before the First-tier Tribunal (Judge Naphtine) on 25<sup>th</sup> February 2013.
7. In a determination promulgated on 4<sup>th</sup> March 2013, the judge found that the Appellant was never married to Margaret Pamela Okpekpe during the time that he had been in the United Kingdom on the basis that their marriage was annulled on 4<sup>th</sup> May 2004, which had the effect of voiding it ab initio, that is, as if they had never been married, therefore there was no marriage to refer back to. At paragraph 11 of the determination, the judge reached the conclusion that even if the marriage were not void ab initio, in the light of the ruling of **Ahmed (Amos; Zambrano; Regulation 5A(3)(c) 2006 EEA Regulations) [2013] UKUT 00089 (IAC)** the spouse of an EEA

national/union citizen does not acquire a retained right of residence upon a divorce unless the EEA national was in the United Kingdom and exercising treaty rights at the date of the lawful termination of the marriage: **Amos [2011] EWCA Civ 552** was followed. Thus the judge concluded the Appellant would not be assisted in the light of that decision and that he had no rights flowing from any marriage that he may have contracted with Margaret Pamela Okpekpe.

8. The judge made reference to the application that the Appellant had made to a court in Vienna to have the annulment set aside which was still outstanding. The judge therefore found that at the date of the hearing the marriage was still annulled and thus there was no marriage to refer to. The judge also observed that matters may be different if and when the court in Vienna acts to reinstate the marriage if it was minded to do so but that at the present time “there is no reason to suppose the court will so act.”
9. The judge therefore concluded that the Appellant had not established five years’ residence in the UK to enable him to claim under Regulation 15.
10. The rest of the determination dealt with the Appellant’s removal in the light of Article 8 of the ECHR. At paragraphs 15 to 23, the judge dealt with Article 8 and with particular reference to his family life and private life but did not find that Article 8 was engaged and dismissed the appeal.
11. The Appellant sought permission to appeal that decision on the basis that the judge had failed to consider evidence placed before the First-tier Tribunal demonstrating that the Appellant and his wife had been living together from 2003 until their separation in or about 2008 and that she had been exercising treaty rights in the UK whilst together. Therefore, the judge had failed to consider the fact that the parties had been living together as unmarried partners and whether or not he had been in a durable relationship with an EEA national and had therefore satisfied the Regulations, demonstrating that he had resided in the United Kingdom for a continuous period of five years. There was no challenge raised in the grounds to the decision reached by the First-tier Tribunal in respect of Article 8 of the ECHR.
12. Permission was granted on 26<sup>th</sup> March 2013 on the following grounds:
  - “1. First-tier Tribunal Judge Naphine dismissed the Appellant’s appeal against the decision of the Respondent to refuse to issue a residence card as confirmation of a right of residence of the family member of an EEA national having regard to Regulation 8(5) and 10(1)(b) of the Immigration (EEA) Regulations 2006, and on human rights grounds.
  2. Although reference is made in the grounds for Regulation 15(1) the grounds, submit in terms, that the judge failed to consider Regulation 8(5) of the Regulations.
  3. It is arguable that the judge concentrated only on whether there had been a valid marriage and its duration that failed to consider whether, even outside marriage

there had been a durable relationship and the length of time it had endured. This amounts to an arguable error of law.”

### **Error of Law**

13. Thus the appeal came before the Upper Tribunal. In a decision promulgated on the 15<sup>th</sup> May 2013, the Upper Tribunal reached the conclusion that the determination of the First-tier Tribunal disclosed an error of law for the following reasons:

- “18. I am satisfied that the First-tier Tribunal (Judge Napthine) made a material error of law. The Regulations demonstrate that a family member of an EEA national who is not himself an EEA national but has resided in the United Kingdom with the EEA national in accordance with the Regulations for a continuous period of five years acquires a permanent right of residence. The question raised in this appeal was whether or not the Appellant had established that he had been resident in the United Kingdom for a period five years on the basis upon which it was asserted by the Appellant that he had lived with Margaret Okpekpe notwithstanding the annulment of the marriage between 2003 and 2008.
19. It is clear from the determination that the judge dealt with the case on the basis of the validity of the marriage and its duration and the circumstances surrounding the annulment of the marriage but had failed to consider whether, even outside marriage if there had been a durable relationship and the length of time this had endured. Despite the marriage being annulled, this was a case in which it was asserted on behalf of the Appellant that the parties continued to live together between 2003 and 2008 and thus the issue of a durable relationship was raised based on their living together as an unmarried couple. It is clear from the determination, and the concession made on behalf of the Secretary of State by Miss Pal that this was an error of law. It is right to observe that Miss Pal did not concede that it was a material error. However I consider that the error was material. If a person can demonstrate that they have five years of residence in accordance with the Regulations that person acquires a permanent right of residence. If that relationship subsequently comes to an end, the permanent right of residence is not lost unless that person leaves the UK for a period of two years (I refer to the Regulation 15(2)). Thus in this case it was incumbent upon the judge to make a decision based on the evidence placed before the Tribunal as to whether or not there had been a durable relationship between the Appellant and Margaret Okpekpe and the length of time that it had endured. The Regulations demonstrate that if a claimant could not establish five years’ residence, they would not be able to acquire a permanent right of residence and would therefore have to show a durable relationship at the date of the hearing (see Regulation 8(5)). The Appellant would not be able to show that because he was not in a relationship with Margaret Okpekpe since a date in 2008.
20. The following relevant issues remain and were not dealt with by the FtT principally because no findings of fact were made concerning the circumstances of the annulment, the alleged relationship which was said to continue between 2003 and 2008 and whether it was established that they were living together nor whether the Appellant’s former wife was exercising treaty rights during the period. On the basis of his case as was put before the FtT (although no findings were made upon it) was that he was in a relationship irrespective of the

annulment. The relevant Regulations would demonstrate that he may be deemed to be family member under Regulation 7(3) if he was firstly an extended family member and secondly, had a residence card. The fact that a residence card as issued in October 2004 on the basis of the marriage may have relevance. It was issued on the basis of his marriage and not as an EFM. Thus the questions remain; was there a relationship that continued from 2003-2008 and the nature of it, was his former wife exercising treaty rights during the relevant period and what was the status of the residence card issued in 2004 (which was based on marriage and not as an EFM) and whether it was a nullity in the light if the annulment and does the Appellant fall within Regulation 7(3).

21. Thus I am satisfied that the decision of the First-tier Tribunal is materially flawed in law and consequently I set the decision aside. There will have to be a resumed hearing before the Upper Tribunal to consider this issue further which will involve a consideration of the Appellant and his witness giving evidence and for the evidence to be considered in the light of the documents provided before the First-tier Tribunal and the relevant Regulations. “

14. Thus the decision in respect of the EEA Regulations was set aside to be re-made at a resumed hearing.

#### **The re-making of the decision:**

15. The Appellant was represented by Ms Spio-Aidoo and the Respondent by Ms Everett, Senior Presenting Officer. At the outset of the hearing we heard from Ms Everett concerning the matters set out in the refusal letter. She informed the Tribunal that the refusal letter had been decided under a misapprehension of the law and of the facts and that accordingly there was no concession on the part of the Secretary of State concerning the issue of whether the Appellant had demonstrated that he was in a durable relationship with an EEA national during the requisite period. Ms Spio-Aidoo confirmed that the appeal had proceeded before the First-tier Tribunal and the Upper Tribunal on the basis that the issue was to determine whether the Appellant had demonstrated that he was in such a relationship and that that was the purpose of the hearing before this Tribunal.

16. It was also common ground between the parties that the issues that we must determine were two-fold; whether the Appellant was in a durable relationship for the requisite period and whether the EEA national was exercising treaty rights or was otherwise a qualified person during that time period, namely August 2003 until August 2008.

#### **The Evidence**

17. The Appellant's bundles were numbered A and B for convenience. Bundle A consisted of the original bundle before the First-tier Tribunal numbering pages 1 - 50 (not 60 as erroneously set out in the index). Bundle B consisted of other documentation such as bills provided before the Upper Tribunal. There were also some additional documents provided on the morning of the hearing which formed bundle C. Ms Everett relied upon the Respondent's bundle and in addition provided

a copy of a determination of the First-tier Tribunal (Judge Blair-Gould) concerning an application made by this Appellant in 2010 for leave to remain outside the Immigration Rules.

18. We also heard oral evidence from the Appellant. The Appellant adopted his statement (see pages 10 and 11 of bundle A). He confirmed that he had entered the United Kingdom in August 2003. He had not travelled with his wife Margaret because he had come by himself. A few days later she later joined him. He said in his evidence that she had worked for the same company but she worked in Ealing and he had worked in Shepherds Bush. He said that when they first lived together it was at an address Southall but they moved from that address on a date that he could not remember in 2004 and thereafter lived at an address at Westminster Road in Hanwell.
19. He was asked about his relationship with Margaret and stated that it was a good relationship in fact it was a great relationship. He said that they did not have children but that at one point his partner was expecting a baby and made reference to K6 of the Respondent's bundle document (dated 9/10/2006). He was asked about the time when she was pregnant and he had claimed that she had lost the baby and then she had had fibroids. When asked what year that was the Appellant stated "2005 or 2006 I can't remember which". He claimed that she was working throughout the time she was in the United Kingdom. He was asked in evidence-in-chief to remember the exact time that he had moved out of the property. The Appellant said that he had moved out "some time in 2009". He gave an explanation that he was disturbed when he found out about the annulment and moved out. He took his stuff and then called a friend. He spoke to friends from the church and they tried to "put us together" he said that they were always in contact with Margaret and that there was a lot of "coming and going" with a lot of people talking to them from the church about the relationship. He was asked whether in 2008 they were in a relationship. He stated that they had always lived as a couple.
20. In cross-examination he was asked about his witness statement (paragraph 8) in which he had stated he had moved out in 2008 after he had discovered the annulment. The Appellant stated that that was not correct and that he did not move out. He gave an explanation that he tried to ask her about it (the annulment) to figure out why she did it. He claimed that he had just left and spoke to friends who were trying to "put them back together". He claimed that it was in April 2009 that he moved out fully. He was asked when he discovered this deception and he stated that it was "April 2008". When asked why it was April 2008 he then said it was early 2008 but he was not sure. He was asked why they finally separated in 2009 on his own evidence. He said that he wanted to know why she had done it (by reference to the annulment). When asked by the Presenting Officer to give the reason why she had annulled the marriage the Appellant stated that "I have no idea, everyone came to talk to us and wanted to know. I can't understand why she did it." He was asked if he had stayed in touch with her and he said that he had not although friends have seen her and she had been to the local church.

21. He was asked in cross-examination about the documents that he had produced and he how he had obtained them. He gave an explanation that they put all the documents in one place including bills etc. He was asked specifically how he had obtained Margaret's payslips. He said that when he left he tried to sort out his stuff and "somehow some stuff came with me." He was asked whether he had taken the medical documents when he had left in 2009. He said that he had taken those documents and had kept them since 2009. When asked why he had kept them he claimed that "everyone keeps documents". He was asked that in making the application he would have to provide evidence as to her circumstances and whether or not he had got in touch with Margaret? He said that he had not.
22. He was then asked in cross-examination about her medical problems and asked to tell the court what they were. He said he could not tell the court of any details. When asked why he did not know he said he did not know about her medical problems. He said that he had had some tests. The only thing he said he remembered was that she had fibroids.
23. As to the proceedings in Vienna, his statement was put to him where he claimed to be in "constant contact with the lawyer". He was asked if the proceedings were still ongoing and he said that they were. He was asked what the current situation was. The Appellant replied "I don't know". He then claimed that he had been in contact with his Viennese lawyer and that the "Vienna court was contacting someone in London. I don't know the details." He was then asked why he wanted to reverse the annulment and declared in his evidence that he was not seeking to do so. He said that he was just seeking to find out an explanation as to why it had occurred. He claimed that he had obtained legal aid in respect of the proceedings. He confirmed that he had never received an explanation from Margaret as to why she had annulled the marriage.
24. We heard no further evidence from any other witness called on behalf of the Appellant.

### **Submissions**

25. We heard submissions from each of the advocates. Ms Everett submitted that the Appellant had not given credible evidence before the Tribunal. This was a situation which beggared belief and there was no evidence from the absent party involved as to why she would obtain an annulment when it was asserted that the parties had carried on living together. The Appellant's claim is that he has never had an explanation for this which is surprising.
26. As to the date in which he had ended the relationship and he had moved out, the evidence before the court had always been on the basis that it was in 2008 although the month had never been specified. His oral evidence now was inconsistent with that by claiming it was in 2009. Even if there was evidence to demonstrate there was a durable relationship after the date of the annulment, the Appellant could not discharge the burden upon him to show that there was a durable relationship between August 2003 and August 2008.

27. The Appellant had not given a credible account of how he had kept hold of his wife's documents. The account given of keeping important ones in the box and then taking some documents but not others is not a credible explanation for the failure to produce a coherent set of documents. There are also no cogent reasons given as to why he had not contacted his wife to obtain the documentation he required, if it were the position that he had been in a durable relationship for the requisite period and that she had been exercising treaty rights. This was not a case of it being deeply acrimonious and the court should not accept the explanation as to why there is insufficient documentation.
28. As to the proceedings in Vienna they have been ongoing for an extraordinarily long length of time. It is not clear why he would wish to rectify the annulment but then only seek an explanation as to the reasons for seeking such an order given the length of time that had elapsed. There is no reliable or plausible account given by the Appellant concerning those proceedings. As to the health problems, a further extraordinary detail is that it is claimed that the couple were trying to have a baby but the Appellant could not give any details as to what the outcome was and his evidence in this respect was implausible. Ms Everett submitted that the documentation taken in conjunction with the evidence was not reliable; whilst she did not claim that the documents were fraudulently obtained there was little upon their contents to demonstrate that this was a durable relationship between the requisite dates.
29. Ms Spio-Aidoo relied upon the skeleton argument that she had produced. In addition she submitted that the Appellant moved out in 2009 and never returned to the property. She said that he had submitted documents to show that in November 2008 it was in the document making a paying for visa card at bundle C. Whilst the date of payment was said to be 3<sup>rd</sup> December 2008 she conceded it did reflect historically an earlier period.
30. As to his history, she submitted that he had demonstrated that he had entered the United Kingdom in August 2003 and had shown evidence of his previous address. There were documents to show that there was council tax addressed to both of them and a tenancy agreement in their joint names. She submitted that Margaret was still living at the address at 7 Westminster Road. However there was no evidence in support of that provided. She submitted that the Vienna proceedings have no bearing on the current case and that he had given a credible account as to why he continued with the proceedings because he wished to know why she had sought an annulment of the marriage and that was understandable.
31. She submitted that they had lived together for five years having been granted a residence permit in 2004. He had never travelled outside the UK for two years and thus if he could demonstrate and establish the five year period he would be entitled to permanent residence. Thus on the documentation taken in conjunction with his evidence he had discharged the burden upon him to demonstrate that he met the Regulations.



32. We reserved our determination.

**Findings of fact and analysis of the evidence:**

33. From the evidence before us we find that the Appellant married Margaret Pamela Okpekpe on 11<sup>th</sup> August 2003. There does not seem to be any dispute between the parties that she moved to London and that he and his wife set up home at an address in Southall between August 2003 until a date in June 2004. On 24<sup>th</sup> August 2004 he presented before UKBA as a spouse of Margaret Pamela Okpekpe who was said to be an EEA national exercising treaty rights in the UK and accordingly on 5<sup>th</sup> October he was issued with a residence card on this basis.
34. What happened during this period of time we find to be an extraordinary set of events. The evidence before us demonstrates that Margaret Okpekpe travelled from the United Kingdom to Vienna to obtain an annulment of the marriage. The documents before us demonstrate that she obtained a judgment in this respect on 12<sup>th</sup> March 2004 in the Hernalds District Court to annul the marriage that had only taken place a matter of some seven months previously. The documentation demonstrates the marriage was formally annulled on 4<sup>th</sup> May 2004. However it is the Appellant's case that he was unaware of this until a date in 2008 and that she had carried out those proceedings without his knowledge and that notwithstanding the annulment, the parties lived together in a durable relationship until their separation some five years later. It is on the basis of this account that the Appellant claims that he was in a durable relationship with the EEA national and had completed five years' residence and is therefore entitled to permanent residence under the EEA Regulations.
35. As we say this is an extraordinary state of affairs that two parties can remain living together in a relationship against the background of one party taking the step of obtaining an order for annulment which by its effect undermines the whole basis of their marriage and relationship. We have therefore considered with care and scrutinised the evidence of the Appellant and the documents that have been produced in support of his claim that notwithstanding this extraordinary position, the parties remained together for a period of five years.
36. We should say something about the nature of the evidence before us. Despite the Appellant's case that this was a relationship that continued for a lengthy period of time notwithstanding the annulment, the only evidence to confirm this is from the Appellant himself and by the production of some documentation. There is no oral evidence from any of the friends whom he claimed during his oral evidence had been involved in keeping the parties together nor any statements from those who were members of the same church that both parties attended. There is no evidence from Margaret herself in any form whatsoever.
37. The documentary evidence that has been produced we consider to be piecemeal and does not appear to have been disclosed in its entirety. It consists of copy bills including council tax bills although the payment of the council tax is not shown,

“letters” addressed to Margaret from banking or other services and some medical documents that do not follow sequentially. Therefore we have evaluated the evidence with care and remind ourselves that the burden of proof is on the Appellant to demonstrate on the balance of probabilities that he was in a durable relationship for the requisite period of time.

38. We have also had the opportunity to hear the oral evidence of the Appellant and for this to be the subject of cross-examination in the light of the documents provided by both parties. Having heard his evidence, we have not found the Appellant to have been a credible witness upon whose evidence we can place weight and reliance. We have reached this conclusion for a number of reasons which will be apparent from our determination of the factual elements of this case. We do not find that he has been truthful concerning the nature of the relationship between himself and his former wife. The steps taken by her to annul the marriage are indicative of serious problems within the relationship itself. It is of significance that she did not seek a divorce but sought an order that would mean that the marriage was void ab initio as if it had never taken place.
39. The Appellant was asked a number of questions concerning the knowledge he had of the reasons why she would have taken such a step if she intended to continue the relationship as he had claimed. He was specifically asked why she had done this. The Appellant claimed in his evidence to have no idea whatsoever and could provide no explanation before us as to why such steps had been taken by his partner.
40. We do not accept that he would have no idea as to why she had done this. The Appellant’s evidence was that after she had found out about the annulment the parties remained together with the assistance of a number of friends and colleagues from their church who had tried to mediate between them. According to his oral account this took place over a number of months. We find it inconceivable that the Appellant during this period did not find out any information whatsoever concerning the reasons for the annulment.
41. Furthermore the Appellant has instructed solicitors in Vienna to begin proceedings to set aside the annulment of the Hernals District Court. The basis of the appeal appears to be that the Appellant was deprived of an opportunity to be “tried before the court” and that there had been a “failure to notify him of the proceedings” (see document dated 29<sup>th</sup> November 2010). Despite that, the Appellant claims to have no idea whatsoever as the reasons given by his former wife to support the annulment. We do not believe the Appellant’s account. The proceedings have been ongoing since 2010 and according to the evidence before the First-tier Tribunal in February 2013 the proceedings were still active and ongoing whereby the Appellant was seeking to set aside the order (see First-tier Tribunal determination and also skeleton argument for this hearing at paragraph 6). He has therefore been a party to these proceedings for a number of years and has been a party that has been legally represented and able to obtain disclosure of the original petition for the annulment and judgment setting out the reasons for such an order. We do not believe that he would be in ignorance of the reasons given or evidence produced to support an

annulment when set against the background of his own evidence regarding the proceedings that he has taken himself.

42. We also find that the documentary evidence the Appellant has produced concerning the proceedings is selective and piecemeal. It consists of a decision of the Hernalds District Court for Mr Okpekpe (known as the defendant) to “submit the appeal on 8<sup>th</sup> June 2010 in an improved form” (see 28 – 29 bundle A). There is an appeal against the judgment of 12<sup>th</sup> March 2004 dated 29<sup>th</sup> November 2010 (pages 31 – 34). Some of those documents at pages 22 to 23 are not translated. The most recent document is a letter from his legal representative in Vienna dated 3<sup>rd</sup> February 2012 attaching the documents for the appeal stating “till now I did not reach a decision of the court. We will have to wait until the upper court will send.”
43. The current state of the proceedings was a subject of cross-examination before us. In particular his witness statement (paragraph 14) was put to him in which he had stated that he was “in constant contact with my lawyer in Vienna”. Thus he was asked about that claim to be in constant contact but yet to have no information to provide this Tribunal with concerning the proceedings, their outcome and the reasons for seeking the annulment in the first place. He then claimed in his oral evidence the lawyer had been contacting someone but that “I don’t know the details”. When asked “what does the lawyer say about finding out?” (in relation to the details of the annulment) The Appellant replied “not much.”
44. We found the evidence of the Appellant to be unimpressive and consequently do not believe his account that he has no idea as to why his former wife sought to annul the marriage and we do not find him to have been entirely truthful about the nature of the relationship at that time.
45. Notwithstanding the annulment there is some evidence before us that the couple were involved in the early stages of fertility treatment. Again the documentary evidence is piecemeal and has not been fully disclosed. Indeed the documents do not appear to follow each other sequentially. The first document in time is a letter dated 6<sup>th</sup> April 2005 sent to a doctor in respect of Margaret Okpekpe from a consultant obstetrician and gynaecologist. The diagnosis/problem is stated to be “secondary infertility”. It refers to a review in the clinic which took place on 4<sup>th</sup> March 2005 and refers in its contents to initial steps taken by way of endocrine screening but that she had not had an HSG or ultrasound. It makes reference to semen analysis on her partner. The document at page 36 is consistent with the contents of that letter and page 35 refers to a semen analysis for a sample that was taken on 27<sup>th</sup> September 2004. This relates back to the clinic review on 4<sup>th</sup> March 2005. Thus we conclude from that evidence the parties were involved in the initial stages of undergoing tests concerning infertility problems during 2004 and 2005.
46. However we do not accept his account that at a later date she had become pregnant. He was cross-examined about this issue and when asked about the pregnancy he could not remember any details whatsoever even down to the year stating that it might be 2005 or 2006. We find this to be significant bearing in mind his account is

that they had been undergoing fertility treatment together and it is reasonable to expect that given an event of this nature the Appellant would have been able to remember the details concerning the pregnancy and in particular the year that it occurred. The document relied upon dated 9<sup>th</sup> October 2006 (pages 32 bundle B) consists of a sole page of a lab sample with clinical details stating "nausea/vomiting". It is a biochemistry report concerning it appears blood tests including a test for TSH (thyroid stimulating hormone). The document does not support the account given by the Appellant that she had been pregnant at the given date. Thus we conclude that whilst the documents demonstrate they were undergoing tests concerning infertility problems in 2004/2005 we do not accept that the letter from 2006 demonstrates that she had been pregnant at that stage or that the relationship was ongoing at that time.

47. We have considered the evidence before us concerning the period 2007 onwards. As we have observed there is no supporting evidence of those who knew the couple during this period who would be best placed to provide confirmation of the durability of this relationship. Nor is there any evidence of any kind from Margaret herself either in the form of a witness statement or even a letter. The only evidence comes from the oral evidence of the Appellant who we do not find to be a credible witness and a number of disparate piecemeal documents. The documents from 2007 consist of the following. The council tax bill 2007/2008 in the names of both Donald Okpekpe and Margaret Okpekpe. However the bank giro credit is not filled in and the document itself does not demonstrate that they were either living together at the time or even if they were, that the relationship was ongoing. There is a letter from British Gas dated March 2007 it is addressed to Margaret Okpekpe at the address in Hanwell but it is simply entitled "good news energy rates". It is a non-specific open letter sent by a gas company to a person who may once have lived at that address. There is nothing in that letter to support the fact that she was actually living there or in a relationship with him at that time. There are similar open letters of that type provided by this Appellant.
48. There is a letter from Ealing Council dated 13<sup>th</sup> June 2007 addressed to Margaret Okpekpe (page 18) asking for financial information required for an application that had been made in relation to Donald Okpekpe and his student financing. This is simply a request made. There is no evidence to demonstrate that Margaret Okpekpe provided any documentation of a financial nature in response to this letter. Indeed in a letter exhibited by the Appellant and addressed to Donald Okpekpe dated 31<sup>st</sup> January 2008 in respect of such an application for funding there is no reference in that letter to Margaret's financing whatsoever (see page 3 bundle B). There is nothing therefore to demonstrate from those documents that she provided financial information to demonstrate that in 2007 and 2008 they were living together and were pooling their resources which would be a relevant point when making an assessment of Mr Okpekpe's financial circumstances for funding.
49. The document in respect of the Register of Electors seeking information for those resident at the address as at 15<sup>th</sup> October 2007 is a final reminder. It is plain from the documents produced that it has not been signed by either party nor has the

declaration been completed. As a piece of evidence, it does not demonstrate that they were resident together at that date. There are no documents after the council tax bill concerning the period April 2007 – March 2008 that are in the joint names of the parties to demonstrate that the parties were living together or in a durable relationship past this time even if we accepted that the documents had constituted reliable evidence of their cohabitation and relationship. The rest of the documentation produced is in the sole name of the Appellant and is largely historic (including a Sky bill referring to an account in arrears and a visa credit card where credit had been withdrawn).

50. We have also taken into account the evidence concerning the date upon which this relationship ended. The oral evidence before us is that the parties did not separate until an unspecified date in 2009. His account as to the chronology of the events in his oral evidence was that he could not remember the exact date that he had moved out in 2009 but that it was “some time then”. He found that he discovered about the deception in 2008 and thereafter friends had been attempting to reunite them and gave a description of there being “coming and going” but that he had moved out finally in 2009.
51. We find the account given by this Appellant in his oral evidence to be wholly inconsistent with the evidence that he presented before the Tribunal on previous occasions. In the determination of Judge Blair-Gould (19<sup>th</sup> May 2010) and therefore more contemporaneous to the events themselves at paragraph 4 the history of the relationship is referred to as follows:

“In the meantime the relationship with his wife collapsed and they separated in 2008.”
52. At paragraphs 11 and 12 his account is recorded as discovering his wife “divorcing him” in 2008 and authorised a friend to obtain the marriage certificate and found it endorsed for the record that they had been divorced on 4<sup>th</sup> May 2004. The only date given for the separation is 2008. Indeed we are satisfied that contrary to the oral evidence before us, the date given when he first became aware of the annulment was February 2008 as that is the date that is stamped upon the marriage certificate.
53. The refusal letter refers to evidence provided by the Appellant to the relationship ending in 2008 and the current skeleton argument prepared by his legal representatives in the chronology at paragraph 3 states “the couple lived together at the following addresses (ii) June 2004 – 2008”.
54. We are satisfied that none of the documents that we have referred to from 2010 to 2013 provide any support for his oral evidence that the relationship continued until 2009 and that the separation took place then. All the evidence refers to 2008 and not 2009. We find it to be of significance and weight that the Appellant has been deliberately vague about when in 2008 and has chosen at a number of points within the proceedings from 2010 onwards to provide no details of the month in 2008. We have accepted that there is evidence that demonstrates that the relationship was a

durable one during the time of the infertility treatment in 2005 /2006. However we do not find that he has discharged the burden of proof upon him to demonstrate that he was in a durable relationship for the entire period of August 2003 until August 2008 and therefore he cannot satisfy the requisite Regulations.

55. Furthermore we are not satisfied that the Appellant has discharged the burden of proof upon him to demonstrate that during that period of time Margaret Okpekpe was exercising treaty rights or was otherwise a qualified person. The only evidence before us consists of a few disparate payslips from alleged employment with Goldlink Travel and Tours UK Limited. The payslips are of a generally obtainable type and the earliest is from 21<sup>st</sup> April 2006. There are no documents from her employers, no documents from the Inland Revenue nor any documents showing that she was exercising treaty rights or was otherwise a qualified person emanating from other independent party upon whose evidence we can place weight. There is no evidence from Margaret herself or from her employment during that period. In any event, the earliest payslip is 21<sup>st</sup> April 2006 and there is nothing to demonstrate that she was exercising treaty rights throughout the period of August 2003 to August 2008 supported by reliable and cogent documentation.
56. For the foregoing reasons, we are not satisfied that the Appellant has discharged the burden of proof on him to show on the balance of probabilities that he was in a durable relationship from August 2003 until August 2008 (the requisite period) nor that he has discharged the burden upon him to demonstrate that Margaret Okpekpe was exercising treaty rights or was otherwise a qualified person during that period either. Consequently the appeal fails.

### **Decision**

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. The decision is re-made as follows:-

The appeal is dismissed under the EEA Regulations.

Signed

Date: 4/10/2103

Upper Tribunal Judge Reeds