Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/28763/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 June 2017	**On 16 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MR FELIX NWANKWO KALU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Hoshi, Sabeers Stone Greene Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant in this case is a citizen of Nigeria who appealed to the First-tier Tribunal against the decision by the respondent dated 5 August 2015 not to issue the appellant with confirmation of a right of residence in the United Kingdom under Regulation 15 of the Immigration (EEA) Regulations 2006. In a decision promulgated on 27 October 2016, following a hearing on 18 October 2016, Judge of the First-tier Tribunal Brown dismissed the appellant's appeal under the 2006 Regulations.

2. The appellant appeals with permission on the following ground:

Ground 1. It was submitted that the judge erred in the weight that was attached to the evidence before First-tier Tribunal Judge and erred in misapplying Regulation 15(1)(b) and (f) of the 2006 Regulations.

Error of Law

3. For the reasons set out below I am not satisfied that any material error of law was disclosed. Mr Hoshi relied on his grounds of appeal and on his skeleton argument. I allowed Ms Isherwood some additional time to consider the bundle of documents which was before the First-tier Tribunal which was not initially in either the Tribunal or the respondent's file, as these documents were the documents that it was alleged that the judge failed to attach appropriate weight to. It was Mr Hoshi's submission that the judge applied an incorrect standard of proof and that the judge had in effect applied the standard of proof of beyond a reasonable doubt. In addition Mr Hoshi submitted that the judge was incorrect in his finding, at [28], that Mr Hoshi had invited him to make an assumption on the evidence. Rather, Mr Hoshi submitted that he had asked that the judge draw legitimate inference from the evidence that the appellant's partner was a qualified person during the relevant period.

4. The background to this case is that the appellant, a Nigerian national was previously married to an EEA national and had obtained a residence card on that basis. However in refusing the application for permanent residence the respondent was not satisfied that it had been demonstrated that the appellant's partner had exercised free movement rights for a continuous period of five years and the respondent was further not satisfied that the marriage was not one of convenience.

5. Although Judge Brown, at paragraph 29, was not satisfied that the respondent had discharged the burden of proof to demonstrate that the marriage was one of convenience, the judge was satisfied and concluded at paragraph 28 that the appellant had failed to prove on the balance of probabilities that the appellant's former partner was a qualified person, within the meaning of Regulation 6 of the 2006 Regulations, for a continuous period of five years from 21 February 2009 to 20 February 2014, which was the relevant period considered by the judge. In particular, the judge was not satisfied that there was evidence that the appellant's former partner had worked as a hairdresser in 2014.

6. The findings made by the judge were ones that were properly open to him and it is uncontroversial that weight was a matter for the First-tier Tribunal Judge. Although the judge was somewhat sidetracked at paragraph 27 of the decision and reasons in relation to whether or not the couple were living together continuously for the five year period, which is not a requirement as the "residing with" requirement under Regulation 15(1)(b) relates to presence in the UK and does not require living in a common family home (**PM (EEA – spouse – "residing with") Turkey [2011] UKUT 89 (IAC)** applied); the judge in any event was (correctly) of the view that even if they had not been living together this would not have

been sufficient to deprive the appellant to the right to permanent residence. Therefore the judge made no material error in paragraph 27 and such was not suggested.

7. Mr Hoshi, in both the grounds of appeal and his skeleton argument, referred to the fact that the appellant and his former partner were no longer together and that the appellant had provided whatever documents were available. It was submitted in the skeleton argument that the appellant could not possibly have provided any other documents as the couple do not have any contact with each other and that on the balance of probabilities the judge should have accepted that the appellant's partner was working from 2009 to 2014 (for the avoidance of doubt other activities as a qualified person including looking for work can also be taken into consideration).

8. However, Mr Hoshi accepted that the fact that the appellant claims not to have been living with his ex-wife and that not to have any contact with her does not change the burden and standard of proof. It should also be noted that the judge raised credibility issues including at paragraph 24 that the appellant's claim in an email to London Borough of Barking dated 4 December 2015 that he did not know of his ex-partner's whereabouts and no information about her seemed to be inconsistent with the fact that he knew her previous residential address and that they had spoken by telephone in February 2015. That was a finding that was open to the judge on the evidence before him.

9. The judge carefully considered the documentary evidence before him and was satisfied that there was "some reasonably cogent evidence" that the appellant's ex-partner had worked as a self-employed person between 2009 and 2011, in the form of the payment of national insurance contributions, accounts and completed tax returns.

10. However, the judge gave adequate reasons for going on to not be satisfied that the appellant had demonstrated on a balance of probabilities that she had been working or was otherwise a qualified person for a continuous period of five years and the judge correctly directed himself that it was not sufficient that the EEA national had himself been working in the UK or that they had resided as family members in the UK. The judge went on at [25] to indicate that the appellant had "accepted that MK had worked as a hairdresser from 2008 until 2013, but he did not suggest that MK had done so during 2014". Although Mr Hoshi noted that there was no record of interview in relation to the retention of rights interview, it was open to the judge to find that there was nothing to refute the assertion that the appellant's evidence about his ex-partner's work had been vague. The appellant in his witness statement set out his relationship with his ex-wife and in his witness statement he claimed that the marriage irrevocably broke down in October/November 2013 and that they lived together until January/February 2014 (although I note that the email from the appellant to the council was inconsistent with the statement and stated that the appellant's wife had "moved out in May"). The appellant went on in his

statement to discuss the evidence that he had submitted in relation to his wife's employment and strongly refuted that the marriage was one of convenience. However, there was no adequate information or evidence in his witness statement as to his ex-wife's claimed activities as a qualified person, working or otherwise.

11. Much was made at the hearing before me in relation to the document at page 52 of the appellant's second bundle which was an invitation to the appellant's ex-partner to complete a tax return. This was dated 6 April 2014 and related to the tax year 6 April 2013 to 5 April 2014. However there was no error in the judge's findings, at [28], that he could not assume that she had met the requirements. Whether Mr Hoshi had asked him to "assume" this or to draw an inference on the basis of the evidence the result is the same. Mr Hoshi did not reasonably suggest that the judge had not considered all the documents before him or that it was not open to him to find as he did at [22] that the notice to complete a tax return was not "any evidence at all of the fact that" the appellant's ex-partner had been working or economically active.

12. Indeed there appeared to be very little adequate evidence before the judge in relation to the appellant's ex-partner's activities as a qualified person after 2011. Although I accept there were some national insurance documents and some other limited evidence after this date, it is fair to say that the bulk of the evidence relates to the period about which the judge was satisfied, between 2009 and 2011. It was entirely open to the judge not to draw an inference that the limited documents that were produced and the appellant's evidence could be extrapolated to a finding that she was a qualified person for a continuous period of five years. Indeed I am of the view that had he done so that would have been an arguable error of law given the lack of evidence to support such a finding.

13. The decision of the First-tier Tribunal does not disclose any error of law and shall stand. The appeal by the appellant is dismissed.

No anonymity direction was sought or is made.

Signed Date: 15 June 2017

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal no fee award is made.

Signed Date: 15 June 2017

Deputy Upper Tribunal Judge Hutchinson